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Judicial Review and Banking Resolution Regime - The Evolving Landscape and Future Prospects

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I - Introductory Remarks and Key Issues
- Setting the Scene

• **STARTING POINT & LEIT MOTIF** when discussing the Review of Resolution Measures or – more widely - the Review of Measures Adopted by Resolution Authorities (hereinafter, *brevitatis causae* – ‘Resolution measures’/‘R.Measures’)

• Considering here different forms of review – (i) judicial review *stricto sensu* and (2) administrative/quasi judicial review (= *sui generis form of review* and of ensuring accountability of such decisions – as discussed infra...)

• *The incentives to challenge these R.Measures are fundamentally different from the incentives to challenge Administrative Measures, Administrative Sanctions or Early Intervention Measures in the field of Banking Supervision*
I - Introductory Remarks and Key Issues
- Setting the Scene

- Why this particularity of the Review of R.Measures within the overall architecture of accountability of the bodies participating in the System of Financial Supervision lato sensu (including resolution)?

- In a nutshell - Because – R.Measures have the widest implications for a vast range of legal rights and interests

- There is an inherently contradictory feature in R.Measures – At the same time (i) these are envisaged and conceived towards the safeguard of the stability of the financial system as whole and, conversely, (ii) these measures, by their very nature, have a significant potential for disruption that has to be duly contained and monitored.
I - Introductory Remarks and Key Issues - Setting the Scene

- Hence, a *higher incentive* – for various investors and also for Banks – to *challenge* actively/sometimes aggressively/ R.Measures...
- How do we set the legal pendulum for a proper *balancing exercise* between these *two contradictory features* of R.Measures, maximizing the positive, prevailing/stabilizing effects intended with resolution regimes?
- (1) Due process in the adoption and implementation of R.Measures involving adequate procedural safeguards and a (2) *proper system of review* of R.Measures are an essential part of the Answer – *focus here on Review of R.Measures*...
I - Introductory Remarks and Key Issues - Setting the Scene

• As regards these TWO ESSENTIAL CONDITIONS for a successful resolution regime – (1) Due process in the adoption and implementation of resolution measures involving adequate procedural safeguards and a (2) proper system of review of resolution measures, National experiences of EU Member States provide interesting lessons.

• Accordingly, in the complex legal fabric of banking resolution in the EU, with a complex architecture, attention should be paid, for a critical assessment and consolidation of the regime, not only to the Single Resolution Board (SRB) and the Appeal Panel of SRB (AP-SRB) and the Court of Justice of the EU (CJEU) but also to National Resolution Authorities and National Courts.
I - Introductory Remarks and Key Issues - Setting the Scene

- The importance of this multilevel judicial review/multilevel review of R.Measures derives from various causes:

- 1) – Complexity of the architecture of the Single Resolution Mechanism (‘MUR’) involving interventions of SRB typically scrutinised by CJEU and of National Resolution Authorities (‘NRAs’) typically scrutinised by National Courts (‘N.Courts’).

- 2) – Case law on SRB at CJEU (particularly settled case law) will take time to develop – currently ongoing process... No current settled case law – although some extrapolations (mutatis mutandis) allowed from case law already developed on EU/SSM banking supervision and related areas...
I - Introductory Remarks and Key Issues - Setting the Scene

• The importance of this multilevel judicial review/multilevel review of R.Measures derives from various causes (CONT):

• 3) – Accordingly, within this context – as part of the evolving legal landscape – judicial review of enforcement of National second generation resolution regimes (Pre-BRRD or Post-BRRD) at national level will probably produce much sooner an importante body of relevant case law...

• 4) - Also, in multiple instances, challenges may be brought before the Courts of Multiple States – including Non-Euro Member States – Will refer to a landmark resolution case in Portugal that (i) illustrates point (3) and (ii) point (4)
I - Introductory Remarks and Key Issues - Setting the Scene

• 4) - (cont.) This landmark reference case also (iii) illustrates - given its long-term evolution – litigation on “post-resolution issues” (so, the fullest range of litigation arising from resolution) – e.g. concerning the management and aftermath of a bridge bank already sold to third parties after restructuring and the admissible time span and domains to allocate resources of resolution funds after selling a bridge bank (arising from resolution).

