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## National interests and supranational resolution in the European Banking Union

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Tobias H. Tröger | Anastasia Kotovskaia

# National Interests and Supranational Resolution in the European Banking Union

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# National interests and supranational resolution in the European banking union

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**Abstract:** We investigate whether the bank crisis management framework of the European banking union can effectively bar the detrimental influence of national interests in cross-border bank failures. We find that both the internal governance structure and decision making procedure of the Single Resolution Board (SRB) and the interplay between the SRB and national resolution authorities in the implementation of supranationally devised resolution schemes provide inroads that allow opposing national interests to obstruct supranational resolution. We also show that the Single Resolution Fund (SRF), even after the ratification of the reform of the European Stability Mechanism (ESM) and the introduction of the SRF backstop facility, is inapt to overcome these frictions. We propose a full supranationalization of resolution decision making. This would allow European authorities in charge of bank crisis management to operate autonomously and achieve socially optimal outcomes beyond national borders.

**Keywords:** SRB, SRF, bank resolution, banking union, bail-in, ESM, national interest, political economy, bureaucrats' incentives

**JEL Classification:** G01, G18, G21, G28, K22, K23

# National interests and supranational resolution in the European banking union

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## 1 Introduction

The Single Resolution Mechanism (SRM), the second pillar of the European banking union, has established a hierarchically integrated network of supranational and national authorities responsible for the resolution of failing banks. The EU co-legislators launched it as an institutional complement to the substantive rules of the Bank Recovery and Resolution Directive (BRRD)<sup>1</sup> in order to (partially) supranationalize the resolution process in participating member states. The preferences of national supervisory and resolution authorities as well as political decision-makers vary significantly across countries, depending on how unequal the distribution of the costs and benefits would be for the

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<sup>1</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) No1093/2010 and (EU) No648/2012, of the European Parliament and of the Council [hereinafter: BRRD], [2014] OJ L173/190.

respective economies in the event that the plug was to be pulled on a cross-border bank.<sup>2</sup> This typically leads to an inefficient resolution along national borders that potentially aggravates the welfare losses precipitated by a bank's failure in cross-border scenarios.<sup>3</sup> Obviously, supranationalization of resolution powers would alleviate these frictions.

However, the SRM is not an institution but rather a bank crisis management framework that assigns different responsibilities and powers to a multiplicity of agencies and institutions, such as the Single Resolution Board (SRB), the European Commission, the Council of the EU, the European Central Bank (ECB), the national resolution authorities (NRAs), and the national competent authorities (NCAs) in the participating member states. The SRB was established in 2015 as an EU agency with a legal personality and a specific organizational and governance structure,<sup>4</sup> yet the EU co-legislators did not vest all resolution competences and powers in the supranational authority due to constitutional

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<sup>2</sup> For theoretical models on these aspects see Cornelia Holthausen and Thomas Rønde, 'Cooperation in International Banking Supervision', (2004) ECB Working Paper No. 316 <<http://www.fsb.org/wp-content/uploads/TLAC-Principles-and-Term-Sheet-for-publication-final.pdf>> accessed 11 May 2021; Patrick Bolton and Martin Oehmke, 'Bank Resolution and the Structure of Global Banks' (2019) 32 RFS 2384; Elena Carletti, Giovanni Dell'Ariccia, and Robert Marquez, 'Supervisory Incentives in a Banking Union', (2021) 67 Management Science 455; for an informal description of the underlying agency conflicts see also Federico Lupo-Pasini and Ross P. Buckley, 'International coordination in cross-border bank bail-ins: problems and prospects', (2015) EBOR 203, 200-210; generally cf. Paul Davies, 'Resolution of cross-border groups', in: Matthias Haentjens and Bob Wessels (eds.), *Research Handbook on Crisis Management in the Banking Sector*, (EE 2015) 261, 265, 271-281. For anecdotal evidence see Thomas Philippon and Aude Salord, *Bail-in and Bank Resolution in Europe* (International Center for Monetary and Banking Studies 2017) 49-50 (particularly pointing to "trapped liquidity").

<sup>3</sup> Experience shows indeed that supervisory or resolution authorities generally prefer to abandon activities abroad to safeguard or shield the bank operating in their domestic economy thus leaving it to host countries to deal with group affiliates on their own. For an illustration see the accounts of the events in Eastern Europe during the financial crisis of 2007 and 2008 in Thomas Dietz, Tetiana Protysk and Erich Keller, 'Similar but Different? The Financial Crisis in Matured Western and Emerging Eastern European Countries', (2008) 4 Banks and Bank Systems 20, 28; Ewald Nowotny, 'The Financial Crisis and the Role of Austrian Banks in Central, Eastern, and Southeastern Europe', (2010) 17 Econ and Fin Rev 3; On the Dutch/Belgian experience in the Fortis case see Mathias Dewatripont and Jean-Charles Rochet, 'The treatment of distressed banks', in: Mathias Dewatripont, Jean-Charles Rochet and Jean Tirole (eds.), *Balancing the Banks*, (Princeton University Press 2010) 107, 124-125.

<sup>4</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 [hereinafter: SRMR], art. 42(1), [2014] OJ L225/1.

restrictions<sup>5</sup> and political resistance.<sup>6</sup> In addition, the governance structure and the internal decision-making procedures of the SRB involve representatives from NRAs of the participating member states.

This institutional arrangement begs the question of whether the SRM can indeed overcome the dominance of national interests that prevent the efficient resolution of cross-border banks. The practical experience with bank resolution in the banking union is mixed, at best, with only one, highly idiosyncratic, bank failure handled at the supranational level and all other banking crises falling under the remit of national authorities.<sup>7</sup> The obvious reluctance of the SRB to take on resolution cases may be read as an indication that national interests of avoiding a stringent and impartial application of the European crisis management framework – particularly its rigid requirement of significant private sector involvement (PSI) through bail-in<sup>8</sup> – can prevail even within the SRM. This may be the case either because national interests dominate critical SRB decisions directly, or, more subtly, because

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<sup>5</sup> The ECJ in Case C-270/12 *United Kingdom v. Parliament and Council* EU:C:2014:18 affirmed ESMA's restricted discretionary power to ban short selling and refused a narrow construction of the so called Meroni doctrine (see *Meroni v. High Authority* [1958], ECR 11)). Although this rather liberal stance was recently confirmed in Case C-911/19 *Fédération bancaire française (FBF) v Autorité de contrôle prudentiel et de résolution (ACPR)* EU:C:2021:599, there is still a debate on how much discretionary powers can be conferred to EU bodies and agencies, see e.g. Kern Alexander, 'European Banking Union: A Legal and Institutional Analysis of the Single Supervisory Mechanism and the Single Resolution Mechanism', (2015) ELR 154; Eilis Ferran, 'European Banking Union, Imperfect, But It Can Work', in: Danny Busch and Guido Ferrarini (eds.), *European Banking Union*, (OUP 2015) 56; George S. Zavvos and Stella Kaltsouni, 'The Single Resolution Mechanism in the European Banking Union: Legal foundation, governance structure and financing', in: Matthias Haentjens and Bob Wessels (eds.), *Research Handbook on Crisis Management in the Banking Sector*, (EE 2015) 117; Gianni Lo Schiavo, 'A Judicial Re-Thinking on the Delegation of Powers to European Agencies under EU Law? Comment on Case C-270/12 UK v. Council and Parliament', (2015) 16 GLJ 332; Mira Scholten and Marloes van Rijsbergen, 'The ESMA-Short Selling Case: Erecting a New Delegation Doctrine in the EU upon the Meroni-Romano Remnants', (2014) 41 *Legal Issues of Economic Integration* 389. Against this background, EU co-legislators rather played it safe and limited the discretionary powers of the SRB, requiring the extensive involvement of other supranational bodies and NRAs in resolution.

<sup>6</sup> The history and future of the banking union reflects the political struggle between advocates of an expansion of European competences and those seeking to safeguard national sovereignty, see Pedro Gustavo Teixeira, 'The Legal History of the Banking Union', (2017) EBOR 535; Pedro Gustavo Teixeira, 'The Future of the European Banking Union: Risk-Sharing and Democratic Legitimacy' in: Mario P. Chiti and Vittorio Santoro (eds.), *The Palgrave Handbook of European Banking Union Law*, (Palgrave 2019) 135.

<sup>7</sup> For an overview of the main cases see Tobias H. Tröger, 'Too Complex to Work: A Critical Assessment of the Bail-in Tool under the European Bank Recovery and Resolution Regime', (2018) 4 JFR 35, 70-71.

<sup>8</sup> In resolution, BRRD arts. 56(1), 37(10)(a) prescribe that at least 8% of an institution's total liabilities are bailed-in before any government support in the form of a capital contribution or even the nationalization of the bank can be extended under BRRD arts. 57, 58; similarly, BRRD art. 44(5) and SRMR, art. 27(7) require a minimum bail-in of the same proportion before national resolution financing arrangements or the Single Resolution Fund (SRF) can take any losses. See generally Tobias H. Tröger, 'Regulatory Influence on Market Conditions in the Banking Union: the Cases of Macro-Prudential Instruments and the Bail-in Tool', (2015) 16 EBOR 575, 590; Anna Gardella, 'Bail-in and the Financing of Resolution within the SRM Framework', in: Danny Busch and Guido Ferrarini (eds.), *European Banking Union*, (2015) Oxford University Press 373. On the potential drawbacks of bail-in and the resulting limits for its application see generally Jianping Zhou et al., 'From Bail-out to Bail-in: Mandatory Debt Restructuring of Systemic Financial Institutions', (2012) International Monetary Fund (IMF) Staff Discussion Note SDN/12/03; Christos Hadjiemmanuil, 'Limits on State-Funded Bailouts in the EU Bank Resolution Regime', (2016) *European Economy* 91.

SRB decisions are indirectly influenced by the expectation that a supranationally devised resolution scheme will be stuck in the thickets of its execution by NRAs and political bullying at that level.

