



BANCA D'ITALIA
EUROSISTEMA

Quaderni di Ricerca Giuridica

della Consulenza Legale

Judicial review in the Banking Union and
in the EU financial architecture

Conference jointly organized by Banca d'Italia and
the European Banking Institute

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SUMMARY

| | |
|---|----|
| Foreword – MARINO PERASSI | 5 |
| SABINO CASSESE – A European Administrative Justice? | 9 |
| 1 <i>Is there a supranational administrative justice?</i> | 11 |
| 2 <i>Courts or administrative tribunals?</i> | 13 |
| 3 <i>Joint decision-making and joint adjudication?</i> | 14 |
| 4 <i>Lessons from the national and from the global experience. Looking to the future</i> | 16 |
| SIR WILLIAM BLAIR, GRACE CHENG – The role of judicial review in the EU’s financial architecture and the development of alternative remedies: The experience of the Board of Appeal of the European Supervisory Authorities | 17 |
| 1 <i>Introduction</i> | 19 |
| 2 <i>The European Supervisory Authorities</i> | 19 |
| 3 <i>Changes to the EU’s financial architecture following the sovereign debt crisis</i> | 20 |
| 4 <i>The review of regulatory action – an overview</i> | 21 |
| 5 <i>Rights of review from decisions of the ESAs</i> | 22 |
| 6 <i>Procedure of the Board of Appeal</i> | 24 |
| 7 <i>Current developments</i> | 27 |
| 8 <i>Conclusion</i> | 27 |
| RENÉ SMITS – Interplay of administrative review and judicial protection in European prudential supervision. Some issues and concerns | 29 |
| 1 <i>Introduction: scope of the presentation</i> | 31 |
| 2 <i>Administrative review: contours, briefly</i> | 31 |
| 3 <i>Administrative review: issues, mainly</i> | 34 |
| 4 <i>Transparency: comparatively</i> | 35 |
| 5 <i>Subsequent cases at the European Courts</i> | 37 |
| 6 <i>L-Bank and Trasta judgments after administrative review</i> | 39 |

| | | |
|---|---|-----------|
| 7 | <i>Concluding remarks</i> | 46 |
| 8 | <i>Postscript</i> | 48 |
| | LUÍS SILVA MORAIS, LÚCIO TOMÉ FETEIRA – Judicial Review and the Banking Resolution Regime. The evolving landscape and future prospects..... | 53 |
| 1 | <i>Introduction</i> | 55 |
| 2 | <i>Resolution measures</i> | 57 |
| 3 | <i>Review of resolution measures by the AP of the SRB: some issues concerning the scope, nature and intensity of the review</i> | 60 |
| | 3.1 <i>Introduction</i> | 60 |
| | 3.2 <i>Scope of the review</i> | 62 |
| | 3.3 <i>Nature of the review</i> | 63 |
| | 3.4 <i>Intensity of the review (the review standard)</i> | 65 |
| 4 | <i>Review of resolution measures by NRAs (some brief notes)</i> | 67 |
| 5 | <i>Conclusion</i> | 69 |
| | MARCO VENTORUZZO – European Rules and Judicial Review in National Courts: Challenges and Questions..... | 71 |
| 1 | <i>Introduction</i> | 73 |
| 2 | <i>A Sketched Framework of Judicial Review</i> | 74 |
| 3 | <i>EU Rules in National Courts</i> | 76 |
| 4 | <i>Conclusions</i> | 78 |
| | CONCETTA BRESCIA MORRA - The Interplay between the ECB and NCAs in the “common procedures” under the SSM Regulation: are there gaps in legal protection? | 79 |
| 1 | <i>The judicial review of the decision taken within the SSM: division of competence between the CJEU and national courts</i> | 81 |
| 2 | <i>The Interplay between the ECB and NCAs in the “common procedures” under the SSM</i> | 84 |
| 3 | <i>The “common procedures” and the judicial review</i> | 86 |
| 4 | <i>Conclusions</i> | 93 |

FOREWORD

Marino Perassi

Among its institutional activities, the Legal Services Directorate of Banca d'Italia has an enduring commitment to promote scientific research and in-depth analysis on law topics of interest. The national supervisory authority is placed within the Eurosystem and the system of European regulators: the ESFS, the SSM and the SRM. It contributes to their functioning and fosters awareness of applicable rules and principles of the mechanisms.

A complex legal environment, as the European banking and financial architecture, poses challenges and requires constant dialogue among authorities, Courts, industry and scholars, both at national and supranational level.

The hosting of legal seminars, benefitting from the contribution of notable law experts, academics and officers, providing expertise and privileged insight, besides being an institutional task of the Banca d'Italia's Legal Services Directorate, is also a key tool to support a continuous exchange of views.

In the light of the above, in 2015 a round of conferences was dedicated to the main issues arising from the foundation of the European Banking Union and its substantive and procedural law (*i.e.*, the single rulebook and the supervisory and resolution pillars). The contributions have been published in this series of *Quaderni di ricerca giuridica* (issue n. 81).

