EU Banking Union

Dutch Report

Rapporteurs: Thomas Beukers and Thomas van Rijn[1]

Introduction

This report aims at giving the Dutch view with regard to the questions put by the general rapporteur in his questionnaire, in particular views of academic writers and the opinions expressed during debates in the Parliament.

The report has been prepared by a working group established by the *Nederlandse Vereniging voor Europees Recht*, the Dutch member of FIDE. The working group was comprised of Hans van den Oosterkamp (Ministry of Foreign Affairs), Meehea Park (Leiden University), and the two rapporteurs. An important contribution has been given by professor Bart Bierens (Radboud University). The text of the report is the responsibility of the rapporteurs only.

The report follows the order of the questions of the questionnaire. It responds to those questions which appear to be relevant in the Dutch context.

A. General questions

Question 2: Appropriateness legal bases of Banking Union

SSM:

The Single Supervisory Mechanism (SSM) is regulated in Council Regulation (EU) No. 1024/213 of 15 October 2013 conferring specific tasks on the European Central Bank (ECB) concerning policies relating to the prudential supervision of credit institutions.[2]

The legal basis chosen for the SSM Regulation is article 127 (6) TFEU. The provision mentions "specific tasks concerning policies relating to prudential supervision". The ECB has been conferred exclusive competence for certain specific prudential supervisory tasks referred to in article 4 (1) SSMR, although those tasks reflect the essential elements of prudential supervision. These tasks include the authorization of banks, and ensuring compliance with requirements regarding e.g. own funds, securitization, liquidity, and robust governance arrangements. In doing so the Council has chosen for a wide reading of the provision. This wide reading is accepted by the Dutch government, as well as in the Dutch literature. Bovenschen, Holtring, Ter Kuile and Wissink (hereafter: Bovenschen et. al.) suggest that a

[1] Thomas Beukers is Senior legal advisor European law at the Dutch Ministry of Foreign Affairs and Visiting Fellow at the EUI Law Department. Thomas van Rijn is a former Director in the Legal Service of the European Commission.

[2] O.J. 2013, L 287/63.

narrow reading of article 127(6) TFEU would question whether the carrying out of prudential supervision falls within the scope of this article. But that is not necessarily the correct reading, they argue.[3] By being the actual supervisory, the ECB is able to determine policy in the area of prudential supervision. It can also be argued that the ECB carries out only 'specific' supervisory tasks. Authors do not expect the European Court of Justice (CJEU) to adopt a narrow reading of article 127(6) TFEU.[4]

SRM:

Although the lack of an accompanying European deposit insurance and resolution in the Union is criticized, in general, reactions in the Netherlands on the Regulation establishing the SRM are rather positive. It is deemed to be a *conditio sine qua non* for a proper Banking Union and regarded to fit within the legal framework set by the Treaties. Article 114 TFEU is deemed to be an appropriate and sufficient legal basis by the Dutch government, although in some instances the limits are approached. However, the proof is in the eating: the application of the mechanism will show whether frictions with Union law will appear.

B. The Single Supervisory Mechanism

Question 15: Main legal problems

The central themes discussed in Dutch literature are the complexity of banking union, its effectiveness, issues of transparency and legal certainty, judicial protection and political accountability, and the importance of cooperation.

The practical consequences of the division of competences between the ECB and the National Competent Authorities (NCAs) have been signaled in the Dutch literature as a potential legal problem arising from the SSM Regulation, in particular the exercise of the cooperation arrangements and joint supervisory powers of the ECB and NCAs,[5] which create a so called mixed administration.[6] Both the ECB and NCAs bear responsibilities within the SSM, which implies that it may not be clear at which level, the European or national level, the authorities should be held accountable politically and judicially (see also question 18).

Another legal uncertainty arises from Article 4 (3) SSM Regulation. In the Dutch literature, it is found remarkable that the ECB is allowed to apply national law (see for more detail question 17). Bovenschen et. al. interpret it in the sense that, although it is true that the ECB can base its decision on national law, it can only do so because the SSM Regulation does give

[3] Bovenschen, Holtring, Ter Kuile and Wissink, 'Europees bankentoezicht (SSM). Juridische en praktische perspectieven', *Nederlands Tijdschrift voor Europees Recht* (2013) p. 364-373 at p. 365.
[4] Ibid., p. 365-366. Similarly, Ter Kuile, Wissink and Bovenschen, 'Tailor-made accountability within the Single Supervisory Mechanism', *Common Market Law Review* (2015) p. 155-190 at p. 162.
[5] See in particular Ter Kuile, Wissink and Bovenschen, n. 4 *supra*, at p. 166.
[6] See in relation to mixed administration Jans, De Lange, Prechal and Widdershoven, *Europeanisation of public law*, 2nd edition (Groningen, Europa Law Publishing 2015) p. 31: "(…) as a rule, these administrative arrangements are characterized by independent administrative tasks and they involve a complex system of decision-making by both Community and national authorities".

it this competence.[7] The ECB decision remains a decision under EU law. Otherwise, questions of EU legal protection may arise (see also question 18). However, it remains to be seen in what way the CJEU will interpret a decision of the ECB by which national law is applied.[8]

Drijber and Van Toor argue that the haste in building the banking union has led to exceptional complexity and expect problems of interpretation in the application. These problems will likely be solved in the continuous coordination between the ECB, NCAs, European Banking Authority (EBA), and the European Commission, which raises concerns of transparency.[9]

In fact, many authors have stressed the importance of cooperation between the ECB and NCAs.[10]

Question 16: Allocation of powers and supervisory tasks between the ECB and the national competent authorities

The adaptation to, and implementation of, Dutch law to the new European rules relating to the supervision of financial institutions has taken place mainly through an amendment of the Dutch Financial Supervision Act (*Wet op het financieel toezicht (Wft)*). This includes adaptation to the SSM Regulation, to the Capital Requirements Regulation IV (CRR, No 575/2013),[11] and implementation of the Capital Requirements Directive IV (CRD IV, No 2013/36).[12]

Since 2004 financial supervision in the Netherlands follows a Twin Peaks model. Prudential supervision in the Netherlands is a responsibility of the Dutch Central Bank (*De Nederlandsche Bank (DNB)*). Behavioral supervision in the Netherlands is a responsibility of the Authority for the Financial Markets (*Autoriteit Financiële Markten (AFM)*). This model implies cooperation between the two Dutch authorities, cooperation which is affected by the transfer of prudential supervision to the ECB. The ECB will not only have to cooperate with the Dutch Central Bank, but in cases also with the Dutch AFM. Van Gelder and Teule extensively discuss the possible consequences of the SSM for behavioral supervision in the Netherlands.[13] They argue that, since the AFM is not part of the SSM, it has no obligation to assist the ECB or to present draft decisions to it. They do expect the AFM to cooperate with the ECB though and consider this to be of the greatest importance.[14]

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[7] See Bovenschen, Holtring, Ter Kuile and Wissink, n. 3 *supra*, p. 367; Wissink, 'Het (nieuwe) Europese bankentoezicht en de uitdagingen in een gemengde rechtsorde', *SEW-Tijdschrift voor Europees en economisch recht* (2015) p. 10. See contrary: Spoor and Fleuren, 'De Bankenunie-rechtsbescherming bij het Single Supervisory Mechanism', *Tijdschrift voor Financieel Recht* (2013) p. 235.