• 5) – Also, differently from review of supervision measures – relying on a considerable body of law which may be (to some extent) transposed from national jurisdictions to EU jurisdiction (CJEU) – review of R.Measures tends to raise entirely new legal issues – accordingly, entirely new precedents in these ‘uncharted waters’ at national level may have accrued added value for building CJEU case law....
II - Key Issues and AGENDA

- Bearing in mind these fundamental issues and particularities of review of R.Measures – the AGENDA for discussion comprehends:
  1. Overall picture – Types and levels of review – judicial/non-judicial - EU level/national level
  2. Typical/paradigmatic areas/measures challenged
  3. Focusing on EU level – spheres of judicial review (CJEU) and review through Appeal Panel/AP (SRB) – articulation between the two spheres
  4. EU level – Nature of review through AP
  5. EU level – Standard of review (of AP and CJEU/GC)
  6. National level of review – 6.1. General overview/ 6.2. Corollaries of landmark national cases – Portuguese experience with BES case from 2014 [a) first wave of cases in Portuguese courts/b) interplay with cases in other EU Member State Courts/c) Litigation on ‘post-resolution issues’ after sale of bridge bank (Novo Banco)
III - Overall picture - Types and levels of review

• Layers of review – SRM Regulation (Regulation N.º 806/2014 of 15 July 2014) – considering entities which are part of SRM – (a) the SRB; (b) Single Resolution Fund (‘SRF’) (managed by SRB); National Resolution Authorities of each of 19 Eurozone States (also players, Commission and Council):

• Appeals against R.Measures adopted within SRM – depending on the entity adopting measure/type of measure – handled by (i) AP of SRB/(ii) CJEU/Leuxembourg/(iii) National Courts
IV-Typical/paradigmatic areas/measures challenged

- **Most significant potential areas of litigation** (judicial review and review through SRB AP) cover:
  - 1 – Decisions placing banks under resolution and correspondent adoption of Resolution Schemes – 18.º, 6 SRM Regulation (4 types of resolution tools contemplated in arts 22.º to 28.º SRM Regulation and BRRD – arts 39.º to 43.º) and Bail in measures associated – rights of property affected and pondering of alternative interventions/proportionality (executive dimension of resolution)
  - 2 – Decisions on MREL (Minimum requirement for own funds and eligible liabilities – art 12, 1 SRM Regulation)/ and on Removal of impediments to Resolvability – art 10.º, 1 SRM Regulation (preventive dimension of resultation)
IV-Typical/paradigmatic areas/measures challenged

- 3 - Transparency – decisions on access to file/documents (art 90.º, 3 SRM Regulation)
- 4 - Hypothetical damages arising from adoption of resolution schemes (see infra) (art 87.º, 5 SRM Regulation – claims for non contractual liability of SRB under art 87.º, 3 and claims for national resolution authorities for an indemnification by SRB under art 87.º, 4 of SRM Regulation)
- 5 - Decisions on ex ante and ex post contributions to the SRF (arts 70.º and 71.º of SRB Regulation)
- 6 – Decisions on contributions to administrative expenditures of SRB and on penalties (respectively, arts 65.º, 3) and 38.º to 41.º of SRM Regulation)
V - EU level - spheres of review through AP and through CJEU

- **Two types of situations:**
  - (a) cases in which AP-SRB has jurisdiction – direct appeal to CJEU not possible – initial appeal to AP required and possible subsequent action for annulment of AP decisions to General Court – art 86.º, 1 SRM Regulation - and possible subsequent appeal to CJ/Lux (on points of law only).
  - (b) Cases in which AP-SRB has no jurisdiction – direct appeal to CJ/Lux
V - EU level - spheres of review through AP and through CJEU

- So decisive articulation between spheres of review through AP-SRB and CJ/Lux – and decisive to apprehend categories of decisions subject to review by AP (in a context in which AP does not have general appellate jurisdiction)

In a nutshell and on a systematic perspective:

- (A) On the whole, a prevailing area of more intense intervention of AP – preventive dimension of resolution (on the executive dimension of resolution – residual intervention – AP no powers to review adoption of resolution schemes and decisions to place banks under resolution (lack of awareness of this lead to a significant number of inadmissibility decisions by AP concerning appeals against the resolution of Banco Popular addressed to AP in July-August 2017);

- (B) More analytically – THREE key areas of intervention of AP
THREE key areas of intervention of AP (categories of decisions subject to review by AP listed in art 85.º, 3 SRM Regulation – vis a vis cross references to provisions which serve as basis of reviewable decisions)

1. Intervention concerning decisions of SRB on MREL (art 12.º, 1 SRM Regulation) and decisions on removal of impediments to resolvability (art 10.º, 10 SRM Regulation) – **potential area for appreciable workload of AP in course of 2018-2019**

2. Access to file/access to documents (art 90.º, 3 SRM Regulation) – Decisive area of transparency vs protection of public interests requiring safeguard of highly sensitive information – importance enhanced after adoption of first resolution tools – **current string of cases on access to file arising from June 2017 Banco Popular resolution**

3. Interventions concerning penalties and financial issues – ex post contributions to SRF (art 71.º SRM Reg – but not ex ante contributions); contributions to administrative expenditures of SRB (art 65.º, 3 SRM Reg); penalties (arts 38.º - 41-º) – **First year of activity of AP (2016) AP essentially called to intervene in this area** – although again, also, with various inadmissibility decisions (on ex ante contributions), due to lack of awareness of specific areas of competence of AP (learning curve here)