An emerging consideration was that the scope for judicial review and the conditions and the form under which review is granted constitute a cornerstone for the functioning of the Banking Union and the EU financial architecture.

In this line, on 21 November 2017 the Banca d'Italia and the European Banking Institute¹, an international center for banking studies, jointly organized a conference focusing on such topic with the participation of highly regarded speakers holding academic roles at Italian and foreign universities and offices at Boards of review of European institutions and authorities.

The seminar was aimed at exploring a possible notion of European administrative justice and, within it, the interplay between judicial review, both before the European and national Courts, and alternative remedies (typically administrative reviews) to duly protect interests which come at play when supervisory and resolution actions are taken.

As regards administrative review, the relevant tasks in the financial field are allocated on the Board of Appeal of the European Supervisory Authorities, the Administrative Board of Review of the European Central Bank and the Appeal Panel of the Single Resolution Board. Then it was crucial to investigate the relationship between such bodies and the authorities subject to their review, the type of decisions they may review and the legal effects of the assessment, also in the perspective of subsequent judicial action, if any.

¹ European Banking Institute – EBI; <https://ebi-europa.eu/>

The landscape of administrative review boards is a quite composite and diverse environment. By way of example, review panels are differentiated by reference to the scope of the scrutiny (i.e. type of decisions), the nature and the standards of review (whether it is limited to the legality of the decision or extended to the merit), as well as to the legal effects of review acts (whether binding or not).

In general terms, administrative review by an independent respected body complying with due process rules inheres to the coherent application of EU regulatory framework and to the accountability of the authorities whose decisions may be reviewed. It may also pave the way for judicial proceeding, should the decision under review be subsequently challenged before a Court.

However, along with such desirable advantages, the administrative review regime sometimes shows margin for improvement: that is the case of further transparency for opinions of the Board of review of the European Central Bank.

Judicial review on its turn should target equal treatment of analogous situation, that is sometimes not facilitated by the quite fragmented set of rules, standards and guidelines to which judges must resort. Also the technical fashion in which rules are drafted is often a significant obstacle for Courts. In such a context national judges are often encouraged to look beyond boundaries and embrace a comparative approach.

On a separate note, the allocation of judicial review also reflects the functional integration between national and European authorities. Clear examples are those supervisory procedures which are jointly conducted by such authorities. Being the final decision resulting from the combination of their assessments a decision taken by a European institution, its review falls within the exclusive competence of the European Courts. This is the case of the so called common procedures in the SSM under article 4.1(a) and (c) of Council Regulation (EU) No 1024/2013 of 15 October 2013.

The new European financial architecture and the Banking Union are based upon a set of rules which appear to be a novelty in the EU law and the initial approach to this complex system is challenging. The guidance of Courts' leading cases comes necessarily after a while and at present the fundamental value of judicial review is still incomplete due to the limited number of decisions.

Moreover, the administrative alternative remedies still need to be tested in the medium term and the ECB's Administrative Board of Review mechanism probably needs some adjustments.

However, some initial steps forward have been taken. The mechanism aimed at ensuring the review of supervisory measures is in place and the process of judicial review is developing.

Despite its complexity, the coexistence of European and national judicial systems ensure the right to a review of decisions taken by supervisory authorities by independent Courts at any level. The forthcoming jurisprudence of the European Court of Justice shall contribute to the foreseeability of the competence to adjudicate on a disputed matter in the field of the Banking Union.

A EUROPEAN ADMINISTRATIVE JUSTICE?*

Sabino Cassese

1. Is there a supranational administrative justice? – 2. Courts or administrative tribunals? – 3. Joint decision-making and joint adjudication? – 4. Lessons from the national and from the global experience. Looking to the future

* Opening remarks for the Conference jointly organized by Banca d'Italia and the European Banking Institute on "Judicial Review in the Banking Union and in the EU Financial Architecture", Rome, Italy, 21 November 2017. I wish to thank Edoardo Chiti, Maria Rita Circi, Andrea Magliari, Barbara Marchetti, and Marino Perassi for their comments on a previous version of this paper.

1. *Is there a supranational administrative justice?*

At the European level, three new adjudicatory bodies have been established in the last seven years: the Board of Appeal of the European Supervisory Authorities¹, the Administrative Board of Review of the European Central Bank,² and the Appeal Panel of the Single Resolution Board. These bodies are additional with respect to other review or appeal bodies within the Office for Harmonization in the Internal Market (OHIM), the Community Plant Variety Office (CPVO), the European Chemicals Agency (ECHA), the European Aviation Safety Agency (EASA), and the Agency for the Cooperation of Energy Regulators (ACER).³

Many questions arise from this new development, questions that relate to two major problems: do these bodies belong to the executive branch or to the judiciary? What is their role within the executive or the judicial branches of the Union, and how do they adapt to the Union's composite structure?