[8] See Bovenschen, Holtring, Ter Kuile and Wissink, n. 3 *supra*, p. 368; Ter Kuile, Wissink and Bovenschen, n. 4 *supra*, p. 181-182; Wissink, n. 7 *supra*, p. 10.

[9] Drijber and Van Toor, 'Van ESA's, SSM en SRM: rechtsbescherming in een labyrint van Europese regels voor het financiële toezicht', *Ondernemingsrecht* (2015/3) p. 16.

[10] Drijber and Van Toor, n. 9 *supra*, p. 9; Wissink, n. 7 *supra*, p. 10.

[11] O.J. 2013, L 176/338.

[12] O.J. 2013, L 176/1.

[13] Van Gelder and Teule, 'Gedragstoezicht en het SSM: op weg naar een nieuwe balans', *Tijdschrift voor Financieel Recht* (2014) p. 462-468.

[14] Ibid., p. 468.

The Dutch Council of State (*Raad van State*) has raised questions in its advisory opinion on the amendment of the Financial Supervision Act about the legal basis for cooperation between the ECB and the AFM.[15] In its reaction the Dutch government has indicated that the amended Financial Supervision Act is not intended to provide a legal obligation for this cooperation (which already follows from the principle of loyal cooperation), but to provide tools for this cooperation.[16] The Council of State has also raised questions about the possible differences in the definition of prudential supervision following from the SSM Regulation on the one hand and the one following from Dutch law on the other hand.[17]

In the Netherlands, direct supervision by the ECB is carried out over significant financial institutions (meaning: ING Bank, Rabobank, ABN Amro Bank, SNS Bank, Nederlandse Waterschapsbank, BNG Bank and Royal Bank of Scotland N.V.), in cooperation with the DNB. The ECB indirectly supervises all other Dutch financial institutions. The DNB carries out direct supervision over non-significant banks, insurance companies and pension funds. The ECB has some exclusive tasks with regard to both significant and non-significant institutions, namely granting authorization to take up the business of a credit institution, and the assessment of an acquisition of a qualifying holding in a credit institution. The DNB will prepare draft decisions in these areas, and in case of an application for an authorization to take up the business of a credit institution, it will have the independent power to reject applications. In the exercise of its supervisory tasks, the ECB can give instructions to the DNB.

The Dutch Financial Supervision Act (Wft) has been amended to reflect these supervisory changes: it provides that the DNB loses certain supervisory tasks, and includes procedures for the preparation of draft decisions for the ECB. As an example: article 2:12 of the Financial Supervision Act (Wft) on the procedure for granting banking licenses now rules that the DNB prepares a draft decision to grant a banking license in accordance with article 14 of the SSM Regulation.[18] It also provides for the continuation – as much as possible – of the cooperative model between the DNB and AFM (for example with regard to the advisory role that the AFM plays with regard to the granting of authorizations to take up the business of a credit institution, where under the SSM a draft decision by the ECB will be prepared by the DNB) and for procedures for DNB assistance to the ECB in the framework of the SSM.

In Dutch literature, the powers left to the DNB are considered to be crucial, as it remains responsible for the (direct) supervision of non-significant banks, pension funds and insurance companies, and for areas such as supervision of tax authorities, combating money laundering and the financing of terrorism, and consumer protection.[19] Moreover, the DNB is given new roles with regard to both significant and less significant credit institutions in other member states participating in the SSM, as it participates in so-called Joint Supervisory

[15] Raad van State, Advies W06.14.0282/III, 12 September 2014.
[16] Nader Rapport (reaction of the Dutch Government to the advisory opinion of the Council of State), 7 October 2014.
[17] Raad van State, Advies W06.14.0282/III, 12 September 2014.
[18] Implementing Act of the Banking Supervision Regulation (*Uitvoeringswet verordening bankentoezicht*), Stb. 2015, 184.
[19] Drijber and Van Toor, n. 9 *supra*, p. 7. See also Holtring, Ter Kuile and Wissink, 'De taken van DNB in het SSM-tijdperk', *Tijdschrift voor Financieel Recht* (2014) p. 453-461.

Teams (JST).[20] Within the SSM, the Dutch Central Bank will be active in three main ways: 1) as the direct supervisor of non-significant banks, 2) when acting upon instructions by the ECB, and 3) when providing assistance to the ECB in the preparation and implementation of ECB decisions.

Article 6(3) SSM Regulation establishes that 'national competent authorities shall be responsible for assisting the ECB'. This assistance is fleshed out in the SSM Framework Regulation (No 468/2014).[21] Ter Kuile, Wissink and Bovenschen (hereafter: Ter Kuile et. al.) ask the question who will be liable for preparatory and implementing acts and under what regime.[22] They note that the Netherlands has expressly limited the liability of its supervisors. Although the high barriers to liability are uncommon to the general principles of liability under the EU Treaties, it will, in their view, generally not be possible to hold the ECB liable for the supervision it exercises.[23]

Article 6(3) SSM Regulation also establishes that national competent authorities 'shall follow the instructions given by the ECB when performing the tasks mentioned in article 4'. Drijber and Van Toor see the principle of loyal cooperation as a (further) basis for the obligation of NCAs to follow ECB instructions.[24] Should the DNB wish to deviate from an ECB instruction, it will have to carefully examine and motivate.[25] They also argue that, when the DNB does follow an ECB instruction, the extent to which the Dutch General Administrative Law Act (*Algemene Wet Bestuursrecht (Awb)*) obliges it to examine and motivate its decision will depend on the extent to which these tasks have already been carried out by the ECB with regard to its instruction.[26]

Question 17: Powers and tasks of the ECB

Above under question 15 the issue of the power of the ECB to apply national law (article 4(3) SSM Regulation) has been mentioned. Drijber and Van Toor find there to be a logical explanation for this *novum*, namely the fact that European financial law is mainly laid down in directives, and the choice for the ECB to function as a 'national' authority.[27] Bovenschen et. al. consider it to be a creative solution to avoid gaps in the instruments of the ECB, and one that is legally sound, but they do mention that it does raise questions of legal protection (see question 18).[28] Wissink considers that it is necessary for the effectiveness of supervision, but notes that it will require close cooperation between the ECB and national

