

### LEGAL ANALYSIS AND INTERPRETATIONS OF THE JURISDICTIONAL PROTECTION WITHIN THE SINGLE RESOLUTION MECHANISM.

#### *ANÁLISE JURÍDICA E INTERPRETAÇÕES DA PROTEÇÃO JURISDICIONAL NO ÂMBITO DO MECANISMO ÚNICO DE RESOLUÇÃO.*

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**ABSTRACT:** The aim of this research is to present the first reflections on the accountability level in the Single Resolution Mechanism field, that is to say the possibility of controlling the work of a "technical" subject (SRB and NRAs), by "non technical" subjects, or the competent judicial authorities. These reflections, given the lack of rulings by the European judge on the matter, will be formulated starting from the analysis of the relevant legislation, in order to verify whether the effective respect of fundamental rights, as well as rights, freedoms and principles recognized by the Charter of Fundamental Rights of the European Union can be said to be guaranteed.

**Key words:** European banking Union, SRM, BRRD, SRB, NRAs, IRTs, MREL, IGA, ECB.

**RESUMO:** O objetivo desta pesquisa é apresentar as primeiras reflexões sobre o nível de *accountability* no campo do Mecanismo Único de Resolução, ou seja, a possibilidade de controlar o trabalho de um sujeito "técnico" (SRB e NRA), por sujeitos "não técnicos", ou as autoridades judiciais competentes. Estas reflexões, dada a falta de decisões do juiz europeu sobre o assunto, serão formuladas a partir da análise da legislação pertinente, a fim de verificar se o respeito efetivo dos direitos fundamentais, bem como os direitos, liberdades e princípios reconhecidos pela Carta dos Direitos Fundamentais da União Europeia pode ser considerada garantida

**Palavras-Chave:** União Bancária Europeia, SRM, BRRD, SRB, NRAs, IRTs, MREL, IGA, BCE.

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## 1. INTRODUCTION

The allocation of competencies required by the Regulation Single Resolution Mechanism (SRM)<sup>1</sup> through the European Systemic Risk Board (SRB)

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<sup>1</sup> See ex multis, R. HOUBERN, W. VANDENBRUWAENE, **The Single Resolution Mechanism**, ed. Intersentia, Antwerp, Oxford, 2017. D. HOWARD, **The step road to European banking Union: Constructing the Single Resolution Mechanism**, in **Journal of Common Market Studies**, 52 (1), 2014, pp. 7ss. D. BUSCH, Governance of the European banking Union's Single Resolution Mechanism, in **European Business Law Review**, 28 (4), 2017, pp. 448ss. J. ALGIS, P. MINDAGUA, The Single Resolution Mechanism of the European banking Union: Its structure and functioning, in **International Business and Global Economy**, 33, 2014, pp. 78ss. R. CRANSTON, **Principles of banking law**, Oxford University Press, Oxford, 2018, pp. 174ss. J. AMOUR, D. AWREY, P. DAVIES, **Principles of financial regulation**, Oxford University Press, Oxford, 2016, pp. 545ss. J. DERMINE, **The single resolution mechanism in the European Union: Good intentions and unintended evil**, Monetary economics today. Festschrift in honour of Ernst Baltensperger, INSEAD working paper, 2016/69. K. ALEXANDER, European banking Union. A legal and institutional analysis of the single supervision mechanism and the single resolution mechanism, in **European Law Review**, 40 (2), 2015, pp. 155ss. E. FERRAN, V. BABIS, The European Single Supervisory Mechanism, in **University of Cambridge Legal Studies Research Paper Series**, 2013, n. 10. D. LIAKOPOULOS, The legal framework of the Single Supervisory Mechanism (SSM): Elements, legal acts, regulatory perimeter, supervised entities and financial supervision, in Juris Gradibus-working paper, 2017.

is invested with the power to take decisions against institutions or banking groups considered significant, towards bodies or groups directly supervised by the European Central Bank (ECB)<sup>2</sup>, and finally to cross-border groups. The National Resolution Authorities (NRAs), in particular in the context of the Internal Resolution Teams (IRTs), are called to assist the European agency in carrying out all the activities aimed at drafting resolution plans concerning the aforementioned categories of credit intermediaries and likewise, in carrying out the preliminary activities, whenever the legitimating conditions exist, to the adoption of the relevant resolution decisions. This role, which previously defined itself as "ancillary"<sup>3</sup>, has "evolved" into a leading role during the phase following the adoption and entry into force of the resolution program, since the NRAs are holders of the power-duty of direct implementation of the same and, as foreseen in more general terms by art. 29 of the regulation, for the adoption of all the measures necessary to implement the decisions of the SRB<sup>4</sup> of which they are addressed, exercising to this end all the powers attributed to them by the national legislation implementing the Bank Recovery and Resolution Directive (BRRD), Directive no. 2014/59/EC<sup>5</sup>, in compliance with the conditions established by

<sup>2</sup> J. CARMASSI and others, **Banking Union**: A federal model for the European Union with prompt corrective Action, in CEPS Policy Briefs, 282, 2012, pp. 2ss. I. LIAKOPOULOU, **Aspects of transparency and communication in the monetary policy context**, ed. Scriptaweb, Napoli, 2009. I. LIAKOPOULOU (a cura di) Politiche comunitarie e crisi finanziari, ed. Universitalia, Rome, 2012. I. LIAKOPOULOU, Aspetti comunicativi nel meccanismo decisionale del sistema centrale bancario europeo, in I. LIAKOPOULOU, (a cura di), **Le politiche comunitarie dell'Europa allargata**, ed. Libreria Universitaria, Padova, 2011, pp. 409ss.

<sup>3</sup> K. ALEXANDER, **European banking Union**. A legal and institutional analysis of the single supervision mechanism and the single resolution mechanism, op. cit.

<sup>4</sup> See, T-553/17 TW and others v. CRU of 17 May 2018, ECLI:EU:C:2018:300, not yet published; T-745/16, Hypo Voralberg Bank v. CRU of 6 February 2017, ECLI:EU:C:2017:62, not yet published.

<sup>5</sup> Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the

national law and under the strict supervision of the SRB, or in accordance with the instructions received from the latter.

The SRB holder of the task of monitoring in order to ensure the consistency and coherence of the actions undertaken within the borders of the Banking Union, against the subjects considered less significant are the national authorities to be the direct holders of the power-duty of adoption of decisions on every aspect of the resolution procedure in a broad sense, including the carrying out of the resolution planning activities and the assessment of the actual possibility of resolution; the adoption of the necessary decisions aimed at the application of early intervention measures; the adoption of decisions aimed at determining the Minimum Requirements for own funds and Eligible Liabilities (MREL) and, more generally, resolution programs.<sup>6</sup>

## 2. REFLECTIONS ON THE JUDICIAL REVIEW OF THE JURISDICTION OF THE COURT OF JUSTICE OF THE EUROPEAN UNION AND THE PROVISIONS OF THE REGULATION OF SINGLE RESOLUTION MECHANISM AND THE TREATIES.

The regulation concerning the possibility of judicial scrutiny by the European judge in the SRM sphere is foreseen by two specific provisions of the regulation, fully consistent with the principles established first in the jurisprudential way<sup>7</sup> and only later, directly incorporated in the text of the Treaties thanks to the changes introduced by the entry into force of the Lisbon Treaty.

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Council Text with EEA relevance, OJ L 173, 12.6.2014, p. 190-348, and Artt. 63-72 BRRD. For details see: M. HAENTJEWS, B. WESSELS, **Research handbook crisis management in the banking sector**, Edward Elgar Publishers, Cheltenham, 2015, pp. 484ss. D. OGNEJENOVIC, **Deposit insurance schemes. Funding, policy and operational challenges**, Palgrave Macmillan, Basingstone, 2017, pp. 302ss. M. HAENTJENS, D. DE GIOIA CARA BELLESE, **European banking and financial law statute**, ed. Routledge, London & New York, 2017. R. VEIL, **European capital markets law**, Hart Publishing, Oxford & Oregon, Portland, 2017, pp. 72ss.

<sup>6</sup> T.H. DIETZ, On the single supervisory mechanism, in **Journal of Risk Management in Financial Institutions**, 7 2014, pp. 222ss.

<sup>7</sup> CJEU, C-294/83, Parti écologiste “Les Verts” v. European Parliament of 23 April 1986, ECLI:EU:C:1986:166, 01339, parr. 24-25). T-411/06, Sogelma v. European Agency of



The Court of Justice of the European Union (CJEU) is expressly vested with the screening of legitimacy pursuant to art. 263 TFEU<sup>8</sup> concerning any decision made by the Commission for appeals, or any decision, which cannot be challenged before the aforementioned committee, adopted by the Board, on an appeal filed by Member States, institutions of the Union or any natural or legal person who may proving the existence of all the elements provided for by the same article 263 TFEU based on the legitimacy to act.<sup>9</sup> With regard to the specific procedure concerning the adoption and subsequent entry into force of the resolution program, since, in accordance with the provisions of art. 18 Reg. SRM<sup>10</sup>, in this context the final decision-making power seems to be allocated to the

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Reconstruction (AER) of 8 October 2008, ECLI:EU:T:2008:419, II-02791, made in conclusion of a proceeding concerning an application for annulment of the EAR decisions on public procurement. In particular, in paragraphs 36-37, the Judge, comparing the situation of the European bodies endowed with the power to adopt acts intended to produce legal effects vis-à-vis third parties to that which gave rise to the judgment in *Les Verts*. and sharing its reasoning, has enshrined the general principle under which any act adopted by a European body intended to produce legal effects vis-à-vis third parties must be subject to judicial review, finding it unacceptable, in a European law, that such acts sorts can escape judicial control. Principle also enshrined in relation to acts of the EFDO agency, as attributable to the decision-making power of the Commission and, therefore, subject to judicial review, in case: T-369/94, *DIR International Film and others v. European Commission* of 19 February 1998, ECLI:EU:C:1998:39, II-00357, par. 55.

<sup>8</sup> For details see: A. HARTKAMP, C. SIBURGH, W. DEVROE, **Cases, materials and text on European Union law and private law**, Hart Publishing, Oxford & Oregon, Portland, 2017, pp. 282ss. K. LENAERTS, I. MASELIS, K. GUTMAN, *European Union procedural law*, Oxford University Press, Oxford, 2014, pp. 133ss. M. WIERZBOWSKI, A. GUBRYNOWICZ, **International investment law for the 21st century**, Oxford University Press, Oxford, 2015. A.H. TÜRK, *Judicial review in European Union law*, Edward Elgar Publishers, Cheltenham, 2010. L. WOODS, P. WATSON, **Steiner & Woods European Union law**, Oxford University Press, Oxford, 2017, pp. 37ss. C. BARNARD, S. PEERS, **European Union law**, Oxford University Press, Oxford, 2017, pp. 788ss

<sup>9</sup> Art. 86, parr. 1 and 2, Reg. SRM, coherently with the provision referred to in art. 263, par. 1 and 5 TFEU which, in interpreting the jurisprudential evolution that has taken place by means of the pronouncement dated 8 October 2008, given by the then Court of First Instance in the case T-411/06, *Sogelma v. European Agency of Reconstruction*, op. cit., par. 36. For further details see: T.M.C. ARONS, *Judicial protection of supervised credit Institutions in the European Banking Union*, in D. BUSCH, G. FERRARINI (eds.), **European Banking Union**, Oxford University Press, Oxford, 2015, pp. 462 ss.

<sup>10</sup> See in particular the case: T-376/16, *Oberösterreichische Landesbank* of 2 March 2017, ECLI:EU:C:2017:141, not yet published.