My purpose is to state the problems that have arisen and to introduce the discussion. I shall proceed as follows. I shall first discuss the regulations that shape these new bodies, and then examine their nature and function and what is their role within the composite structure of the European Union. Finally, I will consider the lessons that may be learned from the national and the global experiences in this area, and draw conclusions for the future.

What are the rules common to these new adjudicatory bodies?

First, they “act independently” and are endowed with “independence and impartiality”⁴, but they are an extension of the authority that they supervise, because their members are appointed by the Boards of these authorities⁵ and their secretariats are supported by the staff of these same authorities.

Second, all natural and legal persons (as established by Article 263 TFEU) have access to the adjudicatory bodies⁶, but appeals can only be made against certain decisions of the authorities⁷.

¹ See M. LAMANDINI, *The ESA's Board of Appeal as a Blueprint for the Quasi-Judicial Review of European Financial Supervision*, in « European Company Law », 2014, n. 6, pp. 290-294.

² See C. BRESCIA MORRA, *The Administrative and Judicial Review of Decisions of the ECB in the Supervisory Field*, in “Banca d'Italia, *Scritti sull'Unione bancaria*, Quaderni di ricerca giuridica”, n. 81, 2016, pp. 109-135.

³ On these bodies, see A. MAGLIARI, *I rimedi amministrativi nel settore della vigilanza finanziaria europea. Modelli a confronto*, in “Rivista italiana di diritto pubblico comunitario”, 2016, n. 5, pp. 1331-1337 and B. MARCHETTI (ed.), *Administrative Remedies in the European Union. The Emergence of a Quasi-Judicial Administration*, Torino, Giappichelli, 2017.

⁴ Reg. 1093, 1094, 1095/10, Article 59; Reg. 1024/13, Article 24(4); Reg. 806/14, Article 85(5). From now on, the articles of the regulations of 2010, 2013 and 2014 will be quoted in the same order, without reference to the three regulations.

⁵ Article 58; Article 24(2); Article 85(2).

⁶ Article 60(1); Article 24(5); Article 85(3) (the first and the third regulation also include the competent authorities among the appellants)

⁷ Article 60 (and 17 – 19), Article 24(1) and 5; Article 85(3). See A. WITTE, *Standing and Judicial Review in the New EU Financial Markets Architecture*, in “Journal of Financial Regulation”, 2015, 1, 226–262.

Third, their review is subject to time limits, as it must be concluded in two months before the first two bodies, and in one month before the third one⁸. Their reviewing function is also subject to certain standards, as the exercise of power challenged must be checked either in terms of its “legality”, or of its “procedural and substantive conformity with the regulation”⁹. Therefore, the scope and intensity of review are limited, as appropriateness and necessity cannot be checked. The reason for this is to leave only administrative decisions open to review, and not policy decisions. Consequently, judicial activism seems to be inadmissible.

Fourth, the legal effects of the decisions of the reviewing bodies are not very clear. The Board of Appeal of the supervisory authorities provides “expert legal advice”, but “the body of the Authority shall be bound by the decision of the Board of Appeal” and “shall adopt an amended decision”¹⁰. Similar provisions are established for the Appeal Panel of the Single Resolution Board¹¹. The decisions (“opinions”) of the Administrative Board of Review of the European Central Bank are consultative, and not determinative, as they are not binding upon the Governing Council, nor upon the Supervisory Board of the European Central Bank¹². Therefore, the reviewing bodies do not have the final word, either because a new decision must be taken by the administrative authority, or because the administrative authority is not bound by the adjudicatory decision.

Within this framework the Administrative Board of Review of the European Central Bank has a special status. This body can only remit the case to the Supervisory Board for it to prepare a new draft decision. This last body must take into account the opinion of the Board and submit the draft decision to the Governing Council. The opinion of the Board cannot be appealed to the European Court of Justice, while such an appeal is available for decisions of the European Central Bank (therefore, without having first exhausted administrative remedies). On the other hand, the rules on standing are similar to those of the European Court of Justice; the Board’s assessment is limited to the examination of the questions raised by the applicant; the types of evidence that can be brought before the Board are those typical of judicial proceedings; and the decision of the Board must provide reasons. Therefore, while the proceedings are internal and comparable to an administrative procedure of “notice and comment”, they have many of the features of a review process. This is not only a “convoluted procedure”¹³, but also

⁸ Article 60(3); Article 24(7); Article 85(4).

⁹ Article 58(1); Article 24(1); Article 85(2).

¹⁰ Article 58 and Article 60(5).

¹¹ Article 85(2) and 8.