We aim to provide an institutional explanation for the observed outcomes. For this purpose, we analyze the internal decision-making procedures and governance arrangements of the SRB and the inter-agency information-sharing and cooperation requirements within the SRM from a political economy perspective. This allows us to answer the critical questions of whether the institutional arrangement in the SRM permits achieving first-best solutions in the common interest of the EU internal market, and how countervailing national interests of individual member states may influence resolution procedures. This paper is structured as follows: Section 2 shows how the decision-making process within the SRB and its composition allows national interests to prevail in critical matters; Section 3 describes the role of national interests in the implementation of resolution schemes; Section 4 explains why the set-up of the Single Resolution Fund (SRF) does not help to overcome national preferences; and, finally, Section 5 presents the conclusion that future reforms of the crisis management framework have to pursue more ambitious centralization efforts that transfer more ultimate decision-making competences to the supranational level and insulate the internal governance structure of the supranational resolution authority more comprehensively from national interests.

## 2 SRB decision-making

The most obvious channel through which national interests of individual member states may infiltrate supranational resolution is the internal governance structure of the SRB. If the rules for collective decision-making led to a preponderance of member states' representatives, national interests could potentially dominate supervisory decision-making through coalition-building between member states. A careful analysis shows that the internal governance arrangements of the SRB do not limit or even exclude the participation of member states' representatives in critical resolution decisions.

### 2.1 Plenary and executive session decisions

The SRB operates in the following two different types of composition: in the plenary session; or in the executive session,<sup>9</sup> which can sit in a restricted or an extended form.<sup>10</sup> Both the competences and the composition of the respective sessions – and to a lesser degree the right to attend – determine the

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<sup>9</sup> SRMR, arts. 49-55.

<sup>10</sup> Decision of the Single Resolution Board of 24 June 2020 adopting the Rules of Procedure of the Board in its Executive Session (SRB/PS/2020/14), [hereinafter: Executive Session procedural rules], art. 1(2), [2014].

internal power relationships that allow or preclude the preponderance of national interests in SRB decision-making. Table 1 summarizes the relevant arrangements.

	Plenary session	Executive session	
<b>Composition</b>	Chair, full-time Board members and representatives of NRAs.	Restricted: Chair, full-time Board members.	Extended: Chair, full-time Board members and representatives of NRAs where an affected entity or group is established or situated.
<b>Competences</b>	<ol style="list-style-type: none"> <li>1. adoption of the annual work program and activity report; financial rules; anti-fraud strategy; rules for the prevention and management of conflicts of interest; rules of procedure in plenary and executive sessions; staff regulations; framework for cooperation with NRAs;</li> <li>2. establishment of the SRB's internal structures;</li> <li>3. exercise of appointing powers;</li> <li>4. taking measures to follow-up on audit reports and evaluations;</li> <li>5. adoption and monitoring of the SRB's budget, approval of the accounts;</li> <li>6. approval of the use of the SRF for specific resolution actions over €5 billion and for which the weighting of liquidity support is 0.5;</li> <li>7. evaluation of the application of resolution tools if in the previous year over €5 billion SRF resources were used; and</li> <li>8. decision on the extraordinary ex-post contributions to the SRF, voluntary borrowing, alternative financing means, and mutualization of national resolution financing arrangements.</li> </ol>	<ol style="list-style-type: none"> <li>1. drafting, assessment, and adoption of resolution plans;</li> <li>2. delivery of resolution schemes to the Commission;</li> <li>3. determination of MREL;</li> <li>4. application of simplified obligations for certain institutions (SRM, Reg. art. 11); and</li> <li>5. decisions on some parts of the budget (SRM Reg. art. 60).</li> </ol>	
<b>Majority requirement</b>	<p>Simple majority</p> <p>For approval of submitted plans for financial recovery: simple majority of Board members, representing at least 30% of contributions.</p> <p>For decisions on ex-post contributions: 2/3 Board members, representing at least 50% of contributions during the transitional period, and 30% thereafter.</p>	Simple majority if a consensus is not reached.	Simple majority of the full-time Board members and Chair (NRAs excluded) if a consensus is not reached.

Table 1 - Overview of SRB sessions' compositions, competences, and decision-making rules



The plenary session is composed of the Chair, four full-time Board members, and the dispatched representatives of the 21 participating member states' NRAs.<sup>11</sup> The Vice-Chair participates in the plenary session only as a non-voting member if they do not fill-in for the Chair in case of their absence.<sup>12</sup> In this composition, the SRB decides on the most general issues unrelated to specific resolution cases, such as the adoption of the working programs, the activity reports, and the budgets, and it also resolves on staff and investments.<sup>13</sup> The default rule for decisions is a simple majority vote of all Board members with the Chair having the casting vote in the event of a tie.<sup>14</sup>

At the outset, decisions regarding a particular bank or banking group are reached in the executive session.<sup>15</sup> In its restricted composition, the executive session includes only the Chair and the four full-time Board members,<sup>16</sup> with the SRB Vice-Chair assuming the same covering role as performed in the plenary session. The extended composition of the executive session also includes the SRB members that represent relevant NRAs. Where the SRB deliberates on a specific entity or group, NRA representatives from all member states in which group affiliates are established are automatically included in the composition of the SRB executive session.<sup>17</sup> Therefore, if the SRB deliberates on resolution measures *vis-à-vis* specific institutions or cross-border groups, the NRAs of those member states in which a subsidiary or entity covered by consolidated supervision is established will participate in the extended executive session. If the members of the session do not reach a consensual agreement, decisions are adopted with a simple majority of the Chair and the four further full-time Board members.<sup>18</sup> This means that the representatives of NRAs are excluded from the vote and none of the participants in the session have veto rights. In case of a tie, the casting vote belongs to the Chair.<sup>19</sup> Representatives of other European institutions,<sup>20</sup> NRAs in non-participating member states with subsidiaries or significant branches<sup>21</sup>, and coordinators of internal resolution teams<sup>22</sup> may attend the meetings of the executive session as non-voting observers.

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<sup>11</sup> SRMR, art. 49.

<sup>12</sup> SRMR, art. 56(3) subpara 2.

<sup>13</sup> SRMR, art. 50.

<sup>14</sup> SRMR, art. 52(1). On the important exemptions that require a supermajority and/or the representation of a minimum of SRF contributions in the majority vote see below.

<sup>15</sup> All matters not explicitly reserved for the plenary session are decided in the executive session of the SRB, SRMR, art. 54(1).

<sup>16</sup> Executive Session procedural rules, art. 1(4).

<sup>17</sup> SRMR, art. 54(3) and (4); Executive Session procedural rules, art. 1(3)(c) and (d).

<sup>18</sup> SRMR, art. 55(1) and (2).

<sup>19</sup> SRMR, art. 55(3).

<sup>20</sup> SRMR, art. 43(3). While Commission and ECB designated representatives have the status of permanent observers with access to all sessions and documents by law, SRMR, art. 43(3), EBA representatives can be invited as observers at the Board's ad hoc discretion, SRMR, art. 53(1) subpara. 3.

<sup>21</sup> SRMR, art. 53(1) subpara 3.

<sup>22</sup> SRMR, art. 83(4).

However, this *prima facie* very strong position of the supranational SRB members who, in principle, possess the ultimate power to decide all controversial issues regarding the resolution of failing institutions and groups on their own, needs to be put into perspective. The SRMR reserves those decisions on the resolution of specific institutions or groups that arguably touch upon the most sensitive national interests for the SRB plenary session. Resolution schemes that foresee sizeable contributions from the SRF mutualize at least part of the costs of failure because the Fund procures its means nationally.<sup>23</sup> Therefore, where institution-specific resolution actions require the use of the SRF (i.e. where the SRB cannot achieve the resolution objectives without having to provide significant financial support to the ailing institution), member states may dominate supranational decision-making. To this effect, the plenary session ultimately decides on specific resolution actions, which foresee tapping into the resources of the SRF of a total amount exceeding €5bn, if at least half of the funds are committed to liquidity support.<sup>24</sup> When the total amount of funds used for a calendar year exceeds €5bn, the SRB plenary session evaluates the previous use of resolution tools and develops guidance for future decisions of the executive session.<sup>25</sup> Finally, the plenary session moves on extraordinary financing measures (ex-post contributions (SRMR, art. 71), borrowing from other resolution-financing arrangements (SRMR, art. 72), borrowing on the market and from public financial arrangements (SRMR, arts. 73, 74), and mutualization of national resolution-financing arrangements in group resolutions involving entities in non-participating member states (SRMR, art. 78)).<sup>26</sup> Quite importantly, in all of these matters, the rule for decisions of the plenary sessions is modified, requiring either the majority to represent at least 30% of the contributions to the SRF or a supermajority of two-thirds of the Board members which represents 30% of the contributions to the SRF (the latter threshold is augmented to 50% during an eight-year transition period).<sup>27</sup> The more stringent supermajority requirement applies if the additional funds raised exceed those available to the SRF.

## 2.2 Commission and Council involvement

The involvement of additional European institutions in resolution decisions is frequently mentioned in the legal literature as an impediment to speedy decision-making.<sup>28</sup> However, resolution practice is

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<sup>23</sup> This is true for regular and extraordinary contributions, but also for the backing by the European Stability Mechanism (ESM), because this SRF backstop is funded from national coffers as well. The national level (banking system) is also liable for funds raised by the SRF on lending markets, because the amount borrowed needs to be recouped by raising ex ante or ex post contributions within the maturity of the loans, SRMR, art. 73(2). For a detailed description of the procedure for raising national SRF contributions see below 4.1.

<sup>24</sup> SRMR, art. 50(1)(c).

<sup>25</sup> SRMR, art. 50(1)(d).

<sup>26</sup> SRMR, art. 50(1)(e).

<sup>27</sup> SRMR, art. 52(2) and (3).