(residual areas – simplified obligations – art 11.º SRM Reg)
VI - Nature of Review through AP-SRB

- AP – SRB – integrated by 5 effective members and 2 alternates (fully functioning as from January 2016) – **mixed/interdisciplinary composition** - **lawyers and economists** (expertise in financial regulation and supervision – selected through a transparent/e/public call of interest) – this mixed composition not only a formal attribute but has **possible substantive corollaries** for the overall perception of AP and its standard of review on the medium term

- Mandate to act **independently** from SRB and in the **public interest** – art 85.º, 3 and 5 SRM Reg
VI - Nature of Review through AP-SRB

• AP – similarities but also differences with Bodies of Appeal of other European Agencies (pertinent to single out for parallels the Board of Appeal of the EU Intellectual Property Office/EUIPO – as one of the most active – and, in the financial area, ESAs (EBA/ESMA/EIOPA) Joint Board of Appeal and SSM/ECB Administrative Board of Review (Abor)

• Probably the greatest resemblance with ESAs Joint Board of Appeal – as it happens with AP SRB, it may confirm or set aside decisions, then remitting the case to the Board – which is bound by such ruling and has to adopt new decision (differently from Abord whose rulings/opinions are not binding)
VI - Nature of Review through AP-SRB

• But – conversely – major difference of ESAs Joint Board of Appeal vis a vis AP SRB – in the case of ESAs the Board of Appeal deals chiefly with Regulation issues (not so much supervision and related issues) – differently, AP involved in core issues of resolution – greatest incentives to challenge decisions (as illustrated in the more than 50 cases of AP – starting in 2016 and accelerating in 2017...)

• Within this context – what is the nature of review by AP SRB in view of its powers and status? (a) administrative body; (b) quasi-judicial body; (c) or a body to be placed – in balancing exercise – towards a more ‘judicial’ or ‘administrative’ end of the spectrum
VI - Nature of Review through AP-SRB

- Possibly (although with some oversimplification here, brevitatis causae) that may be a rather ‘futile’ quest (regardless of an overall dogmatic elaboration in the future) – Instead of graduating a body more towards the ‘administrative’ or ‘judicial’ end of the spectrum, acknowledging as such the ‘sui generis’/hybrid nature of this body – its particularity lies in its mixed attributes/not a tribunal – but general attributes of a legal adjudicative body (art 85.º SRM Reg) more flexible – operating under different requirements (whose mandate is limited to confirm decision or remitting it to SRB to adopt new decision – art 85.º, 8 SRM Reg)

- Relevant to ponder appreciable case law on these bodies of appeal (e.g. “Procter and Gamble” case T-63/01; “Henkel v OHIM” case T-308/01 or “Schräder v CPVO” cases T-133/08 and C-546/12) – but debatable if these actually capture ‘sui generis’/hybrid nature of AP SRB...
VII- EU level - Standard of review (of AP and CJEU)

- **CJEU** – standard of legality (not opportunity or appropriateness) – beside lack of competence, infringement of essential procedural requirements, misuse of powers and – of great importance – infringement of a rule of law (comprehending manifest error of assessment and breach of proportionality)

- **AP** – also basically standard of legality (assess if appeals ‘admissible’ and ‘well founded’ – art 85.º, 7 SRM Reg) and also decisions of AP cannot replicate the participation of national resolution authorities (NRAs) in SRB decision-making (determined per art 53.º, 3 and 4 SRM Reg – hence problematic for AP to produce alternative assessments of situations without such involvement of NRAs
VII- EU level - Standard of review (of AP and CJEU)

- But do the particularities of AP SRB – due to its mixed composition and practical and technical expertise of its members – have any corollaries on standard of review of AP? (especial expertise acknowledged as particular factor in Boards of Appeal of agencies in some case law – e.g. again “Schräder v CPVO” case T-133/08)?

- Too soon to tell – Potential corollaries on gradual finetuning of a qualitatively more demanding/technical evaluation of sufficiency of technical/economic assessments of SRB?/although not replacing as such the decisions of SRB...
Thus — in the medium term (?) — **more intrusive/proactive economic assessment** (?) - mirroring or amplifying what already happens in some competition law Court cases involving **complex economic assessments** - see e.g. very recent example of General Court ruling of 26 October 2017 ("**Liberty Global/Ziggo**" case T-394/15) in which GC annulled a merger approval decision by Commission — due to lack of investigation of some effects of the merger or at least lack of explanation of choice of not looking into certain effects...
Within that context – *De iure condendo* if competence of AP SRB expanded (future reforms of SRM Reg) and *if trend continues*, *also in other cases of more complex economic assessment*, towards *more vigorous/intrusive review* - *may the AP SRB (and other bodies of appeal) become in the future the *embryo* of *Specialised Chambers of Appeal of a sui generis nature?* – *more than purely administrative while definitely not judicial?*