¹² Article 24(7). See General Court of the European Union, T-122/15 *Landeskreditbank*, according to which the Board takes a decision that is a “proposal”. On this decision, see A. MAGLIARI, *Il sistema di ripartizione delle competenze all’interno del Single Supervisory Mechanism: una questione di “significatività”*. *Considerazioni critiche a margine della sentenza Landeskreditbank Baden-Württemberg c. BCE*, in “Rivista di diritto bancario”, 2017, n. 9, pp. 1-20 (offprint).

¹³ C. HARLOW and R. RAWLINGS, *Process ad Procedure in EU Administration*, Oxford and Portland, Hart, 2014, p. 294.

a peculiar case of hybridization between different approaches to administrative justice, due to the impossibility for the new body, which was not established by the Treaty, to issue opinions that are binding on the Governing Council¹⁴. The precedent of the French “*Conseil d’État*”, which had a similar role for 72 years (“*justice retenue*”), before developing, in 1872, into a full judicial body (“*justice déléguée*”) may suggest how this body could evolve in the future.

Finally, against the decision of the reviewing body, a right of appeal to the European Court of Justice is provided. The three regulations introduce different norms to regulate the prior exhaustion of internal remedies and the subjects entitled to appeal.¹⁵

To date, not many cases have been brought before the three reviewing bodies: one every year, from 2013 to 2017, before the Board of Appeal of the European Supervisory Authorities; 14 in 2016 and 34 in 2017 before the Appeal Panel of the Single Resolution Board. To the Administrative Board of Review of the European Central Bank 20 cases have been brought: 4 in 2014, 8 in 2015, and 8 in 2016.¹⁶

2. *Courts or administrative tribunals?*

Jean-Paul Redouin, the Chair of the Administrative Board of Review of the European Central Bank, has written that “we are not an advisor to the Governing Council. But we are not a judge either”.¹⁷ The same may be true for the two other bodies.

If they are neither advisory administrative bodies nor courts, they can only be considered to be administrative tribunals, as the approximately 100 British quasi-judicial bodies that act in areas ranging from social security benefits, health, education, tax, agriculture, land disputes, immigration, rents, and the like, handling around 300,000 cases per year.

In fact, the supranational reviewing bodies share many features with British administrative tribunals (at least as they were before 2007). Tribunals

¹⁴ The case is analysed well by M. CLARICH, *Il riesame amministrativo delle decisioni della Banca centrale europea*, in “*Rivista italiana di diritto pubblico comunitario*”, 2015, n. 6, pp. 1513-1527 and by C. BRESCIA MORRA, *The Administrative and Judicial Review of Decisions of the ECB in the Supervisory Field*, *op. cit.*.

¹⁵ Article 61(1); Article 24(11); Article 86(1).

¹⁶ *ECB Annual Report on supervisory activities 2016* (see: <https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssmar2016.en.pdf?18a802a965e19df5821f74240486250e>, p.56). See also C. BRESCIA MORRA, R. SMITS, A. MAGLIARI, *The Administrative Board of Review of the European Central Bank: Experience After 2 Years*, in “*European Business Organization Law Review*”, 2017, 18, pp. 567-589.

¹⁷ See the ECB’s website: <https://www.ecb.europa.eu/>.

are considered a “patchwork quilt”,¹⁸ and supranational quasi-judicial bodies are developing in the same random and haphazard way. Like tribunals, the three supranational bodies are extensions of administrative departments. Their jurisdiction is limited in scope, compared to courts of general jurisdiction, as they can address only financial matters. Like tribunals, they are not uniform and do not have standard procedures. They rely heavily, like tribunals, upon the specialist expertise of their members, and are therefore constituted by non-judicial members who are experts in the relevant field. Like tribunals, they follow a more inquisitorial and investigatory approach, rather than the traditional adversarial form of justice. They are either advisory or determinative, but in any case they do not have the final word. They enjoy more flexibility than courts and they are less formal.

The growth of such administrative tribunals in the European space raises two fundamental questions. First: are there now two complementary justice systems, like the French or the Italian “dualité de juridictions”, one civil and criminal, and the other administrative? It is true that decisions of the European tribunals can be appealed to the European Court of Justice, as the decisions of UK tribunals can be appealed to the Court of Appeal (provided that permission to appeal is granted by the Upper Tribunal). However, this also occurs in the French and in the Italian dualist systems, where the decisions of the “Conseil d’État” and of the “Consiglio di Stato” can be appealed to the “Tribunal des Conflits” and to the “Corte di Cassazione” respectively.

Second, in 2007 the United Kingdom’s administrative tribunals underwent a “quiet revolution”, being unified into the Courts and Tribunals Service. This Service, led by the Senior President of Tribunals, has more independence from the sponsoring department, more links with the judiciary, and a two-tier system of bodies. Should we expect a similar reform to occur soon at the European level?

3. *Joint decision-making and joint adjudication?*

I shall now turn to a second set of problems: how is quasi-judicial review arranged in a composite system that is national and supranational, where supranational bodies are composed of national representatives, and where decision-making processes are joint decision-making processes? Can there be “Politikverflechtung” yet no joint adjudication? How are interconnections between national and supranational reviewing bodies established, and how are they regulated? Can judicial review avoid replicating the interconnections between the different legal orders?