<sup>28</sup> See for instance Danny Busch, 'Governance of the Single Resolution Mechanism', in: Danny Busch and Guido Ferrarini (eds.), 'European Banking Union' (2nd edition), (2020) Oxford University Press 281.

based on extensive pre-packaging before the resolution weekend.<sup>29</sup> This planning stage engages the relevant agents in an extensive discourse beyond legally pre-shaped decision-making procedures, and leads to a consensus, which is then implemented in the design and approval of the scheme in the ‘war room’ after resolution has been triggered on Friday evening. Yet, the allocation of ultimate decision-making powers certainly shapes outcomes. With regard to this paper’s focus, the involvement of European bodies that comprise member state representatives and decide with simple majorities are of particular interest. Veto rights for these bodies can lead exactly to the resurfacing of national interests in supranational resolution as earlier described for internal SRB decision-making in the plenary session.

In this regard, the Commission’s role in approving SRB-devised resolution schemes, regardless of the determinants of the respective tests,<sup>30</sup> is less of a problem, because the Commission with its specialized, supranationally-hired staff is a truly European authority that has an institutional set-up that, in principle, safeguards impartial decision-making against member states’ special interests. Yet, the European Council that brings together the 27 heads of state or government of EU member states is also involved in critical resolution decisions on which it resolves with a simple majority.<sup>31</sup> This adds to the observation that, under certain circumstances, national interests may dominate in supranational crisis management. On the books, the role of the Council is passive as it can only resolve on resolution issues if the Commission appeals for a Council decision that either rejects the resolution scheme because resolution is not in the public interest<sup>32</sup> or would materially alter the SRF contribution.<sup>33</sup> In both instances, the Council can block resolution schemes that the SRB deems efficient. While forcing an amendment to the prospective SRF contribution only allows for burdens to be shifted at the margin,<sup>34</sup> the option to deny the public interest in resolution allows for avoiding the supranational crisis management framework altogether and instead dealing with the failing or likely-to-fail (FOLTF) institution under national law.<sup>35</sup> This enables member states who oppose the SRB-devised strategy to shove through national interests, if they are able to form coalitions and orchestrate

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<sup>29</sup> See for instance Thom Huertas, ‘Safe to Fail’, (Palgrave Macmillan 2014) 84.

<sup>30</sup> The Commission is involved in matters regarding state aid within the meaning of TFEU art. 107(1), SRM, Reg., art. 19(1), the use of the SRF in conjunction with the exclusion of certain liabilities from bail-in, SRMR, art. 18(7) subpara. 7, and – adhering to the restrictive interpretation of the Meroni-doctrine (see above n 5) – the exercise of discretionary powers by the SRB, SRMR., art. 18(7) subpara. 2.

<sup>31</sup> SRMR, art. 18(7) subpara 4.

<sup>32</sup> SRMR, art. 18(7) subpara 3(a).

<sup>33</sup> SRMR, art. 18(7) subpara 3(b).

<sup>34</sup> If the Council-majority concurs with the Commissions proposition, the SRB needs to adapt the resolution scheme within eight hours, SRMR, art. 18(7) subpara. 6. Increasing the SRF contribution may alleviate the burden on the banks’ creditors in a bail-in, yet it cannot undo the requirements of minimum private sector involvement in resolution, see above n 8.

<sup>35</sup> If the Council-majority concurs with the Commissions proposition, the entity is liquidated under national law, SRMR, art. 18(8).

a majority in the Council. The Commission's gatekeeping role that comes from the authority's exclusive competence to initiate the Council's decision may not prove too big of an obstacle in political reality, if a majority of member states commits to bullying the Commission and pushing for such an initiating proposal.<sup>36</sup>

### 2.3 SRB incentives

In light of the above, the true balance between supranational and national dominance in SRB decision-making hinges on the financial implications of resolution schemes devised by the Board for the SRF. While it is reasonable to assume that the extraordinary financing measures aimed at boosting the firepower of the SRF and requiring an SRB decision in the plenary session<sup>37</sup> will be invoked only under exceptional circumstances, it is not implausible that already resolving and stabilizing a medium-sized failing bank may require contributions from the SRF that exceed the relevant €5bn threshold. Put differently, only where the resolution objectives can be reached through the implementation of resolution schemes that are largely funded by private sector involvement (bail-in) and do not even require significant public sector liquidity support, does the unqualified supranational decision-making power prevail, whereas national dominance shapes resolution decisions in all cases that involve significant SRF contributions. It would be irrational if the SRB in its executive session proposed a resolution scheme involving a significant SRF contribution if it already foresaw that the required approval of the plenary session could not be achieved.<sup>38</sup>

Similarly, where the SRB expects the Council to interfere with the resolution scheme, the Board may rationally refrain from proposing such a resolution scheme in the first place. The run-up to an FOLTF assessment which, in practice, always involves intense exchanges between the relevant actors with decision-making power to prepare for the preferred resolution strategy<sup>39</sup> would make the respective positions of the supranational authorities very clear and would thus shape the SRB's internal deliberations.

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<sup>36</sup> See also George S. Zavvos and Stella Kaltsouni, 'The Single Resolution Mechanism in the European Banking Union: Legal foundation, governance structure and financing', in: Matthias Haentjens and Bob Wessels (eds.), *'Research Handbook on Crisis Management in the Banking Sector'*, (2015) Cheltenham 117 who purport that the Council involvement leads to politically reasoned decisions based on the national interests of member states.

<sup>37</sup> SRMR, art. 50(1)(e).

<sup>38</sup> For a similar assessment that also suggests that political economy considerations may influence the choice (or refusal) of resolution strategies that involve SRF funding see Jens-Hinrich Binder, 'The Relevance of the Resolution Tools Within the Single Resolution Mechanism' in: Mario P. Chiti and Vittorio Santoro (eds), *'The Palgrave Handbook of European Banking Union Law'*, (Palgrave Macmillan 2019) 307.

<sup>39</sup> A senior executive of a NRA once described the preparatory phase before the resolution weekend to one of the authors as an intense exchange during which resolution action is fully predetermined ("prop'em 'til you push'em over").

This observation has important ramifications for the incentives of the supranationally-appointed Board members. Whenever they foresee that the orderly resolution of a failing institution or group requires significant public support – which at the supranational level necessarily has to come from the SRF<sup>40</sup> – they may want to avoid the ordeal of balancing national interests and quelling unproductive coalition-building among NRA representatives who can easily outvote the five full-time SRB members in the plenary session. The incentives are similar when it comes to the prospective involvement of the Council in contested cross-border resolution cases.

The literature on the incentives of public officials (or ‘bureaucrats’) supports our hypothesis.<sup>41</sup> Methodologically, collective decision-making at public agency bodies can be analyzed by using the analytical inventory of agency-theory: bureaucrats constitute agents who have some discretion not only allowing them to adapt to unforeseen contingencies<sup>42</sup> but also granting them leeway to take hidden action and pursue their own interests because the bounded rationality of the principals—ultimate (citizens) or intermediate (legislators)—prevents the writing of complete contingent constitutions and laws that would secure the untainted pursuit of the common good.<sup>43</sup>

According to standard analysis, bureaucrats are driven by a desire to increase their personal power and to augment their prestige.<sup>44</sup> They thus seek to enlarge their agency’s size, competence, and right to intervene in the affairs of those falling within the scope of its mandate. They discharge their duties in a way that allows them to acquire a favorable reputation among their peers, the general public, and the media. Moreover, opportunities to advance their future careers in administration, politics, or the private sector motivate their behavior, which makes them prone to promoting the interests of those who offer the most desirable job opportunities in the long term. This can result in regulatory capture.<sup>45</sup>

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<sup>40</sup> The direct bank recapitalization tool foreseen in the ESM was never implemented in practice (see European Stability Mechanism, ‘*ESM direct bank recapitalization instrument adopted (Press release)*’ (2014) <<https://www.esm.europa.eu/press-releases/esm-direct-bank-recapitalisation-instrument-adopted>> accessed 23 September 2021)) and was abandoned during the ESM reform in favour of an indirect solution that sees the ESM backstop the SRF. For an alternative policy suggestion see Moritz Schularick, Sascha Steffen, and Tobias H. Tröger, ‘Bank capital and the European recovery from the COVID-19 crisis’, (2020) CEPR Discussion Paper No. 14927, 15-18 <[http://www.cepr.org/active/publications/discussion\\_papers/dp.php?dpno=14927](http://www.cepr.org/active/publications/discussion_papers/dp.php?dpno=14927)> accessed 23 September 2021.

<sup>41</sup> Programmatic contributions include Gordon Tullock, *The Politics of Bureaucracy* (Public Affairs Press 1965), Barry R. Weingast and William J. Marshall, ‘The Industrial Organization of Congress’, (1988) 96 JPE 132 and Terry M. Moe, ‘Politics and the Theory of Organization’, (1991) 7 JLEO 106. For an analysis with a particular view to the governance of financial supervisors see Luca Enriques and Gérard Hertig, ‘Improving the Governance of Financial Supervisors’ (2011) 12 EBOR 357.

<sup>42</sup> On the positive aspect of “adaptive efficiency” Douglas C. North, ‘Institutions, Institutional Change and Economic Performance’ (CUP 1990) 80-1.

<sup>43</sup> For an overview of various political agency models see Timothy Besley, *Principled Agents?* (OUP 2007) 98 – 172.

<sup>44</sup> William A Niskanen, Jr., *Bureaucracy and Representative Government* (Routledge 1971) 36-42.

<sup>45</sup> The concept describes how and when interest groups dominate regulatory decision processes Jean-Jacque Laffont & Jean Tirole, ‘The Politics of Government Decision Making: A Theory of Regulatory Capture’ (1991) 106

Finally, agency personnel seek to avoid liability for false actions or forbearance and consequentially have a proclivity to follow approved practices that can be verified in any review, even in the event of new developments not suitably covered by such practices.