European Commission (EC) and Council, it is believed that appeals against this type of decision will have to be directed not only towards the Board, but in *primis*, against the two aforementioned institutions. With the consequence that the appeals concerning resolution programs that came into force could be declared inadmissible, if they are directed only to the Board and not to the political institutions. Furthermore, in the event that the Committee has an obligation to intervene and fails to adopt a decision, it is possible to bring proceedings before the CJEU into a deficiency.<sup>11</sup>

Any dispute regarding non-contractual liability involving the Board<sup>12</sup>; is also left to the jurisdiction of the CJEU; any dispute regarding contractual liability, if such jurisdiction is provided for by specific compromise clauses in this regard, contained in the contracts stipulated by the Committee<sup>13</sup>; as well as, finally, any dispute concerning the liability of the officials of the agency towards the same.<sup>14</sup>

Although not provided directly by the regulation, but rather by the

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<sup>11</sup> See art. 87, par. 5, Pursuant to par. 3 of the same provision-requiring the exact words referred to in art. 340, par. 2 TFEU-if the non-contractual liability is established, the Committee, in accordance with the common general principles and national laws regarding non-contractual liability applicable to public authorities of the MS, is obliged to compensate for damages caused by the same personnel, in the exercise of their functions (in particular in the exercise of resolution functions). In addition, pursuant to the following par. 4, the Committee is obliged to compensate NRAs for damages resulting from an action/omission of the latter in the context of a resolution procedure against institutions subject to the direct responsibility of the Board, which the latter had to incur according to the provisions of any rulings given by national courts or following the closure of an amicable settlement procedure. The right of the NRAs of recourse against the Committee, however, does not exist if the damages they may have sustained were caused by actions or omissions they have undertaken, intentionally or by gross or manifest error, in violation of the regulation, of other provisions EU law, decisions by the Committee, the Council and the Commission. The next par. 5, finally, provides that the limitation period for actions concerning non-contractual liability is set at five years from the occurrence of the event giving rise to them.

<sup>12</sup> Art. 87, par. 2, in conjunction with art. 272 TFUE.

<sup>13</sup> Art. 87, par. 6, in conjunction with 270 TFUE.

<sup>14</sup> Art. 14 IGA. In particular see: par. 2, which brings this jurisdiction back to the Court pursuant to art. 273 TFUE.

Intergovernmental agreement<sup>15</sup> aimed in particular at regulating the transfer to the Small Resolution (SRF) of financial resources collected by Member States in the light of BRRD<sup>16</sup>, the CJEU by virtue of the compromise signed by the contracting countries, it is also expressly vested with the competence to know all the disputes arising from the interpretation of the rules of the agreement or the failure by one of the contracting parties to respect the obligations arising from it.

The union experienced by the CJEU in the SRM sphere is not limited to what is expressly provided for by the detailed regulations referred to in the regulation, since the latter must be respectful and compliant with the provisions of the Treaties. What to say that, in addition to the competences ex artt. 263 and 265 TFEU<sup>17</sup>, the European courts will also be competent to give preliminary rulings on the validity and interpretation of the decisions of the SRB alone, as well as those which require the Council and ECouncil to enter into force. Finally, although the CJEU is expressly competent to know, in accordance with art. 277 TFEU<sup>18</sup>, of the inapplicability exceptions made in the course of proceedings

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<sup>15</sup> F. FABBRINI, The euro-crisis and the Courts: Judicial review and the political process in comparative perspective, **Berkeley Journal of International Law**, 32 (1), 2014. M. ADAMS, F. FABBRINI, P. LAROCHE, **The constitutionalization of European budgetary constraints**, Hart Publishing, Oxford & Oregon, Portland, 2014) 399. S. SCHMIDT, A sense of Déjà Vu? The FCC's preliminary European stability mechanism verdict', in **German Law Journal**, 14 (1), 2013, pp. 10ss. K. SUM, **Post-crisis banking regulation in the European Union opportunities and threats**, Palgrave Macmillan, Basingstone, 2016.

<sup>16</sup> See: T-298/18, Banco Comercial Português and others v. European Commission of 29 June 2018, non available informations.

<sup>17</sup> For analysis see: E. BERRY, M.Y. HOMEWOOD, B. BOGUSZ, **Complete European Union law. Texts, cases and materials**, Oxford University Press, Oxford, 2013. G. CONWAY, **European Union law**, ed. Routledge, London & New York, 2015. F. NICOLA, B. DAVIES, **European Union law stories**, Cambridge University Press, Cambridge, 2017. J. USHERWOOD, S. PINDER, **The European Union. A very short introduction**, Oxford University Press, Oxford, 2018. J.L. DA CRUZ VILAÇA, **European Union law and integration. Twenty years of judicial application of European Union law**, Hart Publishing, Oxford & Oregon, Portland, 2014. T.H. FOLSOM, **Principles of European Union law, including Brexit**, West Academic, Minesotta, 2017, pp. 278ss.

<sup>18</sup> See, R. GEIGER, D.E. KHAN, M. KOTZUR, **EUV/AEUV**, C.H. Beck, München, 2016. M. DECHEVA, **Recht der europäischen Union**, ed. Nomos, Baden-Baden, 2018. C. BARNARD, S. PEERS, **European Union law**, Oxford University Press, Oxford, 2017, pp. 586ss. N. FOSTER,

against acts of general scope adopted not only by the Institutions, but also by EU bodies and bodies, it is considered that this competence, in the SRM framework, should not, at least theoretically, be never applied to the concrete case, since the SRB is not invested with the power to adopt deeds falling within this category. In fact, it is not believed that the guidelines and general instructions that the SRB is entitled to issue pursuant to art. 5 and 6 of the Cooperation Framework<sup>19</sup> can be traced back to this category if necessary, a compliance mechanism could be envisaged based on the same comply or explain mechanism also envisaged in relation to the guidelines and guidelines of the European Banking Authority (EBA), but they must be taken into consideration, if relevant, by the competent institutions at the time of the adoption of binding acts.

As envisaged towards all the bodies and organisms belonging to the European Institutional architecture and invested with administrative tasks, the SRB, in carrying out its work, must and will necessarily act in compliance with the principle of good administration art. 298, par. 1 TFUE<sup>20</sup> and to art. 41 of the Charter of the Fundamental Rights of the European Union<sup>21</sup>.

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European Union law directions, Oxford University Press, Oxford, 2016. A. THIES, **International trade disputes and European Union liability**, Cambridge University press, Cambridge, 2013. D.A.O. EDWARD, R. LANE, **Edward and Lane on European Union law**, Edward Elgar Publishers, Cheltenham, 2013. C. NOWAK, *Europarecht nach Lissabon*, ed. Nomos, Baden-Baden, 2011. D. CHALMERS, G. DAVIES, G. MONTI, **European Union law**, Cambridge University Press, Cambridge, 2014. J. TILLOTSON, N. FOSTER, **Text, cases and materials on European Union law**, Gavedish Publishing, New York, 2013.

<sup>19</sup>Adopted from the Decision of the Plenary Session of the Board of 28 June 2016 establishing the framework for practical arrangements for the cooperation within the Single Resolution Mechanism between the Single Resolution Board and national resolution authorities (SRB/PS/2016/07)

<sup>20</sup>M. HORSPOOL, M. HUMPHREYS, **European Union law**, Oxford University Press, Oxford, 2012, pp. 552ss. T. OPPERMANN, C.D. CLASSEN, M. NETTESHEIM, *Europarecht*, C.H. Beck, München, 2016. R. SCHÜTZE, T. TRIDIMAS, **Oxford principles of European Union Law**, Oxford University Press, Oxford, 2018. C. BARNARD, S. PEERS, **European Union law**, Oxford University Press, Oxford, 2017, pp. 788ss.

<sup>21</sup>In our case, according to our opinion, impartiality in the proceeding with a view to issuing the final act that is prejudicial or not to the party is a fundamental duty of the previous authority, which is not surprisingly that the EU legislation emphasizes and promotes well beyond narrow



In each of the aforementioned hypotheses, as is logical, the Committee will be required to take the necessary measures in order to comply with the ruling that should be given by the European judge. On the other hand, as regards the active legitimacy of the SRB, we limit ourselves to observing that, despite the evolution in the area of judicial protection with the entry into force of the amendments made to the legislation under the Lisbon Treaty, the SRB equal to the other European agencies<sup>22</sup> and of any natural and legal person, remains, pursuant to art. 263 TFEU<sup>23</sup>, which can be counted in the category of non-privileged applicants, having therefore to show that it has a qualified interest in the annulment of the contested act, which must prove to have been adopted to it and deal with it directly and individually. Also, like the other European agencies<sup>24</sup>, according to the provisions of the CJEU Statute, the SRB may intervene in the pending judgments, adhering to the conclusions of one of the parties, whenever it proves to have an interest in resolving the dispute, as well as proposing opposition thirdly against a sentence which he considers to be prejudicial to his rights, pronounced without having been called into question<sup>25</sup>.

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scope of the traditional excess of power. The violation of that principle and especially of its lengthy duration also entailed an infringement of the rights of the defense by affecting the validity of the procedure and can only be regarded as a ground of injury capable of being relied on before the Union judicature. For details see also: X. GROUSSOT, G.T. PETURSSON, *The EU Charter of the Fundamental Rights five years on. The emergence of a new constitutional framework?*, in S. DE VRIES, U. BERNITS, S. WEATHERILL, **The EU Charter of Fundamental Rights as a binding instrument**. Five years old and growing, Oxford University Press, Oxford, 2015.

<sup>22</sup> M. CHAMON, *European Union agencies. Legal and political limits to the transformation of the European Union administration*, Oxford University Press, Oxford, 2016.

<sup>23</sup> M. CHAMON, *EU Agencies. Legal and political limits to agentification*, Oxford University Press, Oxford, 2016.

<sup>24</sup> V. BABIS, *The power to ban short-selling and financial stability: The beginning of a new era for EU agencies?*, in **Cambridge Law Journal**, 73 (2), 2014, pp. 268ss.

<sup>25</sup> See the Regulation no. 207/09, or the regulation on the Community trade mark, which establishes the Office for the harmonization at the level of the internal market of the subject trade marks and designs (OHIM); the Regulation 2100/94, or the regulation on the Community plant variety right, which establishes the Community Plant Variety Office; the regulation n. 216/2008 laying down common rules in the field of civil aviation, which establishes the European Aviation

### 3. THE NATURE OF THE APPEAL PANEL AND RELATIONS WITH THE EXPONENTIAL PROTECTION BEFORE THE COURT OF JUSTICE OF THE EUROPEAN UNION

In the European Union, common to many agencies is the presence of internal bodies-often identified with the name "commissions for appeals/review"-in charge of the administrative review of the decisions and of the acts adopted by the same having effects in the comparisons with third parties<sup>26</sup>. Although the nature of these internal organs can not be traced back to unitary paradigm, it is nevertheless possible to highlight common traits. In particular: they all derive legal legitimacy from the letter of art. 263, par. 5 TFUE<sup>27</sup>; they are composed of personalities with a high level of experience in the field of operation of the agency itself and capable of guaranteeing an adequate level of independence and impartiality with respect to the work of the agency to which they refer; the area of competence is identified by the secondary law deed establishing the specific agency; the exhaustion of the remedy of the internal appeal before them is a condition of admissibility of the appeal which, after the termination of the proceeding, should be presented to the CJEU<sup>28</sup>; they are not of a jurisdictional nature, since they can not be qualified as "judges", which is why almost all the

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Safety Agency; the regulation n. 1907/2006 on the registration, evaluation, authorization and restriction of chemical substances and establishing the European Chemicals Agency.

<sup>26</sup> The presence of internal commissions responsible for reviewing the decisions taken by the decision-making bodies of the agency to which they belong is not the only path adopted by the European legislator. Among the administrative protection instruments to which the European legislator has resorted over the years, in fact, the c.d. internal audit systems (which consist in the possibility of bringing an appeal against the same office that adopted the contested decision), as well as the instrument of the appeal to the European Commission (to which, in some specific cases, the task of knowing the discussion is devolved proceedings against administrative decisions taken by certain agencies).