[20] Holtring, Ter Kuile and Wissink, n. 20 *supra*, p. 460.
[21] O.J. 2014, L 141/1. See for more detail on the rules of the Framework Regulation on the cooperation between the ECB and DNB, Bierman and Silverentand, 'De juridische en praktische gevolgen van het SSM: van het Frederiksplein naar de Kaiserstrasse', *Tijdschrift voor Financieel Recht* (2014) p. 441-452.
[22] Ter Kuile, Wissink and Bovenschen, n. 4 *supra*, p. 185.
[23] Ibid., p. 186.
[24] Drijber and Van Toor, n. 9 *supra*, p. 9. The explanatory memorandum of the Implementing Act of the Banking Supervision Regulation (*Uitvoeringswet verordening bankentoezicht*) states that "An instruction from the ECB will have to be followed by the national competence authority within the possibilities offered by the national legislation.", Stb. 2015, 184, p. 8.
[25] Drijber and Van Toor, n. 9 *supra*, p. 9.
[26] Ibid., p. 9.
[27] Ibid., p. 7.
[28] Bovenschen Holtring, ter Kuile and Wissink, n. 3 *supra*, p. 367.

competence authorities.[29] Critical are Spoor and Fleuren, who wonder if the European legislator has sufficiently considered the administrative law aspects of the SSM, noting that it is not always clear which administrative law is applicable and at what level judicial protection can be found.[30]

The issue of the power of the ECB to apply national law is in the Dutch literature often linked to the many national options left by the Capital Requirements Regulation (CRR) and the Capital Requirements Directive IV (CRDIV). Bovenschen et. al. signal the significant challenges for the ECB in this regard. Wissink argues that effectiveness of supervision requires harmonized rules. The great amount of national options in the CRR and CRDIV may be necessary because of national preferences, but there is a risk of unequal treatment, which would be undesirable.[31] Joosen argues that the national options and discretions often prevent the existence of a true Single Rulebook.[32]

The institutional innovation of the ECB's competence to apply national law on the basis of article 4(3) SSM Regulation has led to a discussion of the question whether the ECB in such a case is to be seen as an 'administrative authority' (*bestuursorgaan*) in the sense of article 1:1 of the Dutch General Administrative Law Act (Awb). Spoor & Fleuren argue that this might be the case.[33] Bovenschen et. al. find a ground in the explanatory memorandum (*Memorie van Toelichting*) of the General Administrative Law Act to argue that the ECB is not to be seen as an 'administrative authority' in the sense of the General Administrative Law Act, since that Act excludes organs of the EU from its scope. In any event they argue that it would not be desirable to embed the ECB in the Dutch legal system.[34] Drijber and Van Toor argue that the explanatory memorandum is clear: an EU institution like the ECB cannot be seen as an 'administrative authority' in the sense of the Dutch General Administrative Law Act (Awb).[35] For the implications for judicial protection see the following question 18.

With regard to the internal organization of the ECB, Ter Kuile et. al. argue that the system created seems overly complicated, but that considering the circumstances – no treaty amendment, separation between monetary and supervisory powers – it is the best possible solution.[36] They expect the Governing Council to follow draft decisions of the Supervisory Board, but they argue it should not be considered rubber-stamping.[37] They argue that from a legal perspective the Governing Council can take a decision without a draft decision of the Supervisory Board, since otherwise its treaty powers would be limited.[38] Between the Governing Council altering a draft decision of the Supervisory Board and remitting it to the

[29] Wissink, n. 7 *supra*, p. 10.
[30] Spoor and Fleuren, n. 7 *supra*, p. 237.
[31] Wissink, n. 7 *supra*, p. 11.
[32] Joosen, *Bankwetgeving na de financiële crisis. Is het genoeg?* (Oratie, Universiteit van Amsterdam 2015) p. 31.
[33] Spoor and Fleuren, n. 7 *supra*, p. 235.
[34] Bovenschen, Holtring, Ter Kuile and Wissink, n. 3 *supra*, p. 367.
[35] Drijber and Van Toor, n. 9 *supra*, p. 8. Similarly, Nuijten, 'Rechtsbescherming bij toezicht onder het SSM', *Tijdschrift voor Financieel Recht* (2014) p. 469-478 at 470.
[36] Ter Kuile, Wissink and Bovenschen, n. 4 *supra*, p. 179.
[37] Ibid., p. 177.
[38] Ibid., p. 178.

latter, they do prefer the latter approach as the Supervisory Board has the advantage of day-to-day supervision and expertise.[39]

Again with regard to the internal organization of the ECB, Ter Kuile et. al. argue that the Vice-Chair of the Supervisory Board has the most influential position when it comes to the ECB's supervisory tasks. The Vice-Chair is a member of the Executive Board, and as such also of the Governing Council. She is entrusted with preparatory work as well as draft decisions regarding supervision.[40]

Bierman and Silverentand make a number of predictions on the nature of ECB supervision in comparison with the traditional supervision of the DNB. Firstly, they expect the European supervisor to be more visible and present in the credit institutions, leading to more constant contact between the supervisor and bank employees.[41] To avoid the risk of regulatory capture, on-site monitoring is carried out not by the members of the Joint Supervisory Teams (JST), but by a horizontal ECB division. Secondly, they expect the ECB to be formalistic as opposed to the more pragmatic approach of the DNB (and they would welcome it if the ECB would stay closer to the rules than the DNB).[42] Finally, they expect the ECB to focus less on supervisory themes than the ECB has done in recent experience (such as behavior and culture), and to be more concerned with a strict application of the rules.[43]

Question 18: Appropriateness of rules to guarantee independence and accountability

According to both the Dutch government and the Dutch parliament,[44] the SSM Regulation, in general, provides for appropriate rules to guarantee both independence and accountability. The same position is generally taken in the Dutch literature.[45] In our discussion of this question we include both political and legal accountability (see also question 32).[46]

Legal/judicial accountability

According to the Dutch government, the system of judicial protection in relation to the SSM is fundamentally clear in the SSM Regulation.[47] In case the ECB takes itself supervisory decisions, it will pay attention to all procedures and requirements, laid down in EU-law. For all supervisory decisions by the ECB, the Regulation makes explicit the opportunity of being heard, and the rights of defense of the persons concerned.