While the early “public choice” literature used these insights to advance a radically pessimistic perception of bureaucrats’ effectiveness,<sup>46</sup> other contributions have taken a more nuanced view.<sup>47</sup> In any case, the respective scholarship highlights that the personnel in public authorities are not robots automatically programmed to serve the public interest in their exercise of office by quasi-mechanically enforcing regulation, along the lines of legally-devised competences, and free of self-interest.

In terms of this paper’s focus, a critical takeaway of the sketched theory is that the uncompromising stance of SRB full-time executives to push through contested resolution schemes against the resistance of national politicians and their administrative representatives does not promote the respective Board members’ personal utility. Indeed, such a stance decreases future job opportunities insofar as they are provided at national level. It can also damage the reputation of SRB full-time members among the media and the general public because opposing politicians in member states may also campaign to call their competency into question and portray them as scapegoats. Such political ‘backing’ will also encourage potential plaintiffs and thus fuel litigation against resolution action, opening another channel for career-limiting reputational harm. In the medium term, fierce insistence on unpopular resolution action (for instance, bail-in of vulnerable bank creditors, liquidation, or dissolution of national champions) will also trigger efforts to reduce the remit of the SRB. Full-time SRB members who anticipate these negative ramifications of non-consensual resolution action are likely to adapt their behavior and look for ways to avoid meritless confrontation.

## 2.4 Public interest assessment as an allocator of resolution cases

The public interest assessment (PIA) is a tool that allows the SRB to take a deferring stance that, according to our political economy considerations, the SRB full-time members may prefer. The SRB conducts a PIA at two stages. The proper PIA is performed at the resolution trigger stage when a bank

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QJE 1089; with a particular view to banking regulators Daniel C Hardy, ‘Regulatory Capture in Banking’ (2006) IMF, Working Paper No. 34 <<http://www.imf.org/external/pubs/ft/wp/2006/wp0634.pdf>> accessed 23 December 2021.

<sup>46</sup> George J. Stigler, ‘The Theory of Economic Regulation’, (1971) 2 Bell J. Econ. & Mgmt. Sci. 3; Canice Prendergast, ‘The Motivation and Bias of Bureaucrats’ (2007) 97 AER 180. For the role of cognitive biases that tend to aggravate the deviation from desirable outcomes see Stephen J. Choi and Adam C. Pritchard, ‘Behavioral Economics and the SEC’ (2003) 56 Stan. L. Rev. 1.

<sup>47</sup> For at least ambiguous assessments of the complex web of incentives and its inherent trade-offs, see Michael E. Levine and Jennifer L. Forrence, ‘Regulatory Capture, Public Interest and the Public Agenda: Toward a Synthesis’ (1990) 6 JLEO 167; Gordon Tullock, ‘A (Partial) Rehabilitation of the Public Interest Theory’ (1984) 42 Pub. Choice 89.

is declared FOLTF. Here, the SRB decides whether to propose a resolution scheme and to take action accordingly. Meanwhile, a negative PIA remands the case to the national level and has the banking crisis dealt with under the regular bankruptcy laws of the affected member state(s). This provides exactly the exit option SRB bureaucrats may prefer in light of mounting national opposition to supranational resolution (supra 2.4.1). To the same effect, the course may already be set during resolution planning. At this pre-crisis stage, the SRB prepares a preliminary PIA comparing the credibility and feasibility of winding up a bank in national insolvency proceedings with the outcome of potential resolution action. Although this preliminary PIA is non-binding, preparing for liquidation under national bankruptcy proceedings makes it harder to switch to resolution (and its specific tools) once the crisis materializes (infra 2.4.2).

#### 2.4.1 PIA after FOLTF assessment

The pivotal decision as to whether bank failures are dealt with at supranational or national level occurs during the PIA after a positive FOLTF determination. The full-time SRB members thus retain the capacity to brush conflicted cases aside if they indeed wish to avoid conflict with national representatives and stakeholders.

Having the competence to determine whether an institution is FOLTF also allows prudential supervisors to pull the plug against the will of the SRB.<sup>48</sup> The FOLTF determination is therefore ineffective if the supranationally-appointed Board members intend to steer clear of impending resolution cases that will inevitably conjure up a clash between European and national interests. The crisis management framework allows the SRB to take on resolution cases against the will of prudential supervisors, but not to refuse such cases once the supervisory authorities have made an FOLTF determination.<sup>49</sup> This is also true in cases where government actors seek to avoid resolution by instituting a precautionary recapitalization of the ailing institution<sup>50</sup> because the SRB can arguably

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<sup>48</sup> To be sure, the legal framework prescribes that the ECB consults with the SRB before taking a decision, yet, it does not prevent the supervisor from making a positive FOLTF assessment against the position of the SRB, see SRMR, art. 18(1) subpara. 2. Moreover, despite the extensive information sharing requirements (see also SRMR, art. 13(2) subpara. 2), the prudential supervisor will typically have better access to the relevant information and will therefore *de facto* call the shots in FOLTF determinations.

<sup>49</sup> Commentators have hinted at another, highly effective inroad for national interests to prevent resolution, see Thomas F. Huertas, 'Reset required: The euro area crisis management and deposit insurance framework' (2021) SAFE White Paper No. 85, 18 < [https://safe-frankfurt.de/fileadmin/user\\_upload/editor\\_common/Policy\\_Center/SAFE\\_White\\_Paper\\_85.pdf](https://safe-frankfurt.de/fileadmin/user_upload/editor_common/Policy_Center/SAFE_White_Paper_85.pdf) > accessed 31 January 2022. Where national stakeholders deem the failure of a bank undesirable, they can prevent a FOLTF assessment by employing national authorities to buy assets from or supply capital to the wobbling institution to improve its condition and induce the central bank to extend liquidity support (if necessary emergency liquidity assistance, ELA) to the bank until the SRB is ready to do what the member state wants it to do. By design, such a strategy requires a member state to have a specific interest in the survival of the bank.

<sup>50</sup> SRMR, art. 18(4)(d).

deny that the preconditions of such permissible public support are present<sup>51</sup> even if the ECB and the Commission are willing to go along with the bail-out.<sup>52</sup> Yet, the SRB cannot prevent the prudential supervisor from arriving at an FOLTF determination if this authority believes that the preconditions are not met. At best, the SRB may have some power to delay an FOLTF assessment where conflicts loom.<sup>53</sup>

Similarly, alternative private or public sector interventions to prevent a bank from failing at the point of non-viability (PONV) may or may not be available. Hence, the SRB cannot rely on the relevant determination under the SRMR, art. 18(1)(b) if the intention is to turn it into a gateway which allows for the rejection of undesired resolution cases.

The regulatory mechanism that more effectively permits SRB to shrink back is the PIA: by denying the public interest in resolving the failed institution, cases can be referred back to the national level, thereby allowing the full-time Board members to stay out of the *mêlée* of cramming down resolution schemes against the national push-back orchestrated in the plenary session. The pivotal determination that the resolution objectives laid down in art. 14(2) of the SRMR can solely be achieved in a proportionate manner outside regular insolvency proceedings<sup>54</sup> rests on an open standard.<sup>55</sup> Moreover, predicting if resolution is necessary to avoid significant adverse consequences for financial stability and the economy by disrupting the continuous provision of critical functions within the meaning of the BRRD, art. 2(1)(35) is fraught with uncertainty and hinges critically on data input and methodologies used for the respective projections.<sup>56</sup> Therefore, the relevant standard is highly sensitive to case-specific facts and modeling assumptions which provides resolution authorities

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<sup>51</sup> For a description see also Jens Hinrich Binder, 'Resolution: Concepts, Requirements and Tools' in Jens Hinrich Binder and Dalvinder Singh (eds.), *'Bank Resolution: The European Regime'*, (OUP 2016) paras 2.38-2.46.

<sup>52</sup> Assessing the preconditions for a precautionary recapitalization is part and parcel of the FOLTF determination under art. 18(1)(a) of the SRMR for which the ultimate decision making competence lies with the SRB, see above n 48.

<sup>53</sup> The SRB has no dilatory capacity afforded to of requests from NRAs under 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, [2013] OJ L287/63, art. 14(6) if the ECB triggers resolution by withdrawing a bank's license.

<sup>54</sup> On the capacity of national insolvency regimes to realize the public interest served in bank resolution see also Olina Capolino, 'The Single Resolution Mechanism: Authorities and Proceedings' in: Mario P. Chiti and Vittorio Santoro (eds), *'The Palgrave Handbook of European Banking Union Law'*, (Palgrave Macmillan 2019) 257.

<sup>55</sup> SRMR, art. 18(1)(c), (5).

<sup>56</sup> Kern Alexander, 'European Banking Union: A Legal and Institutional Analysis of the Single Supervisory Mechanism and the Single Resolution Mechanism', (2015) ELR, 154 who points to the perils of unexpected and unreliable SRB decisions. See also Martin Götz, Jan Pieter Krahn and Tobias H. Tröger, 'Taking bail-in seriously: The looming risks for banking policy in the rescue of Monte Paschi di Siena', (2017) SAFE Policy Letter No. 54 < [https://safe-frankfurt.de/fileadmin/user\\_upload/editor\\_common/Policy\\_Center/SAFE\\_Policy\\_Letter\\_54.pdf](https://safe-frankfurt.de/fileadmin/user_upload/editor_common/Policy_Center/SAFE_Policy_Letter_54.pdf) > accessed 15. December 2021 advocating transparent and evidence-based determinations.



significant discretion.<sup>57</sup> It thus ultimately permits both a very restrictive interpretation – leaving much leeway for solving banking crises nationally<sup>58</sup> – or an extensive construction – leading to more SRB involvement. While the SRB, as illustrated in Box 1, so far has taken the former approach,<sup>59</sup> reserving resolution for the few,<sup>60</sup> some national authorities cast the net rather wide in interpreting the comparable provisions implementing the PIA under the BRRD<sup>61</sup> and thus also put small banks into resolution instead of insolvency.<sup>62</sup> This indicates that policy choices underpin the SRB approach which may – at least partly – be explained by the considerations sketched in this paper. Quite importantly, if the SRB rejects the existence of a public interest *in the resolution* of an FOLTF institution, the Commission is in no way precluded from acknowledging a public interest *in granting state aid* in the liquidation of this institution.<sup>63</sup> A negative SRB PIA may therefore pave the way toward a more bail-

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<sup>57</sup> Commentators disagree on the adequate leeway that resolution authorities should enjoy in their decision to invoke a bank-specific resolution procedure, see for instance Paul Tucker, 'Resolution and the Future of Finance', (2013) INSOL International World Congress 9 (arguing for constraining discretion) and Jeffrey N. Gordon and Wolf-Georg Ringe, 'Bank Resolution in the European Banking Union: A Transatlantic Perspective on What It Would Take', (2015) Columbia Law Review 1296 (advocating for discretion).