<sup>27</sup> A. HARTKAMP, C. SIBURGH, W. DEVROE, **Cases, materials and text on European Union law and private law**, op. cit., K. LENAERTS, I. MASELIS, K. GUTMAN, **European Union procedural law**, op. cit.,

<sup>28</sup> See in this spirit the next cases: T-163/98, Procter & Gamble v. European Union Intellectual Property Office of 8 June 1999, ECLI:EU:T:1999:145, II- in particular point 38, subsequently confirmed by the pronouncement given by the same jurisdictional body in case: T-252/04, Caviar Anzali SAS v. Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) of 11 July 2006, ECLI:EU:T:2006:199, II-02115, par. 29.

doctrine considers internal commissions to be "quasi-jurisdictional bodies"<sup>29</sup>; the decisions taken by these committees are binding on both parties involved in the review process; in cases where the appeal is not expressly recognized as having a suspensive effect on the contested decision, the internal commission is vested with the power to suspend the last act if, according to the circumstances of the case, it is deemed necessary. Ultimately, given these common elements, the reflections of those who say that the internal commissions are invested, together with the provisions in favor of certain organs and commissions characterizing the US administrative architecture, of adjudication powers<sup>30</sup>, ie of protection, are considered to be shared of the legal positions of the subjects concerned by

<sup>29</sup> A. HARTKAMP, C. SIBURGH, W. DEVROE, **Cases, materials and text on European Union law and private law**, op. cit., K. LENAERTS, I. MASELIS, K. GUTMAN, **European Union procedural law**, op. cit.,

<sup>30</sup> The current approach of delegating more and more public authority (in quantitative and qualitative terms) to agencies without justifying these decisions and without establishing a proper accountability framework to withstand judicial scrutiny will negatively affect the EU's ability to gain democratic legitimacy because the current approach is haphazard with respect to the necessity of agencification and its limits. Acceptance of governing authority rests, however, on understanding of the authority's actions. In this spirit see the next cases: 10/56, *Meroni & Co* of 13 June 1958, ECLI:EU:C:1958:8, ECR, 00157; 98/80, *Romano v. Institut National d'Assurance Maladies* of 14 May 1981, ECLI:EU:C:1981:104, ECR, 01241; C-270/12, *United Kingdom v. European Parliament & Council (short Selling case)* of 22 January 2013, ECLI:EU:C:2014:18, published in the electronic Reports of the cases. In speciem, the Meroni doctrine does not permit the conferral to bodies not provided for in the Treaties of tasks that imply the exercise of broad discretionary powers. Therefore, the European Legislator attributed to them the task of contributing to the unification of the regulation and to favoring the coordination of the practices followed by the national Authorities, which, on the other hand, remained fully entrusted with the exercise of direct supervision over intermediaries. For details see: M. CHAMON, The empowerment of Agencies under the Meroni doctrine and Art. 114 TFEU: Comment on *United Kingdom v. Parliament and Council (Short-selling)* and the proposed Single Resolution Mechanism, in **European Law Review**, 39, 2014, pp. 380ss. P. VAN CLEYNENBREUGEL, Meroni circumvented? Art. 114 TFEU and EU Regulatory Agencies, in **Maastricht Journal of European & Comparative Law**, 21, 2014, pp. 64ss. M. SCHOLTEN, M. VAN RIJSBERGEN, The ESMA-short selling Case: Erecting a new delegation doctrine in the EU upon the Meroni-Romano remnants, in **Legal Issues of Economic Integration**, 41, 2014, pp. 389ss. P. VANCLEYNENBREUGEL, **Market supervision in the European Union: Integrated administration in constitutional context**, Brill/Nijhoff Publishers, Leiden, Boston, 2014. O.K. HOPE, Third-party consequences of short-selling threats: The case of auditor behaviour, in **Journal of Accounting and Economic**, 63 (2-3), 2017, pp. 482ss. M. SCHOLTEN, Legal issues of economic integration, in **Legal Issues of Economic Integration**, 41, 2014, pp. 392ss.

administrative decisions, being invested with the power to carry out a "re-evaluation of the legal and substantial effectiveness and acceptability of the original decision by a body that is not part of the structure of the primary decision maker (...)"<sup>31</sup>.

Given these characteristics, we can say that these bodies put themselves in a position of "functional continuity"<sup>32</sup> with the agency of which they can review the decisions, although their work must necessarily be characterized by a level of independence, in order to exercise a penetrating control, extended to the discretionary and technical elements taken into consideration by the basic administrative body, that is not bound, such as to ensure a more or less intense importance to the protection of private individuals, even though they can not be considered proper jurisdictional bodies but compared to these places in a complementary position. Moreover, EU jurisprudence has also identified important consequences arising from the principle of "functional continuity" in terms of assessment of evidence and guarantees for individuals, such as the duty, in general, for the Boards of Appeal, to base their decision on all the factual and legal elements introduced by the interested party, which is all the more important given that there are no procedural preclusions such as to prevent the parties from presenting to the commissions responsible for the administrative screening new

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<sup>31</sup> The principle of "functional continuity" was accepted by the then Court of First Instance, again with reference to the work of the Office for the harmonization of the internal market, with the judgment of case: T-63/01, *The Procter & Gamble Company v. Office for Harmonization in the Internal Market*, op. cit., par. 21, where the Court, recalling its previous ruling made between the same parties considers that there is "a functional continuity between the different instances of the OHIM and that the Boards of Appeal have in particular the same powers as the examiner to decide on an appeal. Thus, the Boards of Appeal, benefiting from a large degree of independence in the exercise of their functions, constitute an instance of OHIM charged with monitoring, under the conditions and within the limits established by Regulation No. 40/94, the activity of the other instances of the administration to which they belong.

<sup>32</sup> M. HARRIS, *The place of formal and informal review*, in M. HARRIS, M. PARRINGTON (eds.), **Administrative justice in the 21st century**, Oxford University Press, Oxford, 1999, pp. 43ss.



elements of fact and law, not taken into consideration by the administrative body during the "creation" process of the contested decision.

The SRB, like other European agencies, also has an Appeals Committee (also called "appeal panel" or "Panel") competent to hear complaints submitted by natural and legal persons that are directly and individually concerned by decisions adopted by the Board, in executive or plenary composition depending on the competence, concerning the following areas: a) the existence of impediments to the resolution and the consequent need for the entity/entities concerned to adopt alternative measures suitable for the removal of obstacles to resolution; b) the granting of exemptions or the application of simplified requirements for the preparation and drafting of resolution plans; c) the determination of the MREL requirement; d) the imposition of pecuniary sanctions and/or penalty payments; e) the determination of the contributions that each body/group is required to pay in order to support the administrative expenses of the Board; f) the determination of extraordinary ex post contributions to the SRF, where necessary; g) the granting, or the denial, of access to the public to the internal documents of the Board, in compliance with the provisions of Regulation 1049/2001<sup>33</sup>.

The appeal before the Commission of appeals is a condition of eligibility

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<sup>33</sup> Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145, 31.5.2001, p. 43-48. Report from the Commission on the application in 2016 of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents (COM(2017) 738 final, 6.12.2017). From the CJEU in argument see: C-39/05 P and C-52/05 P, Sweden and Turco v. Council of 1st July 2008, ECLI:EU:C:2008:374, I-04723, par. 34; T-188/12, Breyer v. European Commission of 27 February 2015, ECLI:EU:C:2015:124, published in the electronic Reports of the cases, par. 38; T-529/09, Sophie in't Veld/Council of 4 May 2012, ECLI:EU:T:2012:215, published in the electronic Reports of the cases, par. 20; C-365/12 P, European Commission v. EnBW Energie Baden-Württemberg of 27 February 2014, ECLI:EU:C:2014:112, published in the electronic Reports of the cases, parr. 64ss. V. ABAZI, E. TAUSCHINSKY, Reasons of control and trust: Grounding the public need for transparency in the European Union, in **Utrecht Law Review**, 11 (2), 2015, pp. 78-90.

for proposing an action before the CJEU<sup>34</sup>. On the contrary, as foreseen by art. 86 of the Regulation, outside of such an exhaustive area of competence, the interested parties will have to refer directly to the European judge, having to consider inadmissible any appeal that could possibly be submitted to the Appeal Panel<sup>35</sup> in order to guarantee effective autonomy in decision-making, in addition to the impossibility for the technical staff of the Board and the NRAs to participate in the selection and appointment procedures of the members of the Commission<sup>36</sup>, the latter is obliged to act independently and in the public interest, as well as the issue of a public declaration of commitments and interests. It derives from such an internal composition, fully compliant with the provisions also for internal commissions established at other agencies, as the legislator wished to ensure the performance of the functions by an organ with the necessary technical-specialist expertise-given the high complexity of the procedures followed by the SRB in the phases of work prior to the adoption of the decision by the organs of the summit, even though the involvement of the same SRB in executive composition in the nomination procedure of the members totally

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<sup>34</sup> CJEU, C-29/05 P, *Office for Harmonization in the Internal Market v. Kaul GmbH* of 13 March 2007, ECLI:EU:C: 2007:162, I-02213, par. 41-48.

<sup>35</sup> Interestingly, to date, of the 34 appeals of which, in the first two years of activity, the Appeal Panel was invested, only one was declared admissible and, therefore, concluded with a ruling on the merit of the matter. In particular, during 2016, the Panel declared that almost all the appeals received were inadmissible (cases numbered 2 to No. 14/16) since they involved the same number of decisions by the Board of Directors, pursuant to art. 70 reg. SRM, the amount of the ex-ante contributions to the SRF which, pursuant to the list referred to in art. 85, par. 3 reg. SRM does not fall within the competence of the internal commission. In 2017, however, the Panel declared inadmissible all the appeals (cases from 1/17 to 34/17) presented by shareholders of Banco Popular against the resolution program adopted and entered into force against this issue. lastly, in that, also in this case, decision concerning the matter (the resolution of an intermediary) not included in the mandatory list pursuant to art. 85, par. 3 of Regulation.

<sup>36</sup> Art. 85, par. 5. In particular, the art. 3 The Board of Appeals, further specifying this provision, provides that, upon receipt of an appeal, the members, on their own initiative, or at the request of the chairman or the parties request, may refuse to be part of the judging committee or be rejected, whenever, in light of the circumstances of the case subject to the review of the body, there are objective and reasonable doubts about the ability of the aforementioned members to guarantee an adequate level of impartiality and independence.

independent of the agency itself is not envisaged. It seems possible to find that principle of "functional continuity" that European jurisprudence has defined as an informative element of the relations between the commissions responsible for the internal review and the related reference agencies, as well as an obstacle to the possibility of attributing them to the same jurisdictional nature.

On the other hand, the proceedings before the Appeal Panel of the SRB, once received, by the legitimized subjects, the appeal panel-which does not normally suspend the effects and the execution of the contested decision-, has one month to decide on it, with a majority of at least three of the five members. Having preliminarily assessed the admissibility of the applications formulated<sup>37</sup>, the Panel will proceed to examine the merits, in order to examine their validity, inviting the parties also to submit further comments, written or oral, about their conclusions or the communications made from the other parties involved. In other words, given the silence of art. 85 of the regulation on the matter and the impossibility of deriving unequivocal conclusions from the reading of the law, we are led to believe that the scrutiny of which the aforesaid commission is invested is a screening of legitimacy in an "atecnical" sense. This means that the aforementioned commission seems to be invested with the power to assess the goodness of the decisions taken by the decision-making bodies of the SRB not only limited to aspects concerning the legitimacy of the same, but on the contrary,

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<sup>37</sup> In the 2013-014 case, the Global Private Rating Company "Standard Rating" Ltd v. ESMA, the Joint Board, before analyzing the merits of the issues underlying the case in question, the Board has in fact clarified that it would have carried out a full check on the actual substantial and procedural compliance of the EU provisions on rating by ESMA, relevant to the case in question. In the subsequent case 2014-C1-02, SV Capital OU v. EBA, on the other hand, considered that the Joint Board was unable to review the discretion of the EBA to decide on the initiation of an investigative procedure pursuant to Article 17 of the EBA Regulation, in view of the fact that the question did not appear to have been raised during the procedure. According to the doctrine, "this ruling would suggest that, in the future, the body could unify the decision-making discretion of the three ESAs by verifying the exercise according to limits and parameters to be defined.

also in terms of merit and technical aspects taken basis of their adoption, although it is not clear to what extent any discretionary choices made by the SRB can be assessed by the Panel. In an attempt to answer this last question, the comparison that could be drawn with the "closest relative" of the Panel, or the Joint Board of Appeal established within the three European Supervisory Authorities (European Banking Authority, European Security and Marketing Authorities and the European Insurance and Employment Pensions Authority)<sup>38</sup>, -the latter having been pronounced in a contrasting manner on this point-does not seem conclusive.