[39] Ibid., p. 178.
[40] Ibid., p. 176.
[41] Bierman and Silverentand, n. 22 *supra*, p. 448.
[42] Ibid., p. 449.
[43] Ibid., p. 450.
[44] See letter Dutch Minister of Finance dated 1 October 2012, Doc. Second Chamber 2012-2013, n° 21 501-07, nr. 946, p. 6-7; letter Dutch Minister of Finance dated 27 June 2014, Doc. Second Chamber 2013-2014, n° 32 013, nr. 77; doc. Second Chamber 2012-2013, n° 21 501-07, nr. 959, p. 7, 13, 18, 19; doc. Second Chamber 2014-20/15, n° 34 049, nr. 3, p. 2, 3, 4 and 5; doc. First Chamber, 2014-2015, n° 34 049, C, p. 6
[45] See Bovenschen, Holtring, ter Kuile and Wissink, n. 3 *supra*, p. 370; Ter Kuile, Wissink and Bovenschen, n. 4 *supra*, p. 160-161 and p. 164-167; Wissink, n. 7 *supra*, p. 8-10; Drijber and Van Toor, n. 9 *supra*, p. 1-22.
[46] See also Ter Kuile, Wissink and Bovenschen, n. 4 *supra,* p. 161-174, and p. 180-187.
[47] Doc. Second Chamber 2014-2015, n° 34 049, nr. 3. p. 7.

Judicial protection is also well preserved, according to the Dutch government, in article 24 SSM Regulation, which creates the possibility to carry out an internal administrative review by the Administrative Board of Review of the decisions taken by the ECB in the exercise of the powers conferred on it by the Regulation after a request by a natural or legal person for review of a decision of the ECB under the SSM Regulation which is addressed to that person, or is of a direct and individual concern to that person.

Even though according to the Dutch government the system of judicial protection in relation to the SSM is fundamentally clear, the issue has raised a number of questions in Dutch literature.[48] What legal procedure should be followed for example when the ECB applies national law in accordance with article 4 (3) SSM Regulation: that before the European Court of Justice (CJEU) or before a national court? And what procedure should be followed in case the ECB gives an instruction to a national competent authority?

With regard to the application of national law by the ECB, Bovenschen et. al. and Ter Kuile et. al. argue that a procedure before the CJEU is to be preferred in light of the unity of application of Union law through acts of EU institutions.[49] They think that in theory a case can be made both for the argument that these ECB decisions are acts to be challenged before the CJEU and for the argument that they are to be challenged before national courts, and that this is in the end simply something for the CJEU to decide.[50] Thus, on the one hand, it could be held that national courts are best placed to judicially hold to account an institution that applies the national law with that system, and that preliminary references to the CJEU are in any event always possible.[51] On the other hand, the EU legislature seems to prefer the CJEU when it states that the remedy of review by the Administrative Board of Review is without prejudice to the right to bring proceedings before the CJEU,[52] a preference that is considered to be in line with the *Foto Frost* case law (according to which the CJEU is exclusively competent to decide on the legality of acts of EU institutions).[53] Drijber and Van Toor argue that it is reasonable for the CJEU to have jurisdiction over the ECB when it applies national law.[54] They put forward several arguments. Jurisdiction of the Luxembourg court avoids undesirable differences of interpretation and legal uncertainty. Moreover, the legal basis of a decision by an EU institution is not decisive for the jurisdiction of the CJEU. And finally, the ECB cannot be seen as an 'administrative authority' (*bestuursorgaan*) in the sense of the Dutch General Administrative Law Act (Awb) (see on this latter point in more detail also under question 17).[55] Nuijten argues that there can be no national administrative law protection against the application of national law by the ECB, since it is the SSM Regulation that confers this competence to the ECB.[56]

[48] Spoor and Fleuren, n. 7 *supra*, p. 237. Compare Nuijten, n. 36 *supra*, p. 469.
[49] Bovenschen Holtring, ter Kuile and Wissink, n. 3 *supra*, p. 368. Ter Kuile, Wissink and Bovenschen, n. 4 *supra*, p. 183.
[50] Bovenschen Holtring, ter Kuile and Wissink, n. 3 *supra*, p. 368.
[51] Ter Kuile, Wissink, Bovenschen, n. 4 *supra*, p. 181.
[52] Ibid., p. 182.
[53] Ibid., p. 183.
[54] Drijber and Van Toor, n. 9 *supra*, p. 7.
[55] Ibid., p. 8.
[56] Nuijten, n. 36 *supra*, p. 471.

With regard to judicial protection against ECB instructions to national competent authorities, Bovenschen et. al. do not expect the CJEU to accept the availability of both a procedure before the CJEU and national courts in the same instance: one procedure should be sufficient. The CJEU will have to refer to the closed system of legal remedies, with the possibility for national courts to ask a preliminary ruling.[57] Ter Kuile et. al. argue that having parallel procedures would be inefficient and undesirable.[58] Nuijten argues that DNB acts following an instruction by the ECB will be reviewed by the Dutch administrative or civil courts, unless there is absolutely no discretionary power for the national supervisor, in which case the CJEU will be competent.[59] Drijber and Van Toor point to the possibility to invoke the illegality of the underlying ECB instruction before the national court next to the decision of the national competent authority itself. The national court will not easily conclude that it is beyond doubt that the party could have challenged the instruction already directly before the General Court.[60]

In case the NCAs are taking supervisory decisions, judicial protection will generally take place according to national law. For the Netherlands the following national legislation is of importance: the *Wet op het financieel toezicht* (Wft, Financial Supervision Act), the *Algemene Wet Bestuursrecht* (Awb, General Administrative Law Act), and the *algemene beginselen van behoorlijk bestuur* (general principles of good administration).

Wissink wonders whether the CJEU has enough expertise and capacity to deal in an effective manner with the caseload following from the SSM. She considers a specialized court to be a possible solution. The combination of both the lack of clarity on legal protection and long procedures would be detrimental to legal certainty and thus to the effectiveness of supervision.[61] Drijber and Van Toor similarly question whether the General Court will be up to this task, considering that at EU level no procedure exists that can provide the speed of the Dutch procedure for interim measures.[62]

In general, Ter Kuile et. al. conclude that the SSM has created too many instances of judicial accountability.[63]

Political accountability

Wissink argues that a good balance has been sought between effectiveness and independence on the one hand and accountability on the other hand; however, we will have to wait and see how it will function in practice.[64] Drijber and Van Toor consider the relatively strong emphasis on democratic control on the ECB as an independent supervisor justifiable,

[57] Bovenschen, Holtring, ter Kuile and Wissink, n. 3 *supra*, p. 368.
[58] Ter Kuile, Wissink and Bovenschen, n. 4 *supra*, p. 184.
[59] Nuijten, n. 36 *supra*, p. 471.
[60] Drijber and Van Toor, n. 9 *supra*, p. 9-10.
[61] Wissink, n. 7 *supra*, p. 12.
[62] Drijber and Van Toor, n. 9 *supra*, p. 8.
[63] Ter Kuile, Wissink and Bovenschen, n. 4 *supra*, p. 180.
[64] Wissink, n. 7 *supra*, p. 13.