<sup>58</sup> If the public interest in a bank's resolution is denied, the institution is wound-up under national insolvency law, cf. SRMR, art. 18(8).

<sup>59</sup> The SRB conducts a comparative analysis of the preferred resolution strategy and a standard insolvency procedure and thus considers different insolvency proceedings in relevant member states, but also possible consequences of a chosen approach for the affected entity or group. For a detailed description of the SRB approach see SRB, *Public Interest Assessment: SRB Approach*, (2019) <[https://www.srb.europa.eu/en/system/files?file=media/document/2019-06-28\\_draft\\_pia\\_paper\\_v12.pdf](https://www.srb.europa.eu/en/system/files?file=media/document/2019-06-28_draft_pia_paper_v12.pdf)> accessed 24 September 2021; for a description of the SRB practice see also SRB, *Annual Report 2020* (2021) 12 <[https://www.srb.europa.eu/system/files/media/document/Annual%20Report%202020\\_Final\\_web.pdf](https://www.srb.europa.eu/system/files/media/document/Annual%20Report%202020_Final_web.pdf)> accessed 4 November 2021. On 7(66) 52-53; 51(66) paras 2.26-2.37; Karl-Philipp Wojcik, 'Bail-in in the Banking Union', (2016) 53 CMLR 91, 100.

<sup>60</sup> See Elke König, 'Developments in the SRB: Setting MREL and Safeguarding Operational Continuity' (Speech to the BPFI in Dublin, 22 January 2019) <<https://www.srb.europa.eu/en/content/speech-bpfi-dublin-elke-konig-developments-srb-setting-mrel-and-safeguarding-operational>> accessed 27 September 2021 stating that „...we must remember that resolution is for the few, not the many. In most cases, insolvency will be the procedure at play.“

<sup>61</sup> BRRD, art. 32(1)(c) and (5).

<sup>62</sup> The most important example in this regard is Denmark, for a description of the Danish' resolution authority's approach see Danmarks Nationalbank, 'Consistent recovery and resolution of small and large banks in Europe', (2021) <[https://www.nationalbanken.dk/en/publications/Documents/2021/06/ANALYSIS\\_No.%2018\\_Consistent%20recovery%20and%20resolution%20of%20small%20and%20large%20banks%20in%20Europe.pdf](https://www.nationalbanken.dk/en/publications/Documents/2021/06/ANALYSIS_No.%2018_Consistent%20recovery%20and%20resolution%20of%20small%20and%20large%20banks%20in%20Europe.pdf)> accessed 9 December 2021.

<sup>63</sup> For the grounds of the respective assessment that mainly considers the necessity of public bail-out funding to “remedy a serious disturbance in the economy” caused by the institution's failure on either the national or regional level see Treaty on the Functioning of the European Union (TFEU) [2016] OJ C202/1, art. 107(3)(b); for an assessment of the Commission's approach see also European Court of Auditors, 'Special Report: Control of State aid to financial institutions in the EU: in need of a fitness check' (2020/C 325/14) <[https://www.eca.europa.eu/Lists/ECADocuments/SR20\\_21/SR\\_state\\_aid\\_EN.pdf](https://www.eca.europa.eu/Lists/ECADocuments/SR20_21/SR_state_aid_EN.pdf)> accessed 3 November 2021.

out-oriented national solution bringing with it all the drawbacks of an unlevel playing field arising from unharmonized national bankruptcy regimes.<sup>64</sup>

The SRB PIA follows the pattern outlined above. To prove that the possible impact of the bank's failure on financial stability is significant and requires resolution action, the SRB analyzes the level of contagion risk and the interconnectedness of the bank with other financial institutions, its importance for the funding market, and the expected effects of its bankruptcy on the real economy. In the assessment of financial stability risks, the SRB considers the size, total assets, and relevance of the bank. A presumed substitutability of the institution's main functions within a reasonable timespan, also indicated by a constantly decreasing market share, justify denying a public interest in resolution, simply because the liquidation of the bank would not have a significant impact on the economy. Despite these intuitive guiding principles, the relevant legal framework leaves significant room for discretion. A brief look at the cases that came before the SRB illustrates the rather restrictive stance of the supranational resolution authority that acknowledges a public interest in resolution only in cases of the most significant economic threats at European or at least national level.

#### **Banco Popular<sup>1</sup>**

In 2017, the SRB approved a resolution scheme in respect of Banco Popular Español S.A. according to which shares and capital instruments of Banco Popular, at that time the sixth-biggest bank in Spain, were transferred to the biggest Spanish bank at that time, Banco Santander S.A. The SRB decided the sale was in the public interest because Banco Popular performed critical functions on the Spanish market, namely deposit-taking from households and non-financial corporations, lending to SMEs, and payment and cash services. Discontinuation of these functions could lead to negative effects for the national real economy and financial stability. The winding-up of the bank would not be as effective as the implementation of the resolution scheme. It was the only time the SRB decided positively on PIA and concluded that the resolution action would help to maintain the critical functions of the bank as well as prevent significant negative impact on financial stability, including contagion. Therefore, Banco Popular was resolved under the SRMR, involving the sale of business, €7bn capital raise from the acquiring bank and a €3.3bn write down and conversion of tier 1 and tier 2 capital instruments. This was the only bank failure so far handled by the SRB under the supranational crisis management framework.

#### **Banca Popolare di Vicenza and Veneto Banca<sup>2</sup>**

In 2017, the SRB rejected resolution action for two Italian banks, namely Banca Popolare di Vicenza S.p.A. and Veneto Banca S.p.A., and decided in favor of winding up under national law due to the lack of public interest. Specifically, the core functions of the banks were declared as not critical as their services were provided for a limited number of third parties, even though Banca Popolare di Vicenza and Veneto Banca were two large banks in the same Italian region. According to the SRB, the banks' functions could be conducted by other institutions. As the banks were characterized as having low financial and operational interconnectedness with other institutions, significant adverse effects on financial stability were not likely in the event of their failure. Therefore, the SRB concluded that standard insolvency proceedings would accomplish the resolution objectives adequately. The failing banks received considerable public support at national level: the Italian government has contributed €5.2bn of capital and extended €12bn of guarantees.

#### **ABLV<sup>3</sup>**

In 2018, the SRB concluded that resolution action in relation to Latvia's third-biggest bank that stood to lose its banking license (see SRMR, art. 18(1)(a) and (4)(a)) was not in the public interest. In its decision, the SRB explained that the Latvian ABLV Bank and its subsidiary ABLV Bank Luxembourg S.A. did not provide critical functions, and their failure would not lead to a significant adverse impact on financial stability. Pertinently, the SRB expected that other institutions could replace the affected banks in the provision of deposit-taking services from households and SMEs. Similarly, the disruption of payment services and lending to households and SMEs was not expected to cause an essential impact on the real economy and financial stability in affected or other member states. Although both the Latvian parent company and its Luxembourg subsidiary were recognized as FOLTF, this did not trigger insolvency proceedings under national law. The negative PIA blocked resolution,

<sup>64</sup> See Luís Silva Morais, 'Lessons from the First Resolution Experiences in the Context of Banking Recovery and Resolution Directive', (2019) in: Mario P. Chiti and Vittorio Santoro (eds), *The Palgrave Handbook of European Banking Union Law*, (Palgrave Macmillan 2019) 389; Jens-Hinrich Binder, 'Proportionality at the Resolution Stage: Calibration of Resolution Measures and the Public Interest Test', (2020) EBOR 453.

leaving the bank in an uncertain position. Consequently, ABLV's shareholders decided to liquidate the bank voluntarily and the ECB withdrew the license.

#### **AS PNB Banka<sup>4</sup>**

In 2019, the SRB decided against the application of resolution action in respect of AS PNB Banka, the sixth-largest Latvian bank. Again, this was not necessary in the public interest due to low financial and operational interconnectedness with other financial institutions and the lack of significance of the functions performed by the bank. As the likelihood of significant adverse effects or disruption of financial stability was low, the SRB referred this case back to the Latvian national authorities. The institution was wound up under Latvian national law. Information about public support from the Latvian government has not been made publicly available.

<sup>1</sup> See Decision of the Single Resolution Board of 7 June 2017 SRB/EES/2017/08.

<sup>2</sup> See Decisions of the Single Resolution Board of 23 June 2017 SRB/EES/2017/11 and SRB/EES/2017/12.

<sup>3</sup> See Decisions of the Single Resolution Board of 23 February 2018 SRB/EES/2018/09 and SRB/EES/2018/10.

<sup>4</sup> See Decision of the Single Resolution Board of 15 August 2019 SRB/EES/2019/131.