Unlike what is foreseen for internal commissions established at other European agencies, but similarly to the provisions of the Joint Board of Appeal, the appeals commission has the possibility of issuing a confirmatory ruling of the act of the SRB, that is, if not, refer back to the latter to arrange for changes to the decision being appealed. Otherwise, according to the dictate of the law, the ruling with which the Panel closes the proceedings before itself, will never intervene to

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<sup>38</sup> Respectively established through the adoption of the regulations already cited in nt. 52, or the EU regulations of the European Parliament and of the Council of 24 November 2010: n. 1093/2010 which establishes the European Banking Authority (EBA); n. 1094/2010 establishing the European Insurance and Occupational Pensions Authority (EIOPA); n. 1095/2010 establishing the European Securities and Market Authority (ESMA). As emphasized by the doctrine, however, "(...) the regulations of the 2010 did not intervene on the national allocation of the supervisory, information and inspection, and have invested the regulatory profile by formally giving the new authorities (the European Banking Authority and its sector counterparts: ESMA and EIOPA), established on the ashes of the old third-level committees of the Lamfalussy procedure, an important function of collaboration with the European Commission in the preparation of the legal rules of non-legislative status (meaning, according to the systematic sources of the TFEU) intended to complete-depending on the case, through delegated acts or implementing acts pursuant to art. 290 and 291 TFEU- the framework regulatory framework designed, in its founding elements, by the legislative provisions of the Council and of the European Parliament (...)". For details see, A. GEORGOSOULI, Regulatory incentive realignment and the EU legal framework of bank resolution, in **Brooklyn Journal of Corporate, Financial & Commercial Law**, 10 (2), 2016. E.WYMEERSCH, The european financial supervisory authorities or ESAs, in E. WYMEERSCH, J.K. HOPT, G. FERRARINI, **Financial regulation and supervision. A post-crisis analysis**, Oxford University Press, Oxford, 2012. P. IGLESIAS-RODRÍGUEZ, Supervisory cooperation in the single market for financial services: United in diversity?, in **Fordham International Law Journal**, 41, 2018, pp. 590ss.



replace an agency decision considered illegitimate or incorrect<sup>39</sup>. This circumstance, together with the fact that the internal commission does not seem to have the power to exercise on its own initiative investigative powers of investigation or collection of evidence other than those inferred by the parties, has founded the conviction of the doctrine for which it can be considered, on the one hand, the relationship of functional continuity between the agency and the internal commission is weaker, and on the other hand, the Panel's level of independence with respect to the agency's work is more incisive, thus counterbalancing the fact that the members of the commission they are appointed directly by the Board in executive composition, as well as greater guarantees of effective protection, or a full contradictory, in favor of the recurring parties.

Although it is not possible to consider the internal committees of the courts and, consequently, the parties before them, do not appear legally legitimate to invoke the right to a fair trial, this last circumstance does not seem to apply to the Panel of the SRB. In this sense, they lay down some provisions of the internal procedural regulation of which the Panel itself has, under which, as happens for the actual proceedings in court: the language of the appeal is the same as the contested decision, that is, subject to exceptions, the mother tongue

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<sup>39</sup> Article 5, par. 2 RI Appeals Committee. With the clarification, referred to in the same paragraph, that if the contested decision has been issued in several languages, including the English language, this must be the language used to draft the appeal, unless the parties agree for a language different. In this regard, one of the first pronouncements made by the Appeal Panel (case number 1/16) is interesting, in a case characterized not by the presence of a multilingual version of the same decision, but by an appeal concerning three different decisions of the Board, two of which drafted and notified to recipients in English and the remainder in German. Noting that this specific hypothesis does not appear to be regulated by art. 5, par. 2 RI Appeals Committee, the Panel, in light of the express recall made by art. 81 reg. SRM, considered the principle enshrined in art. 2 of the Council Regulation n. 1/1958 establishes the linguistic regime of the EU, in the light of which, in similar hypotheses, the choice of the language of editorial departments is referred to the recurring party. Since the applicant in the internal review procedure had opted for the German language, the Panel confirmed this choice.

of the addressee of the same; the parties are entitled to request, as a precautionary measure, suspension of the effects of the contested deed (given, as mentioned above, the rule that the lodging of the appeal does not have suspensive effect); the Chairman of the Panel is entitled to extend the procedural deadlines, possibly in favor of the parties, if necessary; each party is entitled to request the other to produce further documents, to produce expert reports, the right to be heard, or to formulate oral observations-possibly represented by a lawyer-as well as the faculty, subject to authorization by the commission, to produce testimonies to supplement the written documentation produced.<sup>40</sup>

#### 4. (FOLLOWS) THE RELATIONS WITH THE JUDICIAL REVIEW REFERRED TO THE COMPETENCE OF THE EUROPEAN JUDGE

The scope of competence of the Appeal Panel is delimited by the SRM regulation through an exhaustive list of subjects. There are, however, no gaps in protection, since, on a residual basis, by express provision of the regulation itself, the recipients of decisions taken by the Board outside these specific areas, if they consider their interests, are private interests that is to say publicity, injured by the content of such acts, can obtain protection directly in General Court before the CJEU or, in the first instance, before the Court and, only in an appeal, before the CJEU, *stricto sensu*. The guarantee of the double degree of judgment before the European judge against decisions subject to the adoption by the SRB alone, derives from the division of competences subsisting among the European courts, in the light of which, regardless of the nature of the recurring subjects, the competence in first the Court's petition is related to the nature of the Board's actions that could be appealed. More clearly said, the SRB decisions are not

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<sup>40</sup> Art. 86 Reg. SRM. As well as, as a result of the reform of the Treaties introduced by the Lisbon Treaty.

included in any of the hypotheses set forth in art. 51 of the Statute of the CJEU<sup>41</sup>, in the overwhelming majority of cases it does not seem possible, even if the appeal were to be presented by a privileged appellant, to have jurisdiction in the first and only instance of the latter. However, an important exception to the proposed rule could occur in the cases in which the application is a resolution program or the failure to adopt it. In this case, in fact, the decision-making competence is attributed to the Council and the EC, therefore the hypothesis of a jurisdiction in first and only instance of the CJEU could arise, if ex art. 263 and 265 TFEU<sup>42</sup> if the appeal is presented by an Institution or a Member State.

We limit ourselves to observing that, if we support the thesis for which it is not possible to avoid, where practicable, the screening assigned to the Appeal Panel competence after direct recourse to the jurisdiction, from the aforementioned systematic classification, it seems to have to follow the rule: on the one hand, the decisions of the Board falling within the remit of the Appeal Panel, once the proceedings have been concluded before the latter, may be challenged by private parties before the Court, whose decision will be subject to a second degree of judgment before the CJEU. In this hypothesis, therefore, given the impossibility of defining precisely the breadth of the screen submitted to the Panel, the legitimacy and merit of the contested decision could be examined in three different places, having a "triple degree of judgment"<sup>43</sup>; on the other hand, the recipients of decisions taken by the agency outside the strict areas of competence of the Panel could be the object of the "only" double degree of judgment guaranteed by the courts. In both cases, obviously, the pronouncement

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<sup>41</sup> For details see: P. CRAIG, G. DE BÚRCA, **European Union law. Text, cases and materials**, Oxford University Press, Oxford, 2011.

<sup>42</sup> A. MANGAS MARTÍN, **Tratado de la Unión Europea, Tratado de Funcionamiento**, ed. Marcial Pons, Madrid, 2018.

<sup>43</sup> P. CRAIG, G. DE BÚRCA, **European Union law. Text, cases and materials**, op. cit.

rendered by the CJEU will assume binding value for Board<sup>44</sup>.

The choice made by the legislator to provide for the Board's establishment of the Panel is fully shared here. The reason for this conclusion is essentially one: the SRB, like other agencies for which the establishment of internal review fora has been envisaged, is an agency called to operate, and therefore to take decisions, within a framework, that of the resolution of credit institutions, characterized by a high degree of complexity and technical and specialist knowledge. To foresee that, although in certain areas, the work of the same can be submitted to the scrutiny of a college of personalities having a certain amount of experience and knowledge in this field, guarantees, on the one hand, a review on the merits of these technical decisions, faster and, perhaps, even "better" than it could be asserted in court, since the courts of Luxembourg are not held, given the broader role played, to be bearers of such technical background; on the other hand, a "filter" is ensured, suitable, at least within the limits of the competences attributed to the Panel, to reduce precisely the volume of technical causes of which the same CJEU could be invested in a short time, with a consequent reduction of the workload of the latter. Unfortunately, this is not always true, since this reflection is to be denied with reference to those cases not covered by the limited scope of competences attributed to the SRB Panel, such as the subject of contributions to the SRF and the real matter of resolution (to say, the adoption of resolution plans)<sup>45</sup>. In fact, to date, the CJEU has been invested with over a

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<sup>44</sup> Moreover, as regards the extent of the screening of the decisions of the commissions for appeals submitted to the European Judge, the Court, although referring to the Appeals Committee established within the OHIM, has established the principle that the facts not deducted from the parties before the internal appeal bodies, I can not then be raised in the appeal brought before the European Court (Court of First Instance, judgment of the case. C-24/05 P, office for Harmonization of the Internal Market v. Kaul GmbH, op. cit., par. 54.

<sup>45</sup> R. CRANSTON, **Principles of banking law**, Oxford University Press, Oxford, 2018, pp. 174ss. J. AMOUR, D. AWREY, P. DAVIES, **Principles of financial regulation**, Oxford University Press, Oxford, 2016, pp. 545ss. J. DERMINE, The single resolution mechanism in the European



hundred appeals for annulment, of which at least a fortnight proposed against the decisions taken by the Board determining the contributions to the SRF<sup>46</sup> requested by certain credit institutions.

The Treaty establishing also, the SRF contains a similarly worded provision in article 2(2)<sup>47</sup>. In like manner, even though there is no explicit primacy clause in the European Single Mechanism (ESM), article 13(3) ESM provides for mechanisms to ensure the compliance of the operation of the mechanism with EU law<sup>48</sup>. In particular the CJEU, however, disregarding that the ESMT is a mechanism with its own legal personality, cursorily overcame the issue by stating that "since the membership of the ESM consists solely of Member States, a dispute to which the ESM is party may be considered to be a dispute between Member States within the meaning of article 273 TFEU"<sup>49</sup>. The CJEU seemingly has changed its mind as to the purposive nature of the strict conditionality requirement. The purpose of strict conditionality, "to which all stability support provided by the European Single Mechanism Treaty is subject"<sup>50</sup>, as the CJEU recognizes, "is to ensure that the ESMT and the recipient Member States comply with measures adopted

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Union: Good intentions and unintended evil, Monetary economics today. Festschrift in honour of Ernst Baltensperger, INSEAD working paper, 2016/69.

<sup>46</sup> C.V. GORTSOS, The Single Resolution Mechanism (SRM) an the Single Resolution Fund (SRF): A comprehensive review of the second main pillar of the European Banking Union, ECEFIL-working paper, 2016

<sup>47</sup> J. DERMINE, The single resolution mechanism in the European Union: Good intentions and unintended evil, Monetary economics today. Festschrift in honour of Ernst Baltensperger, INSEAD working paper, 2016/69.

<sup>48</sup> B. DE WITTE, Using international law in the euro crisis: Causes and consequences, in ARENA Working Paper, 4/2013 Oslo: ARENA Centre for European Studies. F. FABBRINI, On banks, courts and international law: The intergovernmental agreement on the single resolution fund in context, in **Maastricht Journal of European and Comparative Law**, 21, 2014. D. HOWART, L. QUAGLIA, The steep road to European banking Union: Constructing the single resolution mechanism, in **Journal of Common Market Studies**, 52 (4), 2014. K. ALEXANDER, European banking Union. A legal and institutional analysis of the single supervision mechanism and the single resolution mechanism, in **European Law Review**, 40 (2), 2015, pp. 155ss.

<sup>49</sup> F. MARTUCCI, La Cour de justice face à la politique économique et monétaire: du droit avant toute chose, du droit pour seule chose. Commentaire de l'arrêt C.J.U.E., 27 novembre 2012, Pringle, in **Revue Trimestrielle de Droit Européenne**, avril-juin 2013, pp. 255-256.