but they signal a remarkable contrast with the approach as regards the monetary tasks of the ECB.[65]

Ter Kuile et. al. argue that both independence and accountability are realized within the SSM. Authors note that different forms of independence for the monetary and supervisory tasks of the ECB seem justified. Political accountability in relation to supervision by the ECB has been created, although no formal sanctions exist. A variety of democratic and political bodies at both EU and national level can ask for explanations, and a network of accountability moments can be an effective manner to hold the ECB to account.[66] Among these bodies are national parliaments. Ter Kuile et. al. argue that the direct possibility for national parliaments to call the ECB to account is appropriate given the mixed administration created. They do note that answering parliaments' questions and visiting them will be time-consuming and quite a challenge for the ECB in 19 Member States.[67] They also note the difficulty in holding the ECB to account created by the fact that supervisory objectives are necessarily broader and more vague than monetary objectives.[68]

In addition to political accountability in the operation of the SSM, Ter Kuile et. al. also discuss political accountability in terms of the legal basis and the procedure for the creation of the SSM. Here they take the remarkable position that, from an accountability perspective, the choice between the use of article 127(6) TFEU as a legal basis and the use of the simplified revision procedure would not have made much difference.[69] Although they realize that there is quite a difference in the role of national parliaments and potentially of the electorate, they emphasize that the electorate is represented not just in national parliaments but also in the European Parliament (which formally only has the right to be consulted under article 127(6) TFEU, but in practice managed to create leverage for itself). What is decisive for Ter Kuile et. al. is that all relevant actors were involved in adopting the SSM Regulation by means of a dialogue, which they consider sufficient for the performance of political accountability in granting the ECB supervisory powers.[70]

The Dutch Court of Audit (*Algemene Rekenkamer*) has asked the question where the ECB will be democratically held to account when the ministerial responsibility of the Dutch Minister of Finance will be limited because the ECB has taken over supervision over significant Dutch banks. The Court of Audit is also concerned about deterioration in the possibilities to execute independent external control on the supervision of banks, and sees a risk of a control gap.[71] On 12 February 2015 a motion tabled by members of Parliament Merkies (Labour) and Omtzigt (Christian-Democrats) was adopted that called on the Dutch government to advocate powers for the European Court of Auditors in the control of ECB

[65] Drijber and Van Toor, n. 9 *supra*, p. 5.
[66] Ter Kuile, Wissink, Bovenschen, n. 4 *supra*, p. 173.
[67] Ibid., p. 170-171.
[68] Ibid., p. 167.
[69] Ibid., p. 163.
[70] Ibid., p. 163-164.
[71] See for example the letter of the Court of Audit of 2 July 2014 on Banking Union to the Chair of the Dutch House of Representatives.

banking supervision that are similar to those of the Dutch Court of Audit.[72] The Minister of Finance in a letter of 30 June 2015 to the Chair of the House of Representatives has promised it will request that the European Commission in its first evaluation of the SSM Regulation studies this issue.[73]

C. The Single Resolution Mechanism

Introduction

As Directive 2014/59 on the establishment of a framework for the recovery and resolution of credit institutions (BRRD)[74] and Regulation 806/2014 on the establishment of the single resolution mechanism (SRM)[75] have been adopted relatively recently, the legal literature in the Netherlands on those topics is not very extensive. In the Parliament the Bill to implement the Directive and to provide for the necessary implementation measures for the smooth operation of the Regulation[76] has been introduced in May 2015 and at the moment of the writing of this report the Bill has not yet been adopted.[77] Therefore, this report will refer only to the governments' explanations and the debates in Parliament during the discussions in the Council and European Parliament on the Commission's proposals.

Stakeholders,[78] the Council of State,[79] and members of Parliament have heavily criticized the proposed implementation of the BRRD and SRM Regulation in Dutch legislation.[80] Indeed, the incorporation of the Directive and parts of the Regulation in the Dutch Financial Supervision Act (Wft) creates a very complicated complex of rules, which even for experts is difficult to understand. Moreover, insurance companies fall within the scope of the Financial Supervision Act, but outside the scope of the SRM Regulation and BRR Directive.[81] The Hazelhoff Centre expresses its doubts with regard to the choice not to include the insurance sector for now, especially since in the Netherlands the banking and insurance sector are closely knit.[82] The government defended itself by pointing out the short period for implementation. It promised to examine a possible review of the Act in the near future.

[72] Doc. Second Chamber 2014-2015 n° 34049, No. 15, p. 1.
[73] Doc. Second Chamber 2014-2015 n° 34049, No. 16, p. 1.
[74] O.J. 2014, L 173/190.
[75] O.J. 2014, L 225/1.
[76] See Doc. Second Chamber, 2014-2015, n° 34 208 (European framework for recovery and resolution of banks and investment firms).
[77] The Dutch Parliament has adopted the legislative proposal to implement the BRRD Directive and SRM Resolution on 8 September 2015. The Dutch Senate still has to adopt the proposal.
[78] See the reactions during the consultation phase of the Hazelhoff Centre for Financial Law of Leiden University to the draft Bill of the Implementing Act, p. 1 and of the Dutch Banking Association (Nederlandse Vereniging van Banken), p. 1.
[79] Doc. Second Chamber 2014-2015, n° 34 208, No. 4, p. 4.
[80] Doc. First Chamber 2014-2015, n° 34 208, B, p. 2.
[81] Compare Kastelein, *De Bankenunie en het vertrouwen in een goede afwikkeling* (preadvies VvFR), Deventer: Kluwer 2014, p. 188.
[82] See the reaction of the Hazelhoff Centre for Financial Law of Leiden University during the consultation phase to the draft Bill of the Implementing Act, p. 4.

Another source for concern are uncertainties as to the relation between the 'regular supervisory tasks' and the tasks following from resolution. Questions have been asked whether or not there is a hierarchy between these tasks.[83]

Although the lack of an accompanying European deposit insurance and resolution in the Union is criticized,[84] in general reactions in the Netherlands on the Regulation establishing the SRM are rather positive.[85] It is deemed to be a *conditio sine qua non* for a proper Banking Union[86] and regarded to fit within the legal framework set by the Treaties. Article 114 TFEU is deemed to be an appropriate and sufficient legal basis by the Dutch government,[87] although in some instances the limits are approached. However, the proof is in the eating: the application of the mechanism will show whether frictions with Union law will appear. In particular, the respect of the general principle of the right of property (Art. 17 EU Charter of Fundamental Rights (hereafter: Charter)) with regard to the principle of no-creditor-worse-off (Art. 15 (1) (g) of the SRM Regulation) has been mentioned by Drijber[88] as a possible cause of difficult legal questions to be solved by the Single Resolution Board (SRB) and the Commission and ultimately the courts.