#### *Box 1 - SRB PIA for FOLTF banks*

The PIA is reserved for the SRB and is conducted in its executive session.<sup>65</sup> Therefore, in the relevant deliberations, which involve the NRA representatives of affected member states,<sup>66</sup> the five supranationally-appointed Board members already get an idea of how fiercely opposed national authorities may be to an SRB-devised resolution scheme but retain full sovereignty in making such a pivotal decision.<sup>67</sup> More importantly, during the run-up to the PONV and the FOLTF determination, behind-the-scenes political bargaining will already expose the varying preferences for dealing with the ailing institution. Hence, the internal governance structure of the SRB allows the supranationally-appointed Board members to take a deferring stance in particularly keenly contested resolution cases. Obviously, this defies the policy objective of overcoming the dominance of national interests in resolution. In light of the above, it is no wonder that those cases of FOLTF banks that were dealt with under national insolvency laws after the SRB denied a public interest in their resolution, involved (national) public support reaching or even exceeding the €5bn threshold.<sup>68</sup>

#### **2.4.2 PIA in resolution planning**

The course for allocating the responsibility for dealing with bank failures at the supranational or member state level is already set during resolution planning. In a preliminary PIA, the SRB also analyzes if resolution action is necessary and proportionate to achieve the relevant resolution objective(s), and if it/they may be achieved to the same extent in normal insolvency proceedings.<sup>69</sup> Depending on the outcome of the credibility analysis, the SRB either determines a resolution strategy under the SRMR

<sup>65</sup> SRMR, art. 18(1).

<sup>66</sup> See above at n 17.

<sup>67</sup> See above at n 18.

<sup>68</sup> See decisions on Banca Popolare di Vicenza and Veneto Banca, Decisions of the Single Resolution Board of 23 June 2017 SRB/EES/2017/11 and SRB/EES/2017/12.

<sup>69</sup> SRMR, art. 18(5).

or prepares a resolution plan with insolvency proceedings as the preferred option. Should the presence of a public interest in resolution be uncertain, the SRB will write a resolution plan to be better prepared. A preliminary PIA is not binding and serves only as a starting point for the considerations in the final PIA.<sup>70</sup> Different conclusions in the preliminary and the final PIA may be explained by changes in market conditions or the more comprehensive assessment conducted at the stage of actual failure, but can also be motivated by the unanticipated mounting of national opposition to the original resolution strategy (see above 2.4.1). Where opposition to a supranational resolution scheme is already expected at the planning stage, the motivation to deny a public interest in supranational resolution already at the planning stage is precisely the same as it is for the final PIA. The full-time SRB members may remand cases to the national level if they want to stay clear of the expected *mêlée* precipitated by opposing national bureaucrats and politicians. To be sure, such a negative preliminary PIA is also legally non-binding, but switching from liquidation to resolution without fully-fledged preparation is, as a matter of practice, hard to conceive. In sum, it is far more likely that a positive decision in the preliminary PIA may be revoked to avoid supranational resolution than the other way round.

We acknowledge that resolution planning, which has been driven by the SRB during recent years, may shift the balance in certain cases at the margin. After all, the SRB stands to execute “their” plans and the relevant stakeholders involved may have conceded leadership to the SRB,<sup>71</sup> particularly in light of such experiences in resolution colleges and crisis management groups. However, such soft soothing factors will be blown away once hard economic and social conflicts become manifest when a cross-border banking crisis hits and catches the interest of politicians not involved in day-to-day crisis prevention.

### 3 Implementation of resolution schemes

Even after resolution is triggered at supranational level, NRAs play an important role in the adopted scheme’s implementation, leading to another, more disguised yet potentially even more disruptive, inroad for national interests in supranational resolution.

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<sup>70</sup> See SRB, *Public Interest Assessment: SRB Approach*, (2019) 13 <[https://www.srb.europa.eu/en/system/files?file=media/document/2019-06-28\\_draft\\_pia\\_paper\\_v12.pdf](https://www.srb.europa.eu/en/system/files?file=media/document/2019-06-28_draft_pia_paper_v12.pdf)> accessed 4 November 2021.

<sup>71</sup> For the general idea of resolution planning as a tool to attenuate anticipated conflicts of interest see D. Ramos and J. Solana, ‘Bank Resolution and Creditor Distribution: The Tension Shaping Global Banking – Part I: “External and Intra-Group Funding” and Global Banking – Part I: “External and Intra-Group Funding” and “Ex Ante planning v. Ex Post Execution” Dimensions’ (2019) 28 U Miami Bus. L. Rev. 1, 30 (also showing that the approach potentially amplifies other conflicts, for instance those among prudential supervisors and resolution authorities).

The SRM divides the competences regarding the execution of resolution decisions, or the implementation of the SRB-devised resolution scheme, between the SRB and the NRAs. Therefore, efficient outcomes hinge on effective information-sharing and cooperation within the SRM.<sup>72</sup> The NRAs implement the approved resolution schemes while the SRB monitors the national execution.<sup>73</sup> The SRB thus assumes the role of the supreme authority responsible for achieving the resolution objectives but depends critically on effective NRA actions to accomplish its task. In the resolution scheme, the SRB identifies the resolution tool(s) to be applied in the institution under resolution and, as the case may be, proposes tapping the SRF.<sup>74</sup> However, any SRB resolution decision can only take effect through NRA implementation. NRAs enjoy discretion in deciding which specific resolution measures to apply in implementing the resolution scheme adopted by the SRB.<sup>75</sup> They may specify resolution actions,<sup>76</sup> ultimately even inducing the SRB to adopt changes to the resolution scheme.

There are sound reasons for involving NRAs who retain expertise close to the ground with regard to national banking systems in the nitty-gritty of resolution. However, the only-partial supranationalization of resolution competences and powers allows reluctant NRAs to throw a spanner in the works of SRB-developed resolution schemes. For instance, bridge-bank strategies or asset separation strategies are deployed with the ultimate aim of the sale of the (good) bank to a private sector acquirer and therefore can be torpedoed if the responsible NRA leads the negotiations sluggishly, insisting on petty details in the representations and warranties in the purchase agreement, etc., thereby deterring potential acquirers.

To be sure, there are legal safeguards designed to compel constructive input from NRAs and limit their obstructive power.<sup>77</sup> For instance, NRAs' choice of specific resolution measures needs to comply with the strategic decision of the SRB.<sup>78</sup> The SRB has a right to monitor individual decisions of NRAs and request from them draft decisions to check if all elements of the decision comply with the legal framework.<sup>79</sup> To that end, the SRB has broad investigatory powers. It may request all information relevant for the case directly from the affected entities, their employees, and persons performing outsourced services for these entities.<sup>80</sup> If such information is available to NRAs, NCAs, or the ECB,

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<sup>72</sup> See generally Niamh Moloney, 'European Banking Union: assessing its risks and resilience', (2014) *Common Market Law Review*, 51 (6), 1609-1670.

<sup>73</sup> SRMR, art. 28.

<sup>74</sup> SRM Reg, arts. 18(6)(c), 67(4).

<sup>75</sup> SRMR, art. 18(9).

<sup>76</sup> SRMR, art. 6(7).

<sup>77</sup> The overarching objective is that NRA actions do neither imperil the achievement of the resolution objectives nor prevent the efficient implementation of resolution schemes, SRMR., recital 87.

<sup>78</sup> SRMR, art. 6(7).

<sup>79</sup> SRMR, art. 31(1) subpara 2 (d).

<sup>80</sup> SRMR, art. 34(1).

these institutions must share their knowledge with the SRB.<sup>81</sup> When performing the necessary investigations in a member state, the relevant NRA is obliged to afford assistance and ensure access to required documents and business premises for the SRB.<sup>82</sup> National judicial authorities are not empowered to decide on the admissibility of the investigations. Only the Court of Justice may review the legality of the SRB's decisions.<sup>83</sup> If the SRB finds that an NRA's draft decision does not comply with the SRMR, it may issue a warning or exercise powers directly on the affected entities.<sup>84</sup> More specifically, should the SRB determine that an NRA does not efficiently implement the resolution scheme, the supranational authority has the power to directly act vis-à-vis the entity or group under resolution.<sup>85</sup>

This distribution of competences and powers within the SRM at the implementation stage allows the SRB to ultimately push through resolution plans in any manner that it deems appropriate. The SRB can even reach a decision to act directly vis-à-vis resolution entities in the executive session (see above 2.1). Yet surmounting national resistance in a non-cooperative resolution game is still a resource-intensive and annoying endeavor that comes at high financial, personal, and political cost for the combat-ready supranational actors. Analyzing the incentive effects of this arrangement by way of backward induction shows that NRAs' obstruction capacity at the implementation stage creates another layer of incentives for the full-time SRB members to avoid resolution cases already at the initial triggering stage, if the resolution scheme prospectively requires the execution to be forced past resisting NRAs. Once again, a negative PIA may be driven by the desire to avoid conflict with national interests in supranational resolution.

## 4 The inadequacy of the SRF to mute national interests

In principle, the SRF is capable of muting national interests in the banking union, because it provides supranational resolution funding beyond PSI and thus attenuates the need for cross-border subsidization from member states' coffers to achieve first-best outcomes in preventing banking crises from negatively affecting their economy. If supranational resources – together with loss-taking and recapitalizing contributions from investors in bank capital and bail-inable liabilities – were to suffice to resolve an FOLTF bank in the mutual interest of all affected member states, one of the most contested issues that may lead to a break-down of resolution along national borders would vanish. The pivotal prerequisite for this soothing effect of supranational resolution funding is that the

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<sup>81</sup> SRMR, art. 34(6).

<sup>82</sup> SRMR, arts. 35(2) subpara 2, 36 (5).

<sup>83</sup> SRMR, art. 37(2).

<sup>84</sup> SRMR, art. 7 (4).

<sup>85</sup> SRMR, art. 29(2).

firepower of the supranational funding arrangement be large enough to reassure affected member states that their legitimate interest in the continuous and stable provision of essential services to their economy through significant affiliates of the failed institution or group can still be satisfied.