<sup>50</sup> J. TOMKIN, Contradiction, circumvention and conceptual gymnastics: The impact of the adoption of the ESM Treaty on the state of European democracy, in **German Law Journal**, 14, 2013, pp. 188ss.

by the Union in particular in the area of the coordination of Member States' economic policies (...)”<sup>51</sup>. Bearing in mind the gravitas of the argument which was derived earlier through teleological interpretation of the Treaties, at this juncture the Court's line of reasoning appears to become ambivalent regarding the function of strict conditionality<sup>52</sup>. The CJEU now views the principle of strict conditionality as consistent with the general system of economic coordination within the European Monetary Union<sup>53</sup>.

With regard to the agreement on the SRF, the legal reasons given to support this choice appear to be very doubtful<sup>54</sup>. The use of an intergovernmental agreement was justified by the argument that the Union would not be competent to levy financial resources from the banks<sup>55</sup>. However, this premise does not appear to be correct: not only can a regulation directly impose obligations on private entities, but it may also impose a tax levy whose revenue is destined to flow into the Union's resources, according to a scheme moreover, for some time now consolidated and applied, in particular, to customs duties levied on entry of goods at the external border of the Union and VAT-based own resources<sup>56</sup>. The SRF, the vital component of the Single Resolution Mechanism as devised by the EU Regulation No. 806/2014<sup>57</sup>, was adopted as an international

<sup>51</sup> L. AZOULAI, The many visions of Europe. Insights from the reasoning of the European Court of Justice in external relations law, in M. CREMONA (ed), **The European Court of Justice and external relations: Constitutional challenges**, Hart Publishing, Oxford & Oregon, Portland, 2014.

<sup>52</sup> In particular see: S. PARK, J. SUNG KWAK, Under standing results-based conditionality in development cooperation. A comparative case analysis, in **Journal of International and Area Studies**, 24 (1), 2017, pp. 128ss.

<sup>53</sup> J.V. LOUIS, The EMU and the EU. Time for reform, in **Revista de Derecho Comunitario Europeo**, 59, 2018, pp. 14ss.

<sup>54</sup> See in particular the analysis of: S. VERHELST, Assessing the single supervisory mechanism. Passing the point of no return for Europe's banking Union, Egmont paper n. 58, The Royal Institute for International Relations, Bruxelles, June 2013.

<sup>55</sup> W. SCHÄUBLE, Strategy for European recovery, keynote speech at the fifth Bruges European Business Conference, 27 March 2014, 5.

<sup>56</sup> V. F. FABBRINI, On banks, courts and international law. The intergovernmental agreement on the single on the single resolution fund in context, in **Maastricht Journal of European and Comparative Law**, 21 (3), 2014, pp. 454ss.

<sup>57</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, OJ L 225, 30.7.2014, p. 1-90. see, A. WELLERD, Organization of banking regulation, ed. Springer, Berlin, 2015, pp. 70ss. M.

agreement signed by all the EU Member States, except Sweden and the United Kingdom, on 21 May 2014. While recognizing the supplementary nature of the conventions to the European legal order, he denounced the creation of a "new body of European law" lacking "the guarantees of uniformity and effectiveness, which in the case of European law proper, result from the institutional system of the Union" and warned against "the danger to the unity of the European legal system arising from the establishment of new rules which, precisely because of their international origin, are not subject to the system of institutional and, more especially, legal guarantees provided by the Treaty"<sup>58</sup>.

It seems possible to conclude that the model of the quasi-jurisdictional remedy established by the SRB internally can be traced back to the tradition followed by other European agencies in terms of internal appeal bodies invested with adjudication powers<sup>59</sup>, even though it is characterized by some elements of specificity, if not of specialty, including the high level of independence and technicality that must be guaranteed through Panel rulings. We have therefore come to believe that, given that the formally quasi-jurisdictional nature of the commission is not negligibly "contaminated" by elements typical of a judicial authority, the breadth and validity of the operation can be delimited and better understood only in years to come. From now on, however, we are led to believe that, in the wake of the evolution concerning the architecture of the legal system and of the "infrastructures" of the EU, the Appeal Panel of the SRB represents an example of the ever increasing attention that the European legislator devotes to the remedies of administrative justice, as useful and necessary

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HAENTJENS, B. WESSELS, Research handbook on crisis management in the banking sector, Edward Elgar Publishers, Cheltenham, 2015. J.V. LOUIS, La difficile naissance du Mécanisme Européen de Résolution des Banques, in **Cahiers de Droit Européen**, 1, 2014.

<sup>58</sup> R. BIEBER, F. MAIANI, **Précis de droit européen**, ed. Stämpfli, Berne, 2011. C. BLUMANN, L. DUBOIS, Droit institutionnel de l'Union européenne, LexisNexis, Paris, 2013, pp. 478ss. C. BOUTAYEB, **Droit institutionnel de l'Union européenne**: Institutions, Ordre juridique et Contentieux, LGDJ, Paris, 2014, pp. 119-125. J.L. CLERGERIE, A. GRUBER, P. RAMBAUD, L'Union européenne, ed. Dalloz, Paris, 2014, pp. 543-545. M. DONY, **Droit de l'Union européenne**, Bruxelles, Editions de l'Université de Bruxelles, 2014. J.C. GAUTRON, Droit européen, Dalloz, Paris, 2012, pp. 24ss.

<sup>59</sup> P. CHIRULLI, L. DE LUCIA, Specialised adjudication in EU administrative law: The Board of Appeals of EU agencies, in **European Law Review**, 24, 2015, pp. 84ss.

elements of complement-especially in sectors characterized by high technical content-of the actual jurisdictional activity.

### 5. RELATIONS BETWEEN NATIONAL JURISDICTION AND EUROPEAN JURISDICTION: CO-ADMINISTRATION AND COMPOUND PROCEEDINGS IN THE REGULATION OF SINGLE MECHANISM RESOLUTION TREATY

The analysis of the relevant provisions of secondary legislation must be aimed at understanding whether the judicial screening conducted by the CJEU can have as its object any decision that the SRB should take against specific NRAs in order to instruct the latter in the exercise of powers, *latu sensu*, of resolution conferred on them by the BRRD<sup>60</sup>. To date, in the absence of an explicit ruling by the European judge on the matter, the answer to this question can be found in the reflections of that doctrine that was expressed on the point, according to which, the main factor to be taken into account in order to resolve this question is the presence, or the absence, of discretionary spaces that the instructions formulated by the SRB should leave in favor of the national authorities.

Most of the cases envisaged by the regulation can be traced back to the "co-administration" model or, in the logic of this, to the model of the "compound procedure". With the term "co-administration" we want to refer to all those hypotheses in which, while maintaining a certain level of autonomy, the role of Member States (or, for them, the role played by the respective NRAs), turns out to be a moment, that is to say a circumscribed procedural phase, of the single procedure aimed at the adoption of the final provision, conducted and led by the European agency, also always subject to the direction of the latter. To further specify the notion of co-administration, the notion of "compound procedure"

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<sup>60</sup> C.C.HU, The recovery framework in the BRRD and its effectiveness, in Nordic & European Company Law Working Paper, n. 15-04, 2015, pp. 18ss.



intervenes, which includes all the specific cases in which the administrative action takes place through a procedure, in fact, composed of strictly interconnected national and Union sequences, deriving from the attribution of powers to various subjects integrated into organizational models which, on the assumption of integration between the European legal system and national laws, include, in fact, both European and national authorities, called to operate in compliance with the principle of close and loyal collaboration<sup>61</sup>. Moreover, in light of the specific characteristics that the composite procedures assume in the specific sectors of the European legal system, the doctrine has essentially come to distinguish the "top-down" procedures, that are concluded with acts of the national authorities, from the compound procedures "bottom-up", ie ending with acts of EU authorities.

In particular in case C-97/91, *Oleificio Borrelli S.p.A. v. Commission of the European Communities* of 3 December 1992 the CJEU was called upon to verify the legitimacy of a provision of the EC by defining the principle that it is for the "national courts" to decide, if necessary upon prior reference to the CJEU, the legitimacy of the national act referred to in accordance with the procedures for judicial review applicable to any definitive measure which, issued by the national authority itself, could harm third parties (...) "<sup>62</sup>. On the contrary, the CJEU also

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<sup>61</sup> M. KLAMERT, **The principle of loyalty in European Union law**, Oxford University Press, Oxford, 2014.

<sup>62</sup> CJEU, C-97/91, *Borrelli SpA* of 3 December 1992, ECLI:EU:C:1992:491 I-06313, par. 13, which principle has also been confirmed in further and subsequent rulings by the European Judge, such as: joined cases: C-106/90, C-317/90 and C-129/91, *Emerald Meats v. Commission* of 20 January 1993, ECLI:EU:C:1993:19, I-00267, parr. 36-41; C-6/99, *Association Greenpeace France and others* of 21 March 2000, ECLI:EU:C:2000:148, I-01651 parr. 49-57; C-269/99, *Carl Kühne GmbH & Co. KG and others v. Jütro Konservenfabrik GmbH & Co. KG*. Of 6 December 2001, ECLI:EU:C:2001:2001:659, I-09517, parr. 57-58; joined cases C-512/07 P (R) e C-15/08 P (R), *Achille Occhetto and European Parliament v. Beniamino Donnici* of 13 December 2009, ECLI:EU:C:2009:3, I-00001, parr. 50-51; C-562/12, *Liivimaa Lihaveis MTÜ v. Eesti-Läti programmi 2007-2013 Seirekomitee* of 17 September 2014, ECLI:EU:C:2014:2229, published in the electronic Reports of the cases, parr. 48-51.

intervened to affirm opposing principles in cases where the administrative decision-making power is not actually divided between European authorities and national authorities, but the European legislation assigns it only to the former, while at the same time providing for the administrative authorities to internal law to contribute to the administrative procedure through the issuing of "preliminary"<sup>63</sup> or "endoprocedimental" acts, therefore not binding on the European authority and not suitable for affecting the individual rights of third parties. In such cases, the administrative procedure has the nature of "unitary unitary procedure" and the possibility of intervention granted to the national administrative authorities would not be such as to affect the substantially European nature of the final decision, with the consequent exclusive attribution to the European court of jurisdiction to know of any appeals against this act<sup>64</sup>, as well as incidentally, against possible defects in the preparatory acts of the national authorities.

With reference to the administrative procedures governed by the secondary legislation set up as a foundation of the banking union, this problem is very significant with reference to the decision-making procedures envisaged in the context of the first pillar, in the matter of supervision and prudential vigilance. Although it does not and can not be the place to deal with the analysis of the multiple provisions of the Single Supervision Mechanism (SSM) regulation, which are very complex, we can not fail to note how, precisely in a specific case concerning this sector, the Problems related to the allocation of jurisdictional powers in the presence of compound proceedings has been very recently the subject of a question formulated by the CJEU for a preliminary ruling, which is

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<sup>63</sup> CJEU, C-64/05 P, Kingdom of Sweden v. Commission of the European Communities of 18 December 2007, ECLI:EU:C:2007: I-11389, parr. 93-94.

<sup>64</sup> CJEU, 60/81, International Business Machines Corporation v. Commission of the European Communities of 11 November 1981, ECLI:EU:C:1981:264, 02639, parr.10-11.

therefore called upon to endorse the application of the principles enshrined in the previous jurisprudence with reference to a new sector, characterized by many peculiarities<sup>65</sup>. Pending the future ruling by the European judge, although not directly related to the sector of the resolution of credit institutions, it is believed that it can play a clarification role for this latter subject as well, it is possible to formulate preliminary reflections on the SRM.