¹⁸ E. RYDER, *Improving the Delivery of Justice in the Shadow of Magna Carta*, in J. Cooper (ed.), *Being a Judge in the Modern World*, Oxford, Oxford University Press, 2017, p. 125. In the same book, see also J. COOPER, *The New World of Tribunals. A Quiet Revolution*, p. 83 and R. CARNWATH, *Reflections on the Tribunal Reform Project*, p. 107. For the history of the British tribunals, see S. CASSESE, *Il privato e il procedimento amministrativo. Un’analisi della legislazione e della giurisprudenza*, in “Archivio giuridico”, 1970, n. 1-2, pp. 25-188. For their reform, M. MACCHIA, *La riforma degli Administrative Tribunals nel Regno Unito*, in “Rivista trimestrale di diritto pubblico”, 2009, n. 1, p. 209 ff.

Both the European banking system and the European system of finance supervisors are very intricate. Heading the first is the European Central Bank. This is a binary institution that includes the Eurosystem, for monetary policy, and the Banking supervision, which has supervisory tasks. The Administrative Board of Review has jurisdiction only over the second part of the system, not on the first. Both the Governing Council and the Supervisory Board include the heads of the competent national public authorities.¹⁹ The same is true for the financial supervisory authorities. The Single Resolution Board is composed of “a member appointed by each participating Member State, representing their national resolution authorities”²⁰(however, only the Chair and the four full-time members may take a decision on a cross-border group, if all of the members are unable to reach a decision by consensus).²¹ The Single Supervisory Mechanism is “composed of the European Central Bank and of the national competent authorities”.²²

As in many other European institutions (in areas such as food safety, electricity and gas, and policing), the governing bodies of the banking system and of the financial system are a mixture of unity and particularism, uniformity and diversity, in which bodies are compound and multilayered and powers are shared along different lines (allocation – control – implementation – secondary implementation), to run common affairs, ensuring diversity and communication among subordinate legal orders²³. Words such as “system” and “mechanism” are used by European law to mean a multiplicity of bodies arranged in a polyarchic, non-hierarchical frame, with much overlapping between purely European, multinational, intergovernmental and inter-bureaucratic elements, with joint decision-making procedures (as national and European bodies intervene in the proceedings, which are subject to European law).

With such complex administrative systems, can there be separate reviewing bodies and procedures? As judicial and quasi-judicial systems are necessarily separate, only time will tell where the balance will be established between the national and the supranational levels and how much unity there will be among the reviewing systems. At the present stage of development, many questions remain. Will remedies remain mainly national? Could a case be brought to both national and supranational reviewing bodies, and which of these will decide conflicting decisions? Will different judges safeguard the same fundamental rights? What about rights that are safeguarded at the European level but not in national legal orders, such as the right to good administration? What about those cases in which the European Central Bank must also comply with national law? What will the role of the European Court of Justice be in areas where administrative

¹⁹ Article 6 and Article 40(1).

²⁰ Article 43(1).

²¹ Article 55 of Reg. 806/2014.

²² Article 6(1).

²³ S. CASSESE, *Che tipo di potere pubblico è l'Unione Europea?*, in *Id., Lo spazio giuridico globale*, Rome – Bari, Laterza, 2003, p. 68.

tribunals are competent: that of an appellate court, or that of a constitutional court? In such a context, will there be more room for “jus inventum”, side-by-side with “jus positum”?

4. Lessons from the national and global experiences. Looking to the future

Will administrative justice develop beyond the State in the same directions as it did within national governments, and as it is developing in the global space?

In national legal systems, administrative justice has developed along two different paths. In monist systems like the UK, it took a long time to establish specialized courts to review administrative decisions and to recognize that tribunals are quasi-judicial bodies. In dualist systems, such as France or Italy, it took a long time for the administrative reviewing bodies (once merely advisory institutions) to approximate the role of courts. In both judicial systems, purely internal review is disappearing everywhere, under the combined pressure of the development of administrative procedure acts (in the United States, the “hearing officer” has become the “administrative law judge”) and of the expansion of judicial review. These pressures act from the inside and from the outside, and reduce the space for review occurring purely at the internal level.

In the global space, the judicial branch is underdeveloped: there are 2,000 global regulatory regimes, but only 120 courts, few of which have a two-tier system. Therefore, quasi-judicial reviewing bodies, such as the World Bank Inspection Panel or the Aarhus Convention Compliance Committee, play an important role.

There are three possible future paths for the three European reviewing bodies. One is that they take a step back and become simple internal control bodies, holding a merely advisory role. Another is that they develop into administrative judges, thus introducing a dualist judicial system (like the French and the Italian systems, where there are civil and administrative courts) into the European Union. Finally, they may become an additional court of first instance, alongside the General Court, thus following the example of the British monist system.