SRF resources can indeed be deployed for a broad variety of funding purposes in resolution, including providing guarantees, granting loans, acquiring assets, and paying compensation to shareholders and creditors. They can also be used to finance a temporary transfer of the management to another bank or to pay for the services of an asset management company.<sup>86</sup> Although institutions in resolution are generally not intended to be direct funding recipients, in certain cases, when bail-in is applied but some liabilities are not subject to write-down or conversion, the SRF funds may even be used directly to cover losses of a failing bank or to carry out outright recapitalizations,<sup>87</sup> if at least 8% of an entity's total liabilities are concomitantly bailed-in.<sup>88</sup> Yet such a contribution of the SRF to a bank's recapitalization cannot exceed 5% of the entity's total liabilities.<sup>89</sup>

Already, this curtailed designation of the SRF to take losses raises doubts as to the Fund's ability to attenuate national interests in supranational resolution. More importantly though, the specific mutualization of losses inherent in the structure of national contributions transferred to the SRF (below 4.1) as well as the targeted size of the Fund and the governance arrangements for the ESM-backstop (below 4.2) do not live up to the essential precondition of providing sufficient fiscal firepower at the supranational level.

#### 4.1 Mutualization and contributions to the SRF

The SRF was established as part of the SRM by a supplementary Intergovernmental Agreement on the transfer and mutualization of contributions to the Single Resolution Fund (IGA).<sup>90</sup> The Fund's purpose is to finance the restructuring of affected institutions,<sup>91</sup> that is to safeguard the efficient application of resolution tools and to contribute to financial stability. The Fund is owned by the SRB and primarily financed from private sector contributions<sup>92</sup> (i.e. payments from credit institutions and certain

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<sup>86</sup> SRMR, arts. 27(6), 76(3).

<sup>87</sup> SRMR, arts. 27(6), 76(3).

<sup>88</sup> SRMR, art. 27(7)(a).

<sup>89</sup> SRMR, art. 27(7)(b).

<sup>90</sup> Agreement 8457/14 of the Council of the European Union of 15 May 2014 on the transfer and mutualisation of contributions to the Single Resolution fund [hereinafter: IGA], [2014].

<sup>91</sup> For the judicial challenges and potential threats to the institutional balance in the EU stemming from the establishment of the SRF in the form of an intergovernmental agreement see Federico Fabbrini, 'On Banks, Courts and International Law: The Intergovernmental Agreement on the Single Resolution Fund in Context', (2014) 21 Maastricht Journal of European and Comparative Law 444.

<sup>92</sup> Some scholars doubt the adequacy of such an arrangement, see e.g. Jeffrey N. Gordon and Wolf-Georg Ringe, 'Bank Resolution in the European Banking Union: A Transatlantic Perspective on What It Would Take', (2015) Columbia Law Review Vol. 115:1297 1354 (arguing that the central bank needs to provide liquidity instead).

investment firms in the participating member states).<sup>93</sup> Contributions can come in the form of regular ex-ante or extraordinary ex-post contributions.<sup>94</sup> Ex-ante contributions are irrevocable and raised at least annually. Extraordinary ex-post contributions may be raised where the available funds are not sufficient to cover the expenses of the SRF. They must not exceed three times the annual amount of ex-ante contributions.

If the collected contributions are not available in time for the implementation of resolution measures, the SRB can also receive repayable loans from third parties,<sup>95</sup> including non-participating member states' resolution-financing arrangements,<sup>96</sup> or contracts for other (public) financial arrangements.<sup>97</sup> However, as neither the EU nor member states are liable for expenses or losses of the Fund,<sup>98</sup> the latter's borrowing capacity ultimately hinges on the industry's aggregate creditworthiness, as covered institutions are effectively collateralizing fund borrowing with their extraordinary ex-post contributions. Yet, banks' financial standing would be constrained particularly in a systemic crisis, which in turn significantly limits the momentum of SRF borrowing as an effective source of additional funding for bank resolution.

Therefore, the SRF's significance with respect to diminishing the influence of national interests in supranational resolution cases essentially depends on the structure of the contributions to the SRF. These contributions are collected by the NRAs and initially held in national compartments, which are gradually mutualized during the transition period.<sup>99</sup>

The two-stage calculation of individual institutions' SRF contributions reflects the size and risk level of an institution.<sup>100</sup> The basic annual contribution (BAC) is determined with regard to the relative size of a bank, that is, according to the ratio of its liabilities to the liabilities of all institutions authorized in the participating member states, with both the numerator and the denominator excluding own funds and covered deposits (flat contribution).<sup>101</sup> For larger banks,<sup>102</sup> the contribution is subsequently risk-

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<sup>93</sup> SRMR, art. 67(3).

<sup>94</sup> SRMR, arts. 70, 71.

<sup>95</sup> SRMR, art. 73(1).

<sup>96</sup> SRMR, art. 72 subpara 1.

<sup>97</sup> SRMR, art. 74.

<sup>98</sup> SRMR, art. 67(2) subpara 2.

<sup>99</sup> Mario Bellia et al., 'The Sovereign-Bank Nexus in the Euro Area: Financial & Real Channels', (2019) European Economy - Discussion Papers 2015 - 122, Directorate General Economic and Financial Affairs (DG ECFIN), European Commission, 10.

<sup>100</sup> The basic calculation is the same for ordinary ex ante and for extraordinary ex post contributions, SRMR, arts. 70(2), 71(1).

<sup>101</sup> SRMR, art. 70(2)(a).

<sup>102</sup> Small banks with total assets of less than € 1 bn only pay a lump sum contribution in accordance with Commission Delegated Regulation (EU) 2015/63 of 21 October 2014 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to ex ante contributions to resolution financing arrangements [hereinafter: Delegated Regulation on ex ante contributions], art. 10 [2014] OJ L 11/44. Medium banks with total



adjusted by multiplying the BAC by a risk adjustment factor.<sup>103</sup> BRRD, art. 103(7) specifies the relevant criteria for assessing an institution's risk profile and calculating the relevant risk factor. These criteria are further operationalized in a complex assessment methodology of discriminatively weighted risk pillars and indicators laid down in a level 2 act.<sup>104</sup> The risk adjustment multiplier ranges from 0.8 to 1.5.<sup>105</sup> Although in 2021 only 24% of institutions paid risk-adjusted contributions, these contributions accounted for 97% of the total amount levied in the banking union.<sup>106</sup> This distribution potentially allows for significant risk adjustments across banking sectors. However, risk adjustments are rather moderate in practice, with deviations from the BAC by 20% or less in 67% of institutions.<sup>107</sup>

The available evidence does not substantiate a firm conclusion that the relatively low risk sensitivity of SRF contributions is completely out of step with the relative riskiness of national banking systems. The data indicate that the significant imbalances between participating member states of the banking union have been reduced since the inception of the SSM, at least prior to the COVID-19 pandemic.<sup>108</sup> Yet, for instance, the geographic distribution of non-performing loans and advances at significant banks in participating member states shows that they have anything but vanished. Quite importantly, the respective exposures vary significantly more (from 1.05% (Germany) to 14.84% (Greece)) than suggested by the risk adjustments to SRF contributions.<sup>109</sup> This may still lead – and certainly in the past has led – to a situation in which stable banking systems would end up subsidizing resolution in fragile financial sectors. Therefore, by design, the residually risk-insensitive resolution funding upholds the relevance of national interests. Banks from those national financial sectors that have to shoulder a disproportionate burden will lobby NRAs and politicians to oppose resolution schemes that require significant SRF contributions, either in the plenary session of the SRB (see above 2.1 ) or in the European Council (see above 2.2).

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assets of more than € 1 bn but less than € 3 bn generally also pay a lump sum; they have to make an additional risk-adjusted contribution only for those total liabilities (less own funds and covered deposits) that exceed € 300 bn, Council Implementing Regulation (EU) 2015/81 of 19 December 2014 specifying uniform conditions of application of Regulation (EU) No 806/2014 of the European Parliament and of the Council with regard to ex ante contributions to the Single Resolution Fund, art. 8(5) [2015] OJ L 15/1.

<sup>103</sup> SRMR, art. 70(2)(b).

<sup>104</sup> Delegated Regulation on ex ante contributions, arts. 6, 7.

<sup>105</sup> Delegated Regulation on ex ante contributions, art. 9(3).

<sup>106</sup> SRB, '2021 SRF levies (ex-ante contributions)' (2021) < <https://www.srb.europa.eu/en/content/2021-srf-levies-ex-ante-contributions#documents> > accessed 21 December 2021.

<sup>107</sup> Ibid.

<sup>108</sup> ECB, Financial Stability Review November 2021 (2021) 59 chart 3.1 <<https://www.ecb.europa.eu/pub/pdf/fsr/ecb.fsr202111~8b0aebc817.en.pdf>> accessed 24 December 2021.

<sup>109</sup> See ECB, Supervisory Banking Statistics, Second quarter 2021 (2021) 74 <[https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.supervisorybankingstatistics\\_second\\_quarter\\_2021\\_202110~20f1cd8593.en.pdf](https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.supervisorybankingstatistics_second_quarter_2021_202110~20f1cd8593.en.pdf)> accessed 21 December 2021.

## 4.2 Size of the SRF and ESM-backstop

In addition to the incentives that flow from the calculation of the SRF contributions (see above 4.1), a momentous impediment that will prevent the Fund from overcoming the preponderance of national interests in supranational resolution stems from the Fund's size and the rules governing the recourse to its backstop, the ESM.

The IGA specifies the total amount that the respective national banking industries have to contribute to the SRF. The Fund is supposed to reach the target level of 1% of covered deposits in participating member states (approximately EUR 70 bn<sup>110</sup>) by 31 December 2023.<sup>111</sup> Yet, even the fully-endowed SRF will be insufficient to deal with the failure of the biggest banks in the banking union<sup>112</sup> or a failure of several medium-sized institutions at the same time in a systemic event, particularly as long as the SRF is also responsible for liquidity provision on the Monday morning after the resolution weekend. Under these circumstances, chances to close funding gaps by procuring means rapidly through public or private sources are slim. Therefore, it is of the utmost importance that the SRF can draw on a well-capitalized and thus credible supranational backstop that can provide funds rapidly.