In fact, we must exclude from the notion of "compound procedures" those in which the European agencies intervene, qualifying them rather as related proceedings, characterized by a centralized and decentralized procedure, it seems possible to attribute to them also a functional relief with similar consequences in terms of attribution. The real category of the "top-down" compound proceedings would seem to refer to all the cases in which the NRAs are called to implement the decisions adopted by the SRB, in accordance with the general principle set out in art. 29 of the Regulation. First of all the cases relating to the execution of the decisions taken by the SRB regarding the power to devalue and convert the equity instruments; to the appointment of a special administrator; to the implementation of the resolution program, as entered into force following the approval obtained from the EC and Council. With particular regard to the latter hypotheses, therefore, that could pose doubts about the division of jurisdiction between the European level and the national level which, at first sight, could be resolved on the basis of the degree of discretion given to the NRAs. Better said,

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<sup>65</sup> See, par. 2 of the SSM Regulations and governed by art. 86 of the Regulation (EU) n. 468/2014 ("SSM Framework Regulation"), concluding that the aforementioned candidates with the reputational requisites required by the national legislation transposing the CRD IV Directive and proposing to the ECB to oppose the acquisition project. The latter, in accepting the proposals formulated by the Bank of Italy, on 25 October 2016, in conclusion of the administrative procedure initiated by the ANC, issued a final decision refusing the acquisition of the qualified shareholding. K. NEUMANN, The supervisory powers of national authorities and cooperation with the ECB-A new epoch of banking supervision, in **Europäische Zeitschrift für Wirtschaftsrecht**, 2014, pp. 10ss.

whenever the instructions received from the European agency are configured in such a way as not to leave any room for discretionary decision-making to the NRAs addressees of the same, the latter will play a mere role of "executing materials" of the content of the decisions adopted by Brussels. Consequently, the court having jurisdiction to hear complaints about which the parties concerned should formulate depending on the implementation of those decisions, being essentially acts coming from an organ of the EU legal order, would be the CJEU<sup>66</sup>.

On the contrary, whenever the formulation of the decisions by the SRB proves to leave more or less large spaces of decision-making discretion and autonomy in favor of the NRAs called to implement them, the jurisdiction of the national judge is deemed to exist. This is to say, exemplifying, that, consistently with the provisions of art. 85, par. 3 BRRD, the natural or legal persons who should be direct recipients of the decisions taken by the NRAs for the purpose of the resolution powers exercise, still in compliance with the instructions received from the SRB through the resolution program that came into force, in order to challenge such decisions may, if not to say, have to refer to the competent national judicial authorities.

This arises from the fact that the decision taken by the European agency would follow decisions taken directly by the national resolution authorities, in accordance with the applicable national legislation in the specific case, in pursuit of the objectives and objectives previously identified by the decision-making bodies of the SRB. Given the application, more or less discretionary, of national regulations by national authorities, of any appeals that may be formulated by the

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<sup>66</sup> CJEU, C-41-44/70, NV International Fruit Company and others v. Commission of the European communities of 13 May 1971, ECLI:EU:C:1971:53, 00411 parr. 23-26, in which the Court ratified the admissibility of the actions brought before it by private individuals against decisions, without any element of discretion, adopted by the national authorities. See also: joined cases T-366/03 and T-235/04, Land Oberösterreich v. Republic of Austria of 5 October 2004, ECLI:EU:T:2005:347, II-04005, par. 29.



subjects affected by the medium-term decisions adopted by the NRAs, the competent national judicial authorities should be invested and not the European judge.<sup>67</sup>

Given the technicality of the subject and the important national peculiarities underlying it, the SRB could be frequently prompted to adopt decisions with the simultaneous remission of spaces of decision-making discretion in favor of the NRAs, we cannot help but notice the double level of jurisdictional competences that seem to be descended from the SRM-BRRD setting may give rise to tensions and difficulties. On the one hand, in fact, there is a need for the private parties to challenge the decision of the SRB before the CJEU<sup>68</sup> and, at the same time, the decision taken in execution of this by the relevant NRA before the national judicial authority. On the other hand, given the contemporary nature of the appeals, there could be no inconsiderable tensions and inconsistencies between the rulings taken at European level and the rulings taken at national level, such as possible risks of conflict between judgments or negative conflict of jurisdiction. This element is the more important and able to represent a threat to the level playing field, as well as to the uniformity of the European legal system, if we consider that the judgments of the national judges will be made in the light of "common principles" of the respective (administrative) national regulations, and also that the Treaties impose the obligation of

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<sup>67</sup> To remedy, at least in part, the difficulties identified in relation to the dual jurisdictional level, there are those who suggest the creation of a section of the EU Court specialized in the financial field (Court of Financial Supervisory and Resolution Affairs), competent to judge in the first instance all appeals concerning banking supervision and resolution. However, even in this case, national judicial authorities would remain competent to scrutinize the administrative enforcement decisions adopted by the NRAs. Finally, the rulings of the specialized section should be open to challenge before the Court of Justice only on grounds of legitimacy and not on grounds of merit. See, T. M. C. ARONS, **Judicial protection of supervised credit Institutions in the European banking Union**, op. cit., pp. 474ss.

<sup>68</sup> CJEU, C-188/92, TWD Textilwerke Deggendorf of 8 March 1994, ECLI:EU:C:1994:90, I-00833, par. 17-18.

preliminary reference only to the national courts of last resort.

Certainly, with reference to the cases that, according to the provisions of SRM, limit the role of the NRAs to that of executing the decision adopted by the Board, we must see if and to what extent the reflections just formulated can be further specified by the application of principles sanctioned by the European judge concerning the execution of national authorities, although with previous rulings and regarding hypotheses of administrative procedures that are completely different from those under examination. In particular, the reference goes to the *Textilwerke* ruling, made in the context of an administrative procedure aimed at the recovery of illegitimate public funding, with which the CJEU established the principle that a final beneficiary of state aid is not entitled to act against a national measure adopted in execution of the decision made by a European Institution (in this case the EC), if the latter was not promptly challenged.<sup>69</sup>

In an attempt to conclude, however, regardless of whether this last position

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<sup>69</sup> CJEU, C-158/14, *A. B. C. D. v. Minister van Buitenlandse Zaken* of 14 March 2017, ECLI:EU:C:2017:202, publishes in the electronic Reports of the cases, par. 66-67, it is recalled that: “(...) as the Court has repeatedly emphasized, to admit that a subject of the legal system which, no doubt, would have been entitled to act under the fourth paragraph of Article 263 TFEU against an act of the Union in the context of an action for annulment, the validity of that measure can be challenged before the national court, after the expiry of the period of appeal provided for in the sixth paragraph of Article 263 TFEU would be tantamount to granting him the right to circumvent the definitive character which deed possesses against it after the expiry of the appeal time limits (...)”. In this spirit see also: C-188/92, *TWD Textilwerke Deggendorf* of 8 March 1994, op. cit. par. 18; C-239/99, *Nachi Europe* of 15 February 2001, ECLI:EU:C:2001:101, I-01197, par. 30; C-370/12, *Pringle* of 27 November 2012, ECLI:EU:C:2012:756, published in the electronic Reports of the cases, par. 41; C-667/13, *Banco Privado Português e Massa Insolvente do Banco Privado Português* of 5 March 2015, ECLI:EU:C:2015:151, published in the electronic Reports of the case, par. 28). 67. However, only in cases where the action for annulment would have been manifestly admissible, the Court held that an entity of the legal order can not challenge the validity of a Union act before a national court (in this sense see: C-188/92, *TWD Textilwerke Deggendorf* of 8 March 1994, op. cit., par. 17-25; C-178/95, *Wiljo* of 30 January 1997, ECLI:EU:C:1997:46, par. 15-25; C-239/99, *Nachi Europe* of 15 February 2001, op. cit., par. 29-40; C-241/01, *National Farmers' Union* of 22 October 2002, ECLI:EU:C:2002:604, I-09079, par. 34-39).

can be shared and accepted, it is believed that any reasoning in the future legitimated by the jurisprudence in this area, both national and Union, must be such as to guarantee that the ever increasing interrelation between national laws and the Union law can be considered a useful tool for the pursuit of objectives such as the elimination and retreat of areas of uncontrolled exercise of administrative powers by the authorities owning them, as well as the elimination of inequality of judicial protection between citizens of the different Member States. Only in this way, in fact, in the context of the EU legal system, the highest degree of effective and complete protection in favor of the administrated or a judicial review of the legality of the acts of EU institutions, bodies and bodies capable of affecting the legal sphere can be guaranteed of the singles.

Guarantees of protection for the parties involved in the exercise of sanctioning powers and investigation by the Board. It is considered interesting to try to develop further analysis of the relationships that may be said to exist between the enforcement of the sanctioning and investigative powers attributed to the SRB, with the criminal law<sup>70</sup>. More precisely, by adopting this perspective, we want to try to understand if, and if so, to what extent, it is necessary to foresee a role in this area to the typical principles of criminal justice systems so that, against the measures and sanctions, at least formally, administrative nature that the SRB is entitled to impose, it can be said guaranteed an effective level of protection in favor of third parties recipients of

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<sup>70</sup> Considering that these powers were also attributed to the ECB in the context of the first pillar of the Banking Union by the SSM regulation and, in the previous era, by Council Regulation no. 2352/98 concerning the power of the ECB to impose sanctions on functions performed in the monetary policy field, parallel considerations can also be developed with regard to the supervisory pillar. However, since this paragraph will be devoted solely to the analysis of the relevant provisions of the SRM regulation, with regard to the SSM framework, reference is made to the more authoritative doctrine made on this point. For details see: A. LUI, **Financial stability and prudential regulation**, ed. Routledge, London & New York, 2016.

the same.

With regard to the powers of investigation<sup>71</sup>, for the purpose of fulfilling its duties, the Board has been invested, first of all, with the power to request or better to demand, even on an ongoing basis, from the relevant credit intermediaries, all the information need, including, in particular, information on capital, liquidity, assets and liabilities related to each institution subject to its resolution powers. Even the respect of professional secrecy does not seem to be objected to by the recipients of the request in order to justify a failure to communicate the information requested by Brussels. The agency is legitimated, after adoption of a decision to that effect, to require the relevant bodies to present documents, books and accounting records (which may also be copied), explanations (both oral and written) and, finally, within the limits and purposes of the investigation, he/she can hear all the physical and/or juridical persons who have consented to be heard. This power requires the recipients of the same the obligation to conduct that facilitates the exercise by the representatives of the Board. Otherwise, the affected NRAs are called upon to provide the necessary assistance to enable the Board to effectively exercise its rights. Finally, concluding

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<sup>71</sup>In particular see art. 37, par. 2, pursuant to which: "If the authorization referred to in paragraph 1 of the present article is requested, the national judicial authority shall check the authenticity of the Committee's decision and verify that the coercive measures envisaged are neither arbitrary nor excessive, in consideration of the object of the inspection. When verifying the proportionality of the coercive measures, the national judicial authority may request the Committee to provide detailed explanations, in particular on the reasons for which it suspects an infringement of the decisions referred to in Article 29, on the gravity of the suspected infringement and on the nature of the involvement of the person subject to the coercive measures (...)". In addition to the use of the definition of "coercive measures" to indicate the exercise of the power of inspection by the agency, it is also intended to point out that, as subsequently provided for in the same paragraph 2, the extent of the screening of the judicial authority national decision about the Board's decision is not such as to be able to question the need for inspection or to be able to request from the agency the transmission of information in the work file of the same. Only the CJEU has the power to exercise legitimacy on the Committee's decision regarding the necessity and motivations behind the exercise of the power of inspection. A.KERN, European Banking Union: a legal and institutional analysis of the Single Supervisory Mechanism and the Single Resolution Mechanism, in **European Law Review**, 40 (2), 2015, pp. 155ss



the recapitulation relating to the narrow scope of investigative powers, the SRB is entitled to perform, upon notification to the relevant NRAs and obtaining, where necessary pursuant to the applicable national legislation, a judicial authorization, all inspections on-site instrumental to the performance of their duties in the commercial premises of the legal entities concerned. This power, by express provision of the law, should be exercised in cooperation with, and thanks to the assistance of, officials from national authorities.

Instead, having regard to the sanctioning powers, the SRB, when resorting to conduct and cases specifically identified by the regulation, is entitled to impose pecuniary sanctions and penalties for late payment. The former may be imposed on all those entities falling within the scope of the regulation, which, by negligence or intentionally<sup>72</sup>, have failed to transmit the information requested by the SRB, have not undergone a general investigation or an on-site inspection or have failed to comply with a decision taken by the SRB. The latter, on the other hand, can be imposed on the same recipients of the sanctions, in order to oblige the latter to comply with a decision requesting information, to undergo an investigation and/or an on-site inspection.