A similar issue with regard to the right to property as laid down in Article 1 of Protocol no. 1 to the European Convention on Human Rights (ECHR) was discussed when the Dutch legislator introduced in 2012 the Act on Special Measures for Financial Corporations (Intervention Act)[89] which provides for intervention possibilities for the Dutch government of which some are comparable to the instruments introduced by the BRRD and SRM Regulation. [90] On the basis of the Intervention Act assets and liabilities of a bank can be transferred by a court order. Moreover, the Minister of Finance has the power to expropriate a bank. This power was used in 2013 to expropriate SNS Reaal N.V., a bank and insurance group that was considered systemically relevant within The Netherlands. The

[83] Within DNB the director responsible for resolution can push certain decisions and it is unclear whether or not this is a reflection of the situation in EU legislation. See the reaction of the Dutch Banking Association, footnote 3, p. 3.

[84] See Gros and Schoenmaker, 'European Deposit Insurance and Resolution in the Banking Union', *Journal of Common Market Studies* (2014) p. 529-546.

[85] The SRM Regulation fits the view of the Dutch cabinet for the banking sector. See Doc. *Second Chamber*, 2012-2013, n° 33732, no. 2 (Reaction of the Dutch cabinet to the Commission Proposal for a European resolution mechanism). And most contributions in the legal literature do mention the complexity of the SRM and stress the need for such a mechanism.

[86] See Hoeblal and Meijer Timmerman Thijssen, 'De vormgeving van het Single Resolution Mechanism: de introductie van een Single Resolution Board en nationale afwikkelingsautoriteiten', *Tijdschrift voor Financieel Recht* (2014) p. 500.

[87] See *Second Chamber*, 2012-2013, n° 33732, no. 2 (Reaction of the Dutch cabinet to the Commission Proposal for a European resolution mechanism). Drijber also finds Article 114 TFEU a correct and sufficient legal basis for the SRM Regulation. See Drijber, 'De Europese Bankenunie op weg naar voltooiing: het gemeenschappelijk afwikkelingsmechanisme', *SEW-Tijdschrift voor Europees en economisch recht* (2015) p. 223. Not everyone agrees though. It is mentioned that the suitability of Article 114 TFEU is not as evident as the European and Dutch legislator would like to make believe since the SRM Regulation does not apply in the whole of the internal market but only for the Eurozone. See Ter Kuile, 'Europese bankenresolutie (SRM). Institutionele perspectieven', *Nederlands Tijdschrift voor Europees Recht* (2015) p. 4.

[88] Ibid.

[89] Stb. 2012, 241.

[90] See Schild, 'De Interventiewet & het EVRM: een lastig huwelijk', *Ondernemingsrecht* 2012/3.

question was raised by Schild,[91] whether or not these competences would pass the fair balance test of the ECHR since the competences allow for a wide margin of discretion and these competences and resolution schemes rely on triggers that encompass open norms. It was mentioned that there should be a legal remedy for affected parties to challenge the expropriation compensation they are given because the absence of such a possibility of sufficient legal redress would not seem to be in conformity with ECHR standards.

On that basis the SRM Regulation could also give rise to legal problems. Whether this will be the case and in particular whether the applied measures are proportionate to the interference with the right of property, has to be determined in every single resolution case.[92]

It is to be noted that a difference exists between the approach under the Intervention Act and the approach under the SRM mechanism. Under the Intervention Act expropriated financiers are compensated for damages whereas the financiers under the SRM mechanism are compensated for a devaluation of the value of their assets.[93]

Dutch literature also discussed whether the Dutch Minister of Finance would retain the competence under the Intervention Act to nationalize an institution as the proposed Bill to implement the BRR Directive and SRM Regulation does not abolish the relevant provision. It is suggested that there is no need to abolish this competence, because when the SRM Regulation is applicable to the resolution, the competence to nationalize an institution could not be exercised by the Dutch government.[94] In the Bill to implement the BRRD and SRM the Dutch government explained why it would maintain the competence to nationalize. It considered the competence to be useful in an extreme emergency situation, although the government recognized that in practice the competence would not likely be exercised, as that would interfere with the useful effect of the SRM, which would be contrary to European law; the SRM takes precedence.[95] However, some stakeholders question whether the continuity of this power of the Minister of Finance is valid and permitted under the system of the SRM and express concerns since the conditions for expropriation under the BRRD are not reiterated for the expropriation competence of the Minister (in Art. 6:2 Dutch Financial Supervision Law (Wft)).[96] Drijber and Van Toor consider that the competence to nationalize could be used in a situation where the SRB does not take the necessary decisions or where the Fund is empty.[97]

As a final general remark it has to be emphasized that the prevention phase is an important (and perhaps the most important) element of the framework on recovery and resolution of banks laid down in the SRM regulation and the BRRD. The SRB has been given substantial

[91] Ibid.
[92] Drijber and Van Toor, n. 9 *supra*, p. 15.
[93] Ibid.
[94] See Busch, 'Blijft de Minister van Financiën bevoegd tot nationalisatie van systeembanken?', *Tijdschrift voor Financieel Recht* (2014) p. 493.
[95] Doc. Second Chamber 2014-2015 n° 34208, No. 3, p. 50.
[96] See the reaction of the Hazelhoff Centre for Financial Law of Leiden University during the consultation phase to the draft Bill of the Implementing Act, p. 6.
[97] Drijber and Van Toor, n. 9 *supra*.

powers when, establishing the resolution plans, it concludes that the institution is not resolvable and that it has not proposed sufficient measures to remove the hindrances to resolvability. In such a situation the SRB may instruct the national resolution authority to impose on the bank measures which interfere substantially with the operation of the bank or group of which it is a member.[98] Although the measures imposed need to be proportional to the hindrances to resolvability to be removed[99] and although the freedom of entrepreneurship (Art. 16 of the Charter) needs to be respected, the SRB has a large discretion to judge on the bank's situation and on the measures to be taken. It will be interesting to see how the SRB will apply its discretion. Assuming that a real bank resolution will remain a rare event but that every bank in the EU will face some *ex ante* measures, the system of checks and balances to ensure that the imposed measures are proportionate is more important for the day-to-day business of banks than the actual process of resolution.

Question 22: Division of Competences

With regard to the large number of actors – ECB, SRB, Commission, Council, national supervision and resolution authorities – concerns have been expressed whether their cooperation will result in swift decision-making and whether a high level of confidentiality during the process will be guaranteed. Although there is an understanding for the difficult process of the negotiation on the SRM, concerns have been expressed on the effectiveness of the SRM mechanism which seems strongly to depend on the successful and close cooperation between the different authorities.[100]

The division of competences between the Union institutions and the SRB on the one hand and the national authorities on the other has in the context of the SRM not been the subject of (many) specific comments in the Netherlands.[101] It is noted that the execution of the cooperation between these authorities will determine the functioning of the SRM.[102] As this division follows the division of competences in the SSM we refer to the comments made earlier in the report.