The three bodies face two important problems. One is the question of asymmetries. Different types of scrutiny may pave the way to regulatory arbitrages for the regulating and the regulated parties (it should be noted that the European Regulations explicitly prohibit arbitrage). The first may try to resort to instruments that are currently subject to less control (for example, monetary policy instead of supervisory tasks). The second, to the reviewing body that is less “soft”.

Another problem is that of judicial dialogue. The need to cooperate is very strong, but still difficult, as judicial and quasi-judicial bodies are in principle independent, including among themselves. How can shared sovereignty and judicial independence be combined? In the end, will fundamental rights be safeguarded more, or will they be safeguarded less?

THE ROLE OF JUDICIAL REVIEW IN THE EU'S FINANCIAL ARCHITECTURE AND THE DEVELOPMENT OF ALTERNATIVE REMEDIES: THE EXPERIENCE OF THE BOARD OF APPEAL OF THE EUROPEAN SUPERVISORY AUTHORITIES*

Sir William Blair, Grace Cheng

1. Introduction – 2. The European Supervisory Authorities – 3. Changes to the EU's financial architecture following the sovereign debt crisis – 4. The review of regulatory action – an overview – 5. Rights of review from decisions of the ESAs – 6. Procedure of the Board of Appeal – 7. Current developments – 8. Conclusion

* This writing is based on the presentation delivered by Sir William Blair at the 'Judicial review in the Banking Union and in the EU financial architecture' conference, jointly organised by Banca d'Italia and the European Banking Institute at Centro Carlo Azeglio Ciampi per l'educazione monetaria e finanziaria, Rome, Italy, on 21 November 2017.

1. Introduction

As submitted in the course of this paper, whilst most decisions of financial regulators will not generally be in the nature of administrative decisions susceptible to judicial review, there are decisions in respect of which a right of review may be appropriate and important. In the European Union (EU) context, a challenge to decisions of national regulators may take place before national courts or tribunals. In the case of EU financial regulatory bodies with direct supervisory powers, a specific right of review must be found in the relevant regulation or directive, or in the jurisprudence of the Court of Justice of the European Union (CJEU). However, an independent right of review has been provided for in the EU architecture to boards or panels that are required independently to appraise decisions. Specialist bodies have real advantages in this often technical area, and (it is submitted) can play a useful role in developing a coherent system of financial regulation throughout the EU. This paper treats the subject from the perspective of the Board of Appeal of the European Supervisory Authorities (ESAs).

The background to the setting up of the Board of Appeal is as follows. Prior to the global financial crisis of 2007-2008, the implementation of financial regulation in the EU was largely within the remit of national regulatory authorities, despite the content of such financial regulation being primarily a matter of EU law. In the wake of the financial crisis, the EU decided to overhaul its system of financial regulation, following the recommendations in the de Larosière report on Financial Supervision in the EU published in 2009.¹ This led to the creation of the ESAs and the European Systemic Risk Board (ESRB), as part of the European System of Financial Supervision (ESFS) which was conceived as a decentralised, multi-layered system of micro and macro prudential authorities established by the European institutions to ensure consistent and coherent financial supervision in the EU. Although the direct powers of the ESAs are relatively limited, their establishment was seen as the foundation of an EU system of financial regulation and supervision. This has since been enhanced by the European Commission's (EC) proposals in September 2017 to strengthen the ESAs to pave the way for further financial integration in the EU and a full Capital Markets Union.²

2. The European Supervisory Authorities

The ESAs were established in 2011 and consist of three entities, namely the European Banking Authority (EBA) which is presently based in London but will soon move to Paris, the European Insurance and Occupational Pensions

¹ The High-Level Group on Financial Supervision in the EU Report, chaired by M. Jacques de Larosière (Brussels, 25 February 2009), available at http://ec.europa.eu/internal_market/finances/docs/de_larosiere_report_en.pdf (accessed on 8 March 2018).

² Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions: Reinforcing integrated supervision to strengthen Capital Markets Union and financial integration in a changing environment (Brussels, 20 September 2017), COM(2017) 542 final, available at http://ec.europa.eu/finance/docs/law/170920-communication-esas_en.pdf (accessed on 8 March 2018).

Authority (EIOPA) which is based in Frankfurt, and the European Securities and Markets Authority (ESMA) which is also based in Paris.

The mandate of the ESAs is to contribute to solve cross-border problems, promote supervisory convergence, and to develop the Single Rulebook for financial regulation which was introduced when the EU overhauled its financial system, in line with global efforts and in response to the 2008 financial crisis. In addition, ESMA also has direct regulatory responsibilities for credit rating agencies and trade repositories³ which were previously outside the scope of formal financial regulation. No significant part of the financial sector had hitherto been supervised at the European level in this manner, but under the 2017 proposals, ESMA's powers in particular would grow.