The executive formula is affixed, with the sole verification of the authenticity of the title, by the authority that the government of each of the participating Member States designates for this purpose, informing the Committee and the CJEU. Once these formalities have been completed at the request of the interested party, the latter can obtain forced execution by requesting it directly from the competent body, according to national legislation. Forced execution can be suspended only by virtue of a decision by the CJEU.

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<sup>72</sup>See art. 38, par. 1, which states that an infringement is considered committed intentionally, whenever there are objective evidence to prove that the entity in question, the governing body of this, have acted deliberately to commit the violation that can be sanctioned.

However, monitoring the regularity of enforcement measures is the responsibility of the jurisdictions of the participating Member States. Finally, it is envisaged that, as a rule, the decisions adopted by the Board regarding the need to impose sanctions should be published, except in the case where such publication could prejudice the resolution of the entity concerned. There is also the possibility that the publication of the decision will take place anonymously, if not, even, postponed for a reasonable period of time.

Always in the light of the ways in which the legislator intervened to outline and define the enforcement of the measures adopted by the Board in the aforementioned areas, it is possible to identify relationships, if not overlap, at least coexistence with enforcement of measures and sanctions, even formally, of a criminal nature. From these relations of coexistence, in order to avoid problems essentially due to unjustified duplication of coercive measures and sanctions, the need therefore arises to understand to what extent the forecasts in the SRM Regulation are subject to the traditionally informing principles of substantive criminal law and procedural law.

It is essential to understand whether the coercive measures and the sanctions that, it is repeated, the regulation defines to be of "administrative" nature, are not in reality "wolves disguised as lambs" or measures of a substantially criminal nature. With regard to SRM, such an investigation, conducted having in mind the invasive force of the same towards the sphere of the recipient subjects, there do not seem to be doubts about the possibility, also in light of the so-called "engel criteria" sanctioned by the European Court of Human Rights (ECtHR)<sup>73</sup> and also followed by the jurisprudence of the CJEU, to

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<sup>73</sup> ECtHR, *Engel and others v. Netherlands* of 8 June 1976, parr. 80-82. In particular, see point 82 of the judgment, where the Court states that, in order to identify the (administrative or criminal) nature of the sanction, it is necessary to carry out the necessary analyzes by verifying, as a starting point, "whether the provision (s) defining the offense charged belong to the legal system of the

be able to attribute "substantially" criminal nature to the sanctions referred to in art. 38 of the regulation since, although subject to the qualification of administrative sanctions according to the relevant provisions of EU law, they clearly pursue a repressive purpose, in most of the Member States are related to the commission of criminal offenses and, finally, their degree of severity seems sufficiently high that the third criterion sanctioned by the ECtHR can also be respected. The same conclusion, however, may not be true with the same evidence, including with regard to the penalty payments governed by the subsequent art. 39, if it were to privilege the thesis that penalties for late payment, even more so if not high, represent "mere" forms of indirect coercion to fulfillment in cases of permanent nature, and, therefore, may be imposed jointly real penalties, without a breach of the principle of *ne bis in idem*<sup>74</sup>.

If, theoretically, it seems justified to attribute coloration pénale at least to the pecuniary sanctions that the Board is entitled to impose (more doubts, it has

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respondent State (or the legal qualification of the offense in national law), "the very nature of the offense" (the 'illicit, involving a verification about the possibility that the penalty imposed pursues a repressive purpose) and, finally, the degree of severity of the penalty that the person concerned risks incurring (the nature and degree of severity of the sanction in which the interested party is likely to incur), with the clarification in a society subscribing to the rule of law, there belong to the "criminal" sphere deprivations of liberty liable to be imposed as a punishment, except those which by their nature, duration or manner of execution cannot be appreciably detrimental (...)". For details see: D. SHELTON, **Regional protection of human rights**, Oxford University Press, Oxford, 2010, pp. 58ss. K. KAMBER, *Prosecuting human rights offences: Rethinking the sword function of human rights*, ed. Brill, The Hague, 2017, pp. 522ss. C. SAVVIDIS, **Court delay and human rights remedies**. Enforcing the right to a fair hearing within a reasonable time, ed. Routledge, London & New York, 2016.

<sup>74</sup> CJEU, C-489/10, Bonda of 5 June 2012, ECLI:EU:C:2012:319, published in the electronic Reports of the cases, par. 37ss. Case C-617/10, Fransson of 26 February 2013, ECLI:EU:C:2013:10, published in electronic reports of the cases, par. 19ss. It is no coincidence that references to the most prominent court rulings are aimed solely at enhancing the binding nature of the general EU principles (CJEU, C-4/73, Nold of 14 May 1974, ECLI:EU:C:1974:51, I-00491, par. 13; case C-44/79, Hauer of 13 December 1979, ECLI:EU:C:1979:290, I-03727, par. 15-16; case C-5/88, Wachauf of 13 July 1989, ECLI:EU:C:1989:321, I-02669, par. 17) although, constant references to the content of the Convention as a parameter to determine the content of these principles are not lacking (see also the case: C-260/89, ERT of 18 June 1991, ECLI:EU:C:1991:254, I-02925, par. 41).

been said, arise in relation to the nature of penalty payments), in order to always be guaranteed an effective level of protection in favor of the subjects that come from these "hit", the application of such measures should be able to say respectful of some principles characterizing the substantial and procedural criminal order.

Although compliance with these principles and therefore, a check on the degree of protection granted to the subjects involved, can not disregard the analysis of the concrete cases in which the sanctions should be paid out highlight some interesting reflections on the necessity or not that the principles of common criminal law traditions can be useful tools in the enforcement phase of the regulatory provisions regulating the sector by the European legislator or, otherwise, about the necessity that some illegal behaviors of an administrative nature identified by the SRM regulation, as well as the SSM<sup>75</sup> regulation should instead, constitute criminal offenses. In particular, both elements from which this necessity would appear to have emerged were highlighted, as well as elements opposing the adoption of such a choice.

By adopting a pragmatic perspective, they would constitute elements opposed to the "criminalisation" of illicit conduct in the banking sector: the existence of a negative "stigma" traditionally associated with the conduct of investigations and criminal proceedings, a source of equally negative consequences for trust in financial-credit sector operators and the stability of the markets; the very complex nature of the regulatory provisions of the European

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<sup>75</sup> Regulation (EU) n. 468/2014 ("SSM Framework Regulation"), concluding that the aforementioned candidates with the reputational requisites required by the national legislation transposing the CRD IV Directive and proposing to the ECB to oppose the acquisition project. For details see, G. FERRARINI, F. RECINE, The single rulebook and the SSM. Should the ECB have more say in prudential rule making?, in D. BUSCH, G. FERRARINI (eds.), **European Banking Union**, Oxford University Press, Oxford, 2015, pp. 118ss. T.H. TRÖGER, The Single Supervisory Mechanism-Panacea or quack banking Regulation? Preliminary assessment of the new regime for prudential supervision of banks with the ECB involvement, in **European Business Organization Law Review**, 15 (4), 2014, pp. 450ss.



banking system; the presence of numerous safeguards characterizing most of the Member States' criminal laws, in the light of which the risk of unlawful conduct would be unpunished. On the other hand, it would also be conceivable that the same elements could form the basis for the choice of criminalization mentioned above, since: the negative stigma linked to the imposition of penalties would also have the strong deterrent role played by the provisions of criminal law that is, the greater effectiveness played by these in order to avoid the repetition of illicit conduct; from the repression of illicit conduct through the imposition of penal sanctions, therefore effective and "of great fanfare", would result in an increase in the level of trust in the financial-credit sector operators and the stability of the markets, as well as in the proper functioning of the judicial system and EU policy.

By adopting a more legalistic perspective, instead, the coordinates in the light of which we have reasoned, have been identified in the principle of last *ratio* (ie the principle for which criminal law must represent the ultimate solution for the protection of individual and collective interests), as well as in the principle of proportionality of the penalty to the seriousness of the unlawful conduct and to the effects of this descendants. In summary, so reasoning, there would be many doubts about the need to attribute criminal nature to illicit conduct that, to date, the European legislator wanted to punish through the imposition of administrative sanctions, primarily because the legal assets that would not be clearly identifiable a possible criminal law provision in the banking sector should intervene to protect; secondly, because it would also be unclear what would be the most appropriate instruments of repression, being of an ambivalent nature (that is, a producer of both negative and positive effects) and repression through the imposition of penal sanctions, and the lack thereof; finally, because, in a sector such as banking-finance, characterized by conduct (legal or illicit that are) mostly "collective" (or realized through the action or inaction of a multiplicity of subjects)

it would be difficult to guarantee the respect for the principle of the personality of criminal responsibility.

As is understandable, the ambivalent nature of the aforementioned considerations did not allow the formulation of univocal considerations, however, it was possible to draw from them a conclusion about the fact that the benefits deriving from the possibility of attributing solely to the criminal justice system the task of norm and, therefore, to repress the illicit ones in the banking-financial sector, would be very limited. Consequently, it is identified as the chosen solution, and therefore suggested to the European legislator as a possible line of action, the exploitation of the guiding principles the criminal laws, not only in the actual phase of enforcement of the provisions on supervision and resolution<sup>76</sup>, but also in the preventive regulatory production phase, so that, in the final analysis, it is always possible to guarantee an adequate level of protection to the recipients of these rules. In this sense, and having these purposes in mind, therefore, it seems to have to share the thought of those who believe that "(...) labelling criminal penalties as administrative, just in order to circumvent the principles associated with criminal law is not an acceptable solution to the more and more intricate contemporary legal problems. Punitive powers have to be subject, not necessarily to the same rules-even within the criminal justice system there are graduations according to the nature and the gravity of the offenses and the sanctions-, but to the same system of rules. If *stricto sensu* criminal law is not always the optimal sanctioning tool to enforce bank prudential regulations, it still has a role to play, both as a corpus of principles and as a scientific discipline: to guide the development, the interpretation and the application of a "less criminal" corpus of

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<sup>76</sup> E.WYMEERSCH, The european financial supervisory authorities or ESAs, in E. WYMEERSCH, J.K. HOPT, G. FERRARINI, **Financial regulation and supervision. A post-crisis analysis**, op. cit.

punitive law"<sup>77</sup>.

### 7. LIMITS ON JUDICIAL PROTECTION...

In the light of the regulatory framework for the resolution of credit institutions outlined by the SRM Regulation and the BRRD, the reflections on the effectiveness of the judicial protection that should be guaranteed by it can also be limited to the sole level of the internal legal systems of the MS. In particular, this is all the more true in the light of the scope of the legislation adopted by the various national legislators when transposing the BRRD.

As regards the first aspect, the system of safeguards envisaged in favor of the subjects affected by the resolution event, first of all, articles 87-89 establish the obligation for the resolution authority to act in compliance with the aforementioned several times mentioned No Creditor Worse Off Principle (NCWO) principle<sup>78</sup> and consequently, whenever this principle should be infringed, compensate shareholders and holders of receivables not assigned for an amount equal to what they would have received in the event that the compulsory administrative liquidation procedure had been opened by national law or other equivalent bankruptcy procedure deemed applicable under internal law. Articles 90-94 regulate the guarantees to be recognized, in the case of partial assignment of the rights, assets or liabilities of the institution under resolution, in favor of certain counterparties, or the parties involved: in financial guarantee contracts, in agreements netting and netting (article 91); in guarantee agreements (article 92); in structured finance contracts (article 93). Furthermore, the functioning of payment, clearing and settlement systems must always be

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<sup>77</sup> D. BUSCH, G. FERRARINI (eds.), *European Banking Union*, op. cit.

<sup>78</sup> M. IWANICZ-DROZDOWSKA, J. KERLIN, E. MALINOWSKA-MISAG, **European bank restructuring during the global financial crisis**, Palgrave Macmillan, Basingstone, 2016, pp. 342ss.

guaranteed (article 94)<sup>79</sup>.