In 2021, reform efforts *inter alia* sought to put the ESM in a position to backstop the SRF. The introduced backstop facility allows direct ESM financing of the SRF,<sup>113</sup> once this facility is properly ratified by all signatory member states. Under the common backstop facility, the ESM will be entitled to lend and disburse any amount equal to or lower than a nominal cap,<sup>114</sup> estimated to be set at €68bn,<sup>115</sup> in the event that the SRF's own resources are depleted. These limited ESM capital injections are a far cry from the firepower that some resolution authorities, like the U.S. Federal Deposit

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<sup>110</sup> SRB, SRF grows to €42 billion after latest round of transfers, press release of 14 July 2020.

<sup>111</sup> SRMR, arts. 67(4), 69(1).

<sup>112</sup> Based on year-end-2020 data, the Bank for International Settlement (BIS) designated 10 banking union institutions (BNP Paribas, Deutsche Bank, Société Générale, Crédit Agricole, Santander, ING Bank, Unicredit, BPCE, Nordea, BBVA) as global systemically important banks (G-SIBs), see BIS, *Global systemically important banks: assessment methodology and the additional loss absorbency requirement*, (2021) <<https://www.bis.org/bcbs/gsib/>> accessed 13 December 2021.

<sup>113</sup> Treaty of 2 February 2012 establishing the European Stability Mechanism between the Kingdom of Belgium, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, Malta, the Kingdom of The Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Slovenia, the Slovak Republic and the Republic of Finland T/ESM 2012-LT [hereinafter: ESM Treaty], art. 18a as introduced by Agreement amending the Treaty Establishing the ESM, signed on 27 January and 8 February 2021, art. 1(26).

<sup>114</sup> ESM, *Draft guideline on the Backstop Facility to the SRB for the SRF* [hereinafter: ESM Draft guideline on the Backstop Facility], art. 3(1) (2019) <<https://www.consilium.europa.eu/media/41668/20191206-draft-backstop-guideline.pdf/>> accessed 21 December 2021.

<sup>115</sup> Based on the ESM's own estimations, see ESM, *A backstop to the Single Resolution Fund now!*, (2020) <<https://www.esm.europa.eu/blog/backstop-single-resolution-fund-now/>> accessed 16 December 2021.

Insurance Corporation (FDIC), can mobilize by borrowing quasi-unlimited amounts from the respective treasuries.<sup>116</sup>

Moreover, the critical decision-making power to grant loans to finance resolution within the framework of the backstop facility is vested with the ESM Board of Directors, which comprises representatives from each of the 19 ESM member states,<sup>117</sup> and decides by mutual agreement,<sup>118</sup> i.e. in the form of a unanimous vote.<sup>119</sup> Such unanimity is also required where the Board of Directors wants to delegate decision-making powers for a certain period and entrust the ESM Managing Director with the competence to grant and disburse loans of a limited amount under the backstop facility.<sup>120</sup> Only where the Commission and the ECB conclude in separate assessments that the failure to urgently adopt a decision on loans and respective disbursements under the backstop facility would threaten the economic and financial sustainability of the euro area, can the Board of Directors resolve with a qualified majority of 85% of the votes cast in an emergency voting procedure.<sup>121</sup> Except for extreme scenarios, this governance structure gives veto power to member states who can thus thwart any resolution scheme that requires ESM backing. Moreover, even where the economic and financial sustainability of the euro area is imperiled and thus decisions are adopted with a qualified majority, the three largest ESM member states (France, Germany, and Italy) retain veto powers.<sup>122</sup>

Once again, the motivation to invoke veto powers may result from looming cross-border subsidies in SRF-funded supranational resolution (see above 4.1). The ESM can extend loans under the backstop facility only if the SRF proves its capacity to repay the funds it receives.<sup>123</sup> The capability to service ESM loans as they become due ultimately can only result from the banking industry's contributions to the

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<sup>116</sup> Federal Deposit Insurance Act, Sec 14(a), 12 U.S.C. § 1824(a) (2021).

<sup>117</sup> Each ESM member state appoints a Governor and an alternate Governor, ESM Treaty, art. 5(1), who in turn appoint one Director and one alternate Director, ESM Treaty, art. 6(1). Although the ESM Directors thus are technically not representatives of the member states, they depend critically on the goodwill of Governors who can revoke their appointments at any time without cause.

<sup>118</sup> ESM Treaty, art. 18a(5); ESM Draft guideline on the Backstop Facility, art. 4(4).

<sup>119</sup> ESM Treaty, art. 4(3).

<sup>120</sup> ESM Treaty, art. 18a(5); ESM Draft guideline on the Backstop Facility, art. 5.

<sup>121</sup> ESM Treaty, art. 18a(6); ESM Draft guideline on the Backstop Facility, art. 4(4).

<sup>122</sup> ESM member states voting power is equal to the fraction of shares they hold from the ESM's subscribed capital stock, ESM Treaty, art. 4(7). With a total number of 7,047,987 shares outstanding (see ESM Treaty, Annex II), any member state that holds more than 1,057,198 shares can cast more than 15% of the votes in any scenario and thus retains blocking power even in emergency voting. This applies to France, Germany, and Italy.

<sup>123</sup> ESM Treaty, Annex IV art. 1(2)(b). Already in its request, the SRB has to provide detailed information relating to its ability to service the ESM loans within the relevant maturity, ESM Draft guideline on the Backstop Facility, art. 4(1a)(e). The ESM Managing Director may only file a proposal for the approval of a loan to the SRF on the basis of a joint positive assessment of the SRB's repayment capacity, ESM Draft guideline on the Backstop Facility, art. 4(3). The SRB and the ESM jointly conduct assessments of the SRB's repayment capacity on a regular basis, ESM Draft guideline on the Backstop Facility, art. 8(2). The ESM monitors the SRB repayment capacity for outstanding loans through its Early Warning System, ESM Draft guideline on the Backstop Facility, art. 9.

SRF, as neither the EU nor member states are liable for the Fund's obligations.<sup>124</sup> This in turn invokes the fear of asymmetric mutualization of resolution costs in cross-border bank failures and triggers resistance from banking sectors that would be disproportionately burdened.

Therefore, even after the ESM reform, the banking union's common backstop – in stark contrast to the FDIC and the Treasury in the US – cannot overcome the dominance of national interests in supranational resolution because (i) the amount the ESM can contribute to individual bank resolution is limited and (ii) the decision-making rules once again allow member states to prevent supranationally-devised resolution schemes from going forward if they are not in line with national interests. The incentives to do so result from the mutualizing ultimate liability of national banking systems for resolution costs and impending cross-border subsidies.

## 5 Conclusion

The European regime for managing crises of financial institutions in the banking union sets out to provide the institutional preconditions to attenuate conflicts of interest in cross-border failures of financial institutions that may prevent efficient solutions ex post. However, supranationalization remains partial. A multitude of agencies at both national and supranational levels are required to share information and collaborate in good faith to achieve the social optimum. The intertwined relationships of the SRB with NRAs as well as with the Commission and the Council provide many inroads for national special interest that may preclude desirable outcomes in common resolution. Even within the SRB, the internal governance structure and decision-making procedure that reserves pivotal decisions for the plenary session is perspicuously dominated by member states' representatives. Detrimental national special interests may resurface in exactly those cases that affect the common European interest the most – because they require supranational resolution funding in the form of SRF contributions. The SRM, therefore, does not fully overcome the dominance of national interests in supranational resolution. This holds true even though day-to-day prudential supervision may be significantly more centralized in the SSM, because it is the sustained fiscal responsibility at the national level that shapes incentives, regardless of who was in the driver-seat during the run-up to the crisis. These circumstances provide incentives for the supranationally-appointed SRB members to refuse the responsibility in cross-border banking crises by denying the public interest in an SRB-led resolution. Hence, the SRM does not guarantee first-best solutions in the common interest of the EU.

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<sup>124</sup> SRMR, art. 67(2) subpara 2.

It would be naïve to believe that the existing legal – and largely unenforceable – obligations of the SRB and the NRAs to perform their tasks independently and in the common European interest<sup>125</sup> are apt to change the incentive structure materially where momentous national interests collide. A consistent solution in the spirit of the banking union<sup>126</sup> would have to transfer ultimate decision-making competences in the crisis management and deposit insurance (CMDI) system, as well as regarding issues of resolution funding and scheme implementation, to the supranational level. Moreover, national representatives should be prevented from seizing de facto ultimate decision-making powers in plenary sessions of the supranational CMDI authority.

To be sure, many of the incentive effects that flow from the disutility derived by supranational bureaucrats from cramming down resolution schemes and actions against political opposition in affected member states (see above 2.3) would persist. However, an institutional framework with a fully empowered supranational resolution authority that is largely insulated from national special interests in its internal governance would provide far fewer handles that opposing forces could grab and use to thwart proceeding in the common interest. The European Commission as an autonomously operational competition authority could serve as a template here.

Finally, the solution we propose has the strongest traction for significant banks with their headquarters in the euro area (G-SIIs, O-SIIs, and other large banks with significant cross-border activities). Yet, even where the only entities in the euro area are subsidiaries – be it of a EU or third country parent institution – a strong centralization of crisis management could at least facilitate efficient outcomes. It could force the subsidiary to issue full TLAC/MREL instruments to the parent and force the subsidiary to convert these instruments as soon as possible so that subsidiary remains a going concern. More generally, if the problem resides in the subsidiary, it could force the parent to act as a source of strength, and potentially overcome the resistance of the parent's own supervisor against such intra-group support.

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<sup>125</sup> See SRMR, arts. 47(1), 6(1), 6(4) and 8(11).

<sup>126</sup> See Tobias H. Tröger, 'The Single Supervisory Mechanism – Panacea or Quack Banking Regulation? Preliminary Assessment of the New Regime for the Prudential Supervision of Banks with ECB Involvement' (2014) 15 EBOR 449 (showing that the rationale of the banking union is to provide credible supranational backstops and align incentives in supervision and resolution by supranationalizing decision making).

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