The ESAs constitute an institutional cornerstone of the comprehensive financial regulation reform package and play an instrumental role in ensuring that financial markets across the EU are strong, stable and well regulated. Whilst national supervisory authorities remain responsible for supervising individual financial institutions, the objective of the ESAs is to improve the functioning of the internal market by ensuring that there is appropriate, efficient and harmonised European regulation and supervision in place. Such supervisory convergence will be increasingly important going forward in the context of the CMU.

3. Changes to the EU's financial architecture following the sovereign debt crisis

The Banking Union (BU) was established in 2012 as a response to the Eurozone crisis. In the banking field, it has brought about an important shift towards front-line regulation beyond what was originally contemplated by de Larosière, by transferring the responsibility for a significant part of banking supervision from the national level to the EU level. It is currently based on two pillars, namely the Single Supervisory Mechanism (SSM) which became fully operational on 4 November 2014, and the Single Resolution Mechanism (SRM) which entered into force on 1 January 2016.

The SSM is described in other papers, but in brief comprises the national supervisory authorities of the 'participating countries'⁴ and the European Central Bank (ECB). Its main aims are to increase financial integration and stability, and to ensure consistent supervision, as well as the safety and soundness of the European banking system. As an independent EU institution, the ECB plays a pivotal supervisory role therefore. Its core task is to oversee the supervision of those banks which are under its direct responsibility. At present, there are

³ E.g. DTCC Derivatives Repository Ltd.

⁴ This is a term used to refer to all countries in the euro area.

119 ‘significant’ banks under the ECB’s direct supervision which together hold almost 82% of all banking assets in the euro area.⁵

Again in brief, the SRM is a central institution for bank resolution in the EU and is tasked in respect of the orderly restructuring of a bank when the bank is failing or likely to fail.⁶ Its main objective is to ensure the orderly resolution of failing banks with minimal costs for taxpayers and to the broader economy. The SRM is formed of the national resolution authorities of the participating countries, together with the Single Resolution Board (SRB) which is a fully independent EU agency acting as the central resolution authority within the BU. The SRB’s main role is to ensure swift decision-making procedures to allow for the prompt resolution of a failing bank. It also manages the Single Resolution Fund (SRF) which is financed by the banking sector and which makes funds available for the payment of resolution measures.

4. The review of regulatory action – an overview

Regulatory action includes a wide range of matters within the particular expertise⁷ or day-to-day supervision of the regulator(s) which is outside the scope of any independent review. Certain kinds of regulatory action, however, may call for rights of review by the party adversely affected by the decision. As provided for in existing regulations, this includes the imposition of financial and other penalties, the withdrawal of authorisation which may effectively close a business, and issues relating to the access to documents.

To be effective, a review at the EU level must be sensitive to the needs of the regulatory system. At the same time, the review should provide the aggrieved party with confidence there will be an independent appraisal of the decision in question, and a remedy awarded against the regulator, if necessary.

The right of review does not necessarily mean that it will be taken up. Experience has shown that regulated entities often prefer to reach a settlement with regulators, rather than pursue an appeal. In some jurisdictions, challenges by major institutions are rare. In the present context, Moody’s was fined €1.24 million by ESMA in June 2017 for two negligent breaches of the Credit Rating Agencies Regulation (CRAR). This is the largest fine imposed by ESMA to date. Moody’s did not pursue an appeal despite having the right to do so.

⁵ European Central Bank – Banking Supervision, ‘Single Supervisory Mechanism’, available at <https://www.bankingsupervision.europa.eu/about/thessm/html/index.en.html>. A list of the 119 significant supervised entities (as of 5 December 2017) is available at https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.list_of_supervised_entities_201712.en.pdf (both accessed on 8 March 2018).

⁶ The European Central Bank plays a critical role in determining whether a bank is failing or likely to fail.

⁷ E.g. Capital requirements.

Instead, Moody's stated that it '*acknowledges ESMA's findings and is pleased that this matter is closed*'.⁸

In domestic systems, there may be a number of avenues by which a party may proceed with a right of review from the decision of a financial regulator, for example an appeal to a specialist tribunal, or to the domestic courts of the State. Either or both avenues may be available to an aggrieved party, depending on the jurisdiction in question. There is no uniformity internationally in this respect.

Taking the example of Germany, individual investigatory measures taken by the Federal Financial Supervisory Authority (Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin)) are generally subject to administrative and judicial review. A formal objection is filed by the aggrieved party which, if not addressed, may be challenged before the competent administrative court (Verwaltungsgericht). It seems that this is rare and does not generally happen in practice. Administrative fines may also be challenged. This is again done by filing a formal objection which unless remedied, may be referred to the public prosecutor and ultimately, to a criminal court.⁹

In the United States, the imposition of fines is a matter for the courts, whilst administrative proceedings can be initiated by the U.S. Securities and Exchange Commission (SEC). Administrative proceedings differ from civil court actions in that they are heard by an administrative law judge who is independent of the SEC. The judge will issue an initial decision containing a recommended sanction. This may be appealed to the SEC, and further appealed to the court.¹⁰ This system has recently been thrown into doubt, however, following the decision of the United States Court of Appeals, Tenth Circuit, in the case of *Bandimere v SEC*¹¹ in which it was decided that in-house administrative judges are not constitutionally appointed. The issue remains to be clarified pending the SEC's appeal of the decision to the U.S. Supreme Court.