That said, the discipline inherent in the plan of judicial protection is contained only in art. 95 which, it has been noted, introduces a widely derogatory legislation of the ordinary procedural regime, which translates into a series of limitations to full jurisdictional protection. The text of article 95 does not hide it, *prima facie* generates strong perplexities however, we are tempted to overcome and accept such perplexities if we take into account the fact that the national legislator, in so doing, did nothing but conform to the choices and intentions pursued by the European legislator, transposing in an almost literal way the minimum provisions as set out in article 85 of the Consolidated Law on Finance. In fact, as a result of the balancing at European level between public and private interests that is considered relevant to the resolution of credit institutions, it has: a) that national judicial authorities calls to rule on the legitimacy of a resolution measure must base their scrutiny on the complex technical assessments already carried out by the resolution authority; b) that the presentation of the appeal does not suspend the effects of the contested provision; c) also, given the presumption of opposition to the public interest, that the appeal does not suspend the execution of the decision of the resolution authority, invested with executive effectiveness; d) that the cancellation of the provision of the national resolution authority is without prejudice to the deeds or shops concluded by the latter on the basis of the annulled order. This last element, moreover, does not constitute a novelty in the EU legal order, finding the basis in the power that the Treaties attribute to the CJEU or the power to specify with the final ruling of a procedure pursuant to art. 263 TFEU, the effects of the canceled act which must be definitive.

Such an approach to the level of minimum judicial protection seems to

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<sup>79</sup> M. IWANICZ-DROZDOWSKA, J. KERLIN, E. MALINOWSKA-MISAG, **European bank restructuring during the global financial crisis**, op. cit.



favor the safeguarding of public interests with respect to the interests of private subjects, considered, perhaps, more "sacrificable", whenever an enlarged perspective is embraced and the final aim is to ensure the achievement of "broader" goals such as the financial stability of the markets. Obviously, as is known, in the transposition phase of the EU directives, national legislators are obliged to guarantee the minimum level of protection envisaged by the directives. Nothing prevents them, in respect of the purposes and this minimum level, to raise the guarantees and safeguards placed to protect the interests involved.

If a position must be taken, since the Italian legislator is limited to the literal transposition of art. 85 BRRD, in general we are led to decree the goodness and limitations to a full judicial protection that derives from it in the light of the important characteristics of specialty in light of the context in which it arises and the purposes underlying it. With the obvious reservation, however, of wanting to change, if not overthrow, this conclusion if, in the light of concrete cases that may occur in the future, such an approach should prove able to empty content the judicial review and, consequently, limit the guarantees of judicial protection in favor of the private subjects in a way that can no longer be justified in the name of the defense of the public interest to the stability of financial markets.

The judges of Luxembourg have made it clear that, in compliance with the principle of institutional balance, the discretionary power to make political choices must always be exercised by the institution that the Treaties have invested with such power. Consequently, we are led to believe that the use of art. 114 TFEU<sup>80</sup> as the legal basis for the establishment of the SRM complies with the rationale and the conditions delimiting the scope of the provision as specified by the EU jurisprudence. If concerning the subject of the delegation, few doubts appear to

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<sup>80</sup> N.N. SHUIBHNE, L.W. GORMLEY (a cura di), **From single market to Economic Union**. Essays in memory of John A. Usher, Oxford University Press, Oxford, 2012, pp. 176ss.

arise about the legitimacy of art. 114 TFEU<sup>81</sup> as the legal basis for the establishment of the SRM and, a fortiori, for the SRB, the same can not be said if the characteristics of the delegation of power intervening in favor of the SRB are compared. The main aspects of uncertainty appear to be determined by the effective possibility of attributing the powers in favor of the SRB to the institution of "delegation of powers" rather than to the different legal case of the "granting of powers"<sup>82</sup>. In addition, should a veritable "delegation of powers" be sustained, the emergence of further doubts and questions are linked according to our opinion: aspects of uncertainty regarding the possibility of considering all the activities carried out by the European agency of screening and scrutiny, not only ex post, but also in itinere, by the delegating authority, in the light of objective and predetermined criteria; to the apparent (as derived from a "mere" reading of the normative text) subsistence of some margins of discretion and uncertainty about the possibility of being able to circumscribe these discretionary spaces to purely technical areas or, on the contrary, also "political"<sup>83</sup>. This is even more so in the light of the SRB's ability to adopt, on multiple occasions, individual binding acts against third parties, implying important consequences in terms of the protection of fundamental rights such as the right to property.

## 8. CONCLUDING REMARKS

In the absence of jurisprudential rulings by the CJEU on the matter, the analysis was naturally carried out having in this regard the literal text of the applicable legal provisions and, where relevant, some general principles of EU law.

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<sup>81</sup> A. ARNULL, C. BARNARD, M. DOUGAN, E. SPAVENTA (a cura di), **A constitutional order of States**. Essays in European Union law in honour of Alan Dashwood, op. cit.

<sup>82</sup> A. ARNULL, C. BARNARD, M. DOUGAN, E. SPAVENTA (a cura di), **A constitutional order of States**. Essays in European Union law in honour of Alan Dashwood, op. cit.

<sup>83</sup> A. ARNULL, C. BARNARD, M. DOUGAN, E. SPAVENTA (a cura di), **A constitutional order of States**. Essays in European Union law in honour of Alan Dashwood, op. cit.

In an attempt at recapitulation, it was first of all seen that, in light of the choices made by the European legislator following an approach that, by now, we could define as "ordinary"<sup>84</sup>, even the SRB was equipped with an internal organ, the Appeal Panel, competent to examine, in some respects we would also say on the merits, the technical decisions taken by the agency included in the mandatory list of subjects provided by the Regulation. It has also been seen that, on a residual basis, in order to avoid gaps in protection, the CJEU is invested with the jurisdiction, to hear appeals against decisions not related to the narrow scope of operation of the Appeal Panel, which, ultimately, must be considered as a body that anticipates and, at the same time, is complementary to the judicial screening submitted to the Court of Luxembourg, and, through a procedure characterized by strong procedural guarantees in favor of the parties, aligns the work of the SRB with the principle of good administration which, as required by the Treaties, must effectively characterize the work of the EU administrative organs and bodies.

Once the reflections limited to the scope of the almost judicial organs provided for by the European legal system were concluded, the analysis horizon was widened, examining the division of jurisdiction between the European judge and the national judges. In this context, a leading role appears to be covered by the case of compound administrative procedures, as identified by the relevant provisions of the SRM Regulation, in the context of which there are areas of decision-making discretion in favor of the NRAs. In such hypotheses, in fact, it is believed that the latter can not be attributed the role of mere executors of the directives received by the SRB, but rather that of real decision-making centers, whenever the private subjects consider themselves injured by the intervention of the respective NRAs, the action of these can be examined by the competent

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<sup>84</sup> In this sense, it advocates the Join statement and common approach on decentralized agencies signed by the European Parliament, Council and Commission on June 12, 2012, p. 7.

national judicial authorities.

One can not help noticing how, even in this area, to date, it is certainly not an easy task to draw some conclusions that may be considered conclusive. Obviously, the hope is that, despite the presence of weaknesses, the goodness of the whole system and the effectiveness of the judicial review mechanism about the work of the entire SRM will depend solely on the ability of the competent judicial authorities to interact and dialogue between them, in order to ensure consistency of decisions, as well as the best possible protection of rights, such as property rights, as well as subjective interests that may be affected (not to say weakened) by the application of secondary legislation governing the scope of resolution.

In detail, as regards the subject of delegation, there does not seem to be any doubt as to the legitimacy of art. 114 TFEU<sup>85</sup> as the legal basis for the establishment of SRM and, a fortiori, for SRB. However, even this "first and apparent certainty" could well be called into question if it is pointed out that the SRB is not invested only with powers of coordination of the aforementioned network, merely facilitating cooperation between the Commission and national administrations, but, coherently with the subjective scope of the SRM Regulation, it replaces itself directly to the national authorities, stripping the latter of relevant areas of competence. This circumstance that, as stated at the end of the chapter, could stand in favor of the illegitimacy of the establishment of the SRB on the basis of art. 114 TFEU<sup>86</sup>, where such powers should be considered as measures exceeding the scope of harmonization and approximation of national laws.

In fact, the SRB is an agency called to operate in a sector of the internal

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<sup>85</sup> A. KACZOROWSKA-IRELAND, *European Union Law*, Routledge, London & New York, 2016. F. MARTUCCI, *Droit de l'Union européenne*, LGDG, Paris, 2017.

<sup>86</sup> F. MARTUCCI, *Droit de l'Union européenne*, op. cit.



market characterized by a high degree of technicality, as well as by the need to guarantee rapid decision-making processes, to predict that, although in certain areas, the work of the same can be subjected to the scrutiny of a college of personalities with a certain amount of experience and knowledge in this field, guarantees, on the one hand, a review on the merits of these technical decisions, faster and perhaps even "better" than it could be said to be guaranteed in court<sup>87</sup>, since the courts of Luxembourg are not held, given the broader role played, to be bearers of such technical background; on the other hand, a "filter" is ensured<sup>88</sup>, suitable, at least within the limits of the competences attributed to the Panel, to reduce precisely the volume of technical causes of which the same CJEU could be invested in a short time, with a consequent reduction of the workload of the latter. Naturally, the Panel's limited scope of competence limits consequently the goodness of this conclusion, since it can not be considered valid with reference to key decision-making situations, such as the subject of contributions to the SRF and the real matter of resolution (to say, the adoption of resolution plans)<sup>89</sup> areas in which judicial appeals can be very numerous and therefore involve a considerable amount of work for the European judge.

There may be doubts about the division of jurisdiction between the European level and the national level which, at first sight, could be resolved on the basis of the degree of discretion given to the NRAs. Whenever the instructions received from the European agency are configured in such a way as to leave no room for decision-making discretion for the NRAs addressed to them, the latter

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<sup>87</sup> R. CRANSTON, **Principles of banking law**, Oxford University Press, Oxford, 2018, pp. 175ss.

<sup>88</sup> R. CRANSTON, **Principles of banking law**, op. cit.

<sup>89</sup> R. CRANSTON, **Principles of banking law**, op. cit. J. AMOUR, D. AWREY, P. DAVIES, **Principles of financial regulation**, Oxford University Press, Oxford, 2016, pp. 545ss. J. DERMINE, The single resolution mechanism in the European Union: Good intentions and unintended evil, Monetary economics today. Festschrift in honour of Ernst Baltensperger, INSEAD working paper, 2016/69.

will play a mere role as "executor materials" of the content of the decisions taken by Brussels. Consequently, the CJEU having jurisdiction to hear complaints about which the parties concerned should formulate depending on the implementation of these decisions, being essentially acts coming from an organ of the EU legal order, would be the CJEU. Reasoning on the contrary, whenever the formulation of the decisions by the SRB proves to leave more or less large spaces of decision-making discretion and autonomy in favor of the NRAs called to implement them, it is considered that the jurisdiction of the national judge exists. Given the more discretionary application of national regulations by national authorities, in fact, of possible appeals that should be formulated by the subjects affected by the decisions adopted by the NRAs, the competent national judicial authorities should be invested and not the European judge.

The reflections that, thanks to the analyzes and studies carried out, it has been possible to formulate, on one hand, the fact that the legal concept of "resolution" is a completely new concept, devoid of heritage and legal tradition, as well as on the other hand, that the SRM is equally new and "young". These reasons are based on the belief that, at the time of writing, it is perhaps too early to draw solid conclusions and, in some respects, definitive conclusions, as no practical experience has yet been gained of all the potentials that are believed to be enclosed and summarized in the establishment of the aforementioned mechanism. The solidity of the legislation, in fact, can be understood and fully evaluated only once the process of stabilization of the same and the adaptation to the new framework of the interested subjects is completed. Of course, a first positive confirmation about the goodness of the actors who animate it and the effectiveness of the forms of cooperation that bind them was the rapid management of the case of Banco Popular and the equally sudden adoption and entry into force of the related program of resolution. The hope is, of course, that

the future work of both the SRB and the NRAs and the relevant EU institutions may be in line with this first experience and that, in ruling on it, also the European judge, in continuous dialogue with the internal judge, can facilitate, by clarifying the skills and administrative procedures provided by the new legislation, the integration into the EU system of this new mechanism, corroborating the role and tasks, without fail to highlight and correct the weaknesses, to the advantage and the benefit of the stability of the relative sector of the internal market, of the subjects operating in it and of the clientele, and ultimately of the European integration process which in the last period was strongly opposed.

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