*Too soon to tell – prudence required...* - *but future trends to be followed...*
VIII - National level of review

- **General overview** – decisions of NRAs can be challenged before national courts on the basis of national procedural rules
- Apparently – Recital 89 of BRRD pressuposes that national courts also conduct a **limited review (of legality)** when dealing with decisions of NRAs
- Case law of national courts on R.Measures adopted by NRAs before SRB/SRM were operating fully (January 2016) – importante indicators for consolidation of EU case law...
- **ALSO** (not to be overlooked) – Relevant area of review by national courts of decisions of NRAs in domains in which (even within SRM) these keep residual own competence on some less significant institutions (namely in case these institutions do not have cross border activities in the area of the Banking Union)
VIII - National level of review

- **Fundamental references and indicators** (‘Law in action’) from major national case law arising from key national resolution cases occuring before SRM was fully operative **BUT under BRRD-style national provisions** so, to a large extent/*mutatis mutandis*, applicable in BRRD legal environment – BES case and precedent in Portugal

- **Why so important a precedent?** - Dozens of cases pending in Portuguese Administrative Courts on BES resolution, raising *inter alia* issues of constitutionality of the measures adopted and of the underlying regime and - *without entering here into undue details (for reasons of professional secrecy and others, involving cases not closed)* – such cases also try to approach/assimilate RESOLUTION to some traditional forms of *curtailing property rights*, such as (i) Expropriation, (ii) Nationalization and (iii) Confiscation – with the corresponding specific procedural safeguards...
VIII - National level of review

- **In a nutshell** – and not disclosing here details – at the very core of such discussion of RESOLUTION vis a vis Expropriation, Nationalization and Confiscation in the context of the Economic Constitution are problems related with the **compression of property rights** and **patterns** to deal with these rights vis a vis the overriding requirements of **public interest** that justify **intervention** in banks.

- ...And, largely underlying such discussion on property rights is the pondering of the **Proportionality** Principle and the corresponding **procedural safeguards** attached to it....
VIII - National level of review

- The final judicial outcome of these multiple cases which will end forseeably at the Portuguese Supreme Administrative Court (and Constitutional Court?) will form in years to come a fundamental body of law to discuss ...

- ...the contents/patterns/limits of exercise of public powers of resolution with a relevance that will very largely transcend the Portuguese jurisdiction....
Furthermore – this case also illustrates interplay with case law of Courts in non-Euro States – since Goldman Sachs International and a group of Investors attempted to bring claims worth around $850 million against Novo Banco (the Bridge bank established within the Resolution of BES) - related to obligations of BES under a facility agreement with Oak Finance, which included an English jurisdiction clause
VIII - National level of review

- This originated a *landmark precedent* in terms of resolution cases with impact on various EU Member States jurisdictions and with key *corollaries for standards of JUDICIAL REVIEW*.
- In fact, while in August 2015, the UK High Court ruled in favour of Goldman Sachs and the investors in matters of *jurisdiction*
- **In November 2016** - the UK Court of Appeal unanimously decided that the High Court judge should not have done so. As a matter of Portuguese law, Novo Banco (*Bridge Bank* arising from resolution) is not a party to the Oak Finance facility agreement and does not owe any money. So, *any challenge to this position therefore had to be brought in the Portuguese courts*...
VIII - National level of review

- At a diferente level this BES case finally illustrates litigation on ‘post-resolution’ issues...

- Appeal to Administrative Court of Lisbon – August 2017 – brough by a bank operating in Portugal (Millenium) against the National Resolution Fund and the Bank of Portugal (as NRA) challenging one of the clauses of the sale agreement of Novo Banco (bridge bank arising from BES) to Lone Star – and challenging, to the extent these approve such clause, the acts of NRF and the NRA
VIII - National level of review

- Clause challenged on mechanism of contingent capitalization – resolution fund may inject funds (up to a maximum extent) in case of underperformance of certain assets of Novo Banco and underperformance of levels of capitalization of Novo Banco – Millenium, participating in the Portuguese resolution fund, challenged this mechanism arguing, inter alia, non-proportionality of further financial efforts of resolution fund and its participating banks after the sale of bridge bank (= “post resolution issues”...)

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CLOSING

• Let me close with GROUCHO MARX (whom I have been re-discovering and quoting in Conferences on financial regulation):

• As resolution is such a sensitive and politically charged matter, quoting G MARX, on Politics:

  “Politics is the art of looking for trouble, finding it everywhere, diagnosing it incorrectly and applying the wrong remedies...”

• Let’s hope that on building resolution regimes we are – on the contrary – able to develop correct diagnoses and to apply the right remedies – also through appropriate standards of review that we have been discussing...

Thank you for your attention