In the Netherlands, the Dutch Central Bank (DNB) is the national supervisory authority under the SSM, and the national resolution authority under the SRM. Within DNB, bank supervisors and resolution officers operate in separate departments with both their own executive director on board level.[103] This is in conformity with Article 3 (3) BRRD. However, Article 3 (4) imposes that an exchange of information between the supervisor and the resolution authority regarding the preparation, planning and application of resolution decisions needs to be secured. Anecdotal evidence suggests currently a rather free flow of information between the SSM and SRM departments within DNB.

[98] Art. 10 (11) of Reg. No. 806/2014.
[99] Art. 10 (10) and recital 46 of Reg. No. 806/2014.
[100] See Busch, 'Governance of the Single Resolution Mechanism', in: Busch and Ferranini, *European Banking Union* (Oxford: Oxford University Press 2015) p. 281-335.
[101] An exception is Ter Kuile, n. 88 *supra*. Other contributions are predominantly descriptive. See e.g. Hoeblal and Meijer Timmerman Thijssen, n. 87 *supra*.
[102] See Hoeblal and Meijer Timmerman Thijssen, n. 87 *supra*.
[103] See Doc. First Chamber 2015-2016, n° 34 208 C, p. 5.

For the division of competences between the different Union actors in the SRM we refer to question 26.

Question 26: Compatibility of SRB powers with limits on agency power

Decision making in the SRM has been regulated in a very complex manner. Different actors – ECB, SRB, Commission, Council [and national authorities] – play a role. In the literature it has been recognized that this complex organisation was necessary to comply with the so called "Meroni" case law of the CJEU.[104] However, the question has been raised which actor takes the substantive decision. The decisions of this actor have to be in conformity with the "Meroni" case law. The view is expressed that in reality it is the SRB which takes the substantive decisions as it is that agency which determines the parameters of the resolution. The interference of the Commission is only to approve that resolution. In Dutch administrative law the power to approve the decision of another body does not give the authorship of the decision to the approving body.[105]

When taking the view that in reality the SRB takes the fundamental decision, the question arises whether the SRB can be considered to operate within the boundaries of the "Meroni" case law. Drijber defends the view that such is the case as its powers are clearly defined in the SRM Regulation. The criteria and principles for resolution are in detail laid down which means that combined with the Commission's power to reject a resolution decision the discretionary room of manoeuvre of the SRB is limited in conformity with the "Meroni" principle.[106]

Question 27: Protection of rights of stakeholders

The *no creditor worse off* principle should prevent that the property rights of shareholders, creditors and other stakeholders are interfered with in a disproportionate manner, so that in principle Article 17 of the Charter and Article 1 of Protocol 1 ECHR would not be infringed. However, the application of this principle is not without problems. Unlike with regard to the Dutch Intervention Act, where shareholders and creditors lose their titles of property and claims, under the SRM their titles lose value of the titles and claims only, so that it will be unlikely that they will have a right to compensation. Another problem that is signalled is the application of the *no creditor worse off* principle in cross border situations, where insolvency laws of different (Member) States would be applicable which may differ in the ranking of claims.[107] Finally, the evaluation *ex post* of the activa and passiva of the bank can pose problems, especially where the future perspectives of the institution need to be taken into account.[108]

Question 30: Problems with regard to Intergovernmental Agreement on the transfer and mutualisation of contributions

[104] See Ter Kuile, n. 88 *supra*.
[105] Drijber, n. 88 *supra*, p. 226.
[106] Ibid.
[107] Cf. Art. 20 (9) of Regulation No. 806/2014.
[108] Cf. Art. 20 (6) of Regulation No. 806/2014. See Drijber and Van Toor, n. 9 *supra*.

The first question that has been discussed in Dutch literature is whether the Intergovernmental Agreement (hereafter "IGA") is in conformity with Union law or whether its subject matter lies within the competences of the Union and therefore should have been covered by the SRM-Regulation. Under Union law Member States are not allowed to conclude agreements among themselves on matters which the Union is competent to regulate. In the Dutch literature the first approach is defended by Drijber. He considers that the collection of levies for the Single Resolution Fund and the rules about the mutualisation of the contributions from the Fund to banks in resolution do not enter into the exclusive competences of the Union according to Article 3 TFEU, but into the shared competences referred to in Article 4 (2) a) TFEU. Moreover, he expresses doubt whether the obligation for banks to pay a levy to the Fund can be based on Union law as it is comparable to pay a tax levy, which belongs to the exclusive competence of the Member States. The case law on the lawfulness of levies under the common agricultural policy would not be applicable as resolution of banks is not part of a common policy of the Union.[109]

However, one can also express the view that the levies which enter into the Fund do not become public money, but remain private money as they can be considered as an insurance premium for the banks which have to contribute. The levy would not be a tax levy, but an insurance premium. The insurance would cover the risk for the bank to be declared bankrupt allowing it to continue its operations albeit in a reduced form and the risk that the financial system would be disrupted through the failure of another bank with adverse effect on every credit institution in the eurozone. In that view, Article 114 TFEU can be considered to be a valid legal basis to regulate the collection of the contributions and their mutualisation. Therefore, the IGA would be contrary to Union law.

This is the view of Fabbrini (at the time at Tilburg University), who questions the wisdom of the use of an IGA.[110] He considers that for the purpose of the Single Resolution Fund (SRF) the resort to an IGA is unwarranted and rests primarily on a misunderstanding of the legal possibilities of EU regulations. He disagrees with the idea that an EU Regulation cannot impose financial obligations upon Member States. He warns against accepting Germany's argument that the Union is not allowed to collect bank levies because that would chip away at the competence that the Union has to impose obligations on the Member States or private parties.[111] Furthermore Fabbrini is of the opinion that the resort to an IGA could open an undesirable gateway to future legal challenges before Member States' courts on the constitutionality of the agreement.[112]

Another question is whether in the legal construction of a Regulation and an IGA the obligation to contribute to the Fund is an obligation under Union law or an obligation under the law of the Member State where the bank is established. On the one hand, Articles 70 and 71 of the SRM Regulation stipulate that ex ante respectively ex post contributions "shall be raised … of all of the institutions authorised in all of the territories of the participating

[109] Drijber, n. 88 *supra,* p. 224.
[110] See Fabbrini, 'On banks, courts and international law: the intergovernmental agreement on the single resolution fund in context', *Maastricht journal of European and comparative law* (2014) p. 444-575.
[111] Ibid*.,* p. 453-456.
[112] Ibid., p. 446 and 456-462.

Member States". This can be interpreted as the imposition of an obligation on those institutions. On the other hand, the provision could also be interpreted as an obligation for the participating Member States to provide in their national law for an obligation to contribute. This interpretation could be corroborated by Article 3 of the IGA determining the commitment of the participating Member States to transfer to the Fund "the contributions that they raise from the institutions authorised in each of their territories by virtue of Articles 69 and 70 [meant is Articles 70 and 71] of the SRM Regulation". The latter interpretation seems to be the less likely one as it raises the question what will be the legal situation after the lapse of the transitional period when the IGA would no longer apply.

Question 32: Judicial protection

According to the Dutch government the system of judicial protection is fundamentally clear. Decisions of the SRB can be challenged before the EU courts, eventually after an appeal to the Board of Appeal in the indicated cases.[113] For decisions of national resolution authorities – the Dutch Central Bank (DNB) and the Authority for the Financial Markets (AFM) – and of the appointed special manager[114] an appeal is possible before the national administrative courts, the Tribunal of Rotterdam and in appeal the *College van beroep voor het bedrijfsleven* (*CBb*, the highest administrative court for economic matters), after having introduced an internal appeal with the DNB respectively the AFM.[115]

However, although in the Dutch literature it has been recognised that this is in principle the correct way of judicial protection, some doubts are expressed and problems signalled.[116] The problem lies in the concurrence of the decisions of the SRB with regard to the resolution of an institution and those of the national resolution authorities implementing those decisions. More or less room of manoeuvre may be left to those authorities. Indeed, the instructions from the SRB to the national authorities may, and probably will, in principle, leave discretionary power to those authorities on certain aspects of the resolution, where national law has to be applied. However, it is also possible that such instructions are very precise and that national authorities have no other possibility than to apply the instructions without being able to decide themselves on the modalities. In the latter case, it seems that the two legal systems concur. For a concerned bank the question then rises which decision it can appeal. It seems that if the instructions are known to the bank, two ways of judicial protection (EU and national) are possible. On the one hand, under Article 263, 4th indent TFEU an appeal with the General Court is open against the SRB decision as the concerned bank is likely to be concerned directly and individually by that decision. On the other hand the decision of the national authority can be appealed under national administrative law. However, it may not be very clear whether a SRB decision leaves room for discretion to the national authority. Therefore, to be sure the concerned bank will have to launch two

[113] Art. 85 (3) SRM Regulation.
[114] Cf. Art. 23 para. 5 SRM Regulation.
[115] Doc. Second Chamber 2014-2015, n° 34208, No. 3, p. 31
[116] See the reaction of the Dutch Banking Association, p. 3.

appeals, one before the General Court against the SRB decision and one before the national judge against the decision of the national authorities.[117]

A particular point of attention is the urgency and speed of the procedure. The question is whether the General Court and the national courts are able to judge on an appeal within a short period of time. Resolution matters are extremely complicated and imply a large number of interests. It will not be easy for the judge to evaluate all aspects in such a period of time that the judicial protection is effective.[118] It will be a huge challenge for the courts to develop a procedure which guarantees a thorough and expedient examination of the most urgent questions raised and a sound decision making thereon. The SRM Regulation does not provide for any measure in that regard.

Within the Netherlands and under the current Intervention Act, court proceedings with regard to the legality of the expropriation are separated from court proceedings with regard to the amount – if any – to be paid for the expropriated assets. In order to stabilize a bank which is likely to fail and to avoid as much as possible uncertainty in the market, it is essential that some fundamental legal questions are answered by courts within a very short time frame. Such a fast-and-slow-track approach was actually tested within the Netherlands. An administrative court had to judge within a couple of weeks on the question whether the Minister of Finance was entitled to expropriate SNS Real NV. The answer was affirmative,[119] and the bank was recapitalized and restructured. The question whether any compensation is to be paid for the expropriated shares is still under judicial review in a separate and less urgent procedure.

In the Dutch Bill implementing the BRRD and the SRM a simplified appeal procedure and very short deadlines are laid down for the courts deciding on resolution decision of the DNB and AFM.[120] Internal appeal is not available for decisions to write down or convert capital instruments and for decisions within the resolution procedure. For those two categories of decisions appeal with the courts is only open in one instance, with the *College van beroep voor het bedrijfsleven (CBb)*. The appeal has to be introduced within 10 days and the judgment has to follow within 14 days thereafter.[121] Provisional measures to suspend the decisions are available, but the Bill states that suspension of decisions of the DNB within the resolution procedure is presumed to be against the public interest.[122] That presumption can be rebutted by the plaintiff. When annulling the decision the judge may declare that the effects of the decision are not affected, when this is necessary to protect the interests of *bona fide* third parties.[123] However, the Bill does not state that the judge needs to base its

[117] Drijber, n. 88 *supra*.
[118] Ibid.
[119] Raad van State, 25 februari 2013, ECLI:NL:RVS:2013:BZ2265 (https://www.raadvanstate.nl/uitspraken/zoeken-in-uitspraken/tekst-uitspraak.html?id=72876).
[120] Doc. Second Chamber 2014-2015, n° 34208, No. 3, p. 32
[121] The same as in the Intervention Act, see Art. 6:7 Dutch Financial Supervision Act.
[122] See Art. 85 (4) under b) and recital 90 of Directive 2014/59.
[123] See Art. 85 (4) of Directive 2014/59.

decision on the economic evaluation of the resolution authority while being allowed to examine the elements of proof which were used for such evaluation.[124]

As the Netherlands has not opted for the possibility offered by article 85 BRRD to provide for ex ante judicial review of a decision to take a crisis prevention measure or which concerns a crisis management measure, concerns were expressed with regard to the judicial protection offered to natural or legal persons, such as shareholders and creditors.[125] This choice of the Dutch legislator is however supported by e.g. the Hazelhoff Centre for Financial Law of Leiden since resolution decisions are not subject to ex-ante judicial approval either.[126] It is uncertain whether or not those persons would have access to a judicial review of resolution decisions on EU level.[127]

[124] Cf Art. 85 (3) and recital 89 of Directive 2014/59.
[125] The Dutch Bond of Shareholders is of the opinion that Article 67 par. 2 of the BRR Directive does not preclude an ex ante judicial review and right to be heard for the shareholders. See reaction of the VEB (Vereniging Effectenbezitters) during the consultation phase on the draft Bill of the Implementing Act.
[126] See the reactions during the consultation phase of the Hazelhoff Centre for Financial Law of Leiden University to the draft Bill of the Implementing Act.
[127] See Ter Kuile, n. 88 *supra*.