5. Rights of review from decisions of the ESAs

In establishing the ESAs, provision was made in the founding Regulations¹² for a right of appeal against certain decisions of the ESAs to the Board of Appeal.

⁸ European Securities and Markets Authority – Press release, 'ESMA fines Moody's €1.24 million for credit ratings breaches' (1 June 2017), available at <https://www.esma.europa.eu/search/site/moody%27s> (accessed on 8 March 2018); Financial Times, 'EU regulator fines Moody's €1.24m for breaching credit rating rules' (1 June 2017).

⁹ Thomas KOPP and Valentin M PFISTERER (Cleary Gottlieb Steen & Hamilton LLP), 'Securities & Related Investigations – Germany', *Global Investigations Review – The law and practice of international investigations*, available at <https://globalinvestigationsreview.com/jurisdiction/1004757/germany> (accessed on 8 March 2018).

¹⁰ U.S. Securities and Exchange Commission, 'How Investigations Work', available at <https://www.sec.gov/enforce/how-investigations-work.html> (accessed on 8 March 2018).

¹¹ 844 F.3d 1168 (2016).

¹² The founding Regulations of each of the three ESAs are materially identical so far as they concern the Board of Appeal.

The Board of Appeal is a joint body of the ESAs and was introduced to provide effective protection of the rights of parties affected by certain decisions adopted by the ESAs.¹³ It comprises six members and six alternate members who have a proven track record of professional experience in the fields of banking, insurance, occupational pensions and securities markets or other financial services. Current staff of the national competent authorities, or other national, or EU institutions involved in the activities of the ESAs are not eligible for service. In 2012, Sir William Blair was elected as the first President and Professor Juan Fernández-Armesto as the first Vice-President.

In its proposal for the regulations, the EC explained that the appeal system would ensure that *‘any natural or legal person, including national supervisory authorities, may in [sic] first instance appeal to a Board of appeal against a decision by the ESAs to ensure the coherent application of Community rules (Article 9), action in emergency situations (Article 10), and the settlement of disagreements (Article 11)...’*¹⁴

There are multiple reasons why a right of appeal against certain decisions of the ESAs is desirable and necessary. First, some decisions made by the ESAs may have a direct effect on the rights including property rights of businesses and consumers. Second, an independent appeal process is integral to the accountability of any effective supervisory authority. Third, having a system whereby decisions of the ESAs may be appealed is an aspect of good governance. Fourth, the existence of an appeal mechanism can be seen as a useful tool in encouraging good decision making. For this reason, the frequency of appeals is not itself a useful barometer of the utility of the system.

The review model established in the case of the Board of Appeal is closely in line with other models already in place for EU agencies with widely differing roles. The body is a specialist tribunal whose members are appointed on the basis of their expertise in the field of finance and financial supervision. The right of appeal is enshrined in Article 60.1 of each of the founding Regulations.¹⁵

In principle, the Board of Appeal will decide an issue as to jurisdiction as a preliminary issue.¹⁶ However, since the direct regulatory powers of the ESAs are currently limited, the jurisdiction of the Board is similarly narrow in scope, with

¹³ European Securities and Markets Authority, ‘Board of Appeal’, available at <https://www.esma.europa.eu/about-esma/governance/board-appeal> (accessed on 8 March 2018).

¹⁴ Proposal for a Regulation of the European Parliament and of the Council establishing a European Securities and Markets Authority COM(2009) 503 final (Brussels, 23 September 2009), para 6.3.5, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52009PC0503> (accessed on 8 March 2018).

¹⁵ Regulation (EU) No 1093/2010 establishing the European Banking Authority, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32010R1093>; Regulation (EU) No 1094/2010 establishing the European Insurance and Occupational Pensions Authority, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32010R1094>; and Regulation (EU) No 1095/2010 establishing the European Securities and Markets Authority, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32010R1095> (all accessed on 8 March 2018).

¹⁶ Article 60.4 of the founding Regulations. See n15 above.

seven decisions handed down between 2013 and 2017.¹⁷ In the case of *SV Capital OÜ v European Banking Authority*¹⁸ in which an appeal from the General Court of the European Union was dismissed, it was confirmed that the Board of Appeal has no competence to consider an appeal by a private party against the refusal by the EBA to institute an ‘*own motion*’ investigation. At present, there are doubts as to which decisions form the subject of an appeal. This is not made clear in the founding Regulations and will need to be resolved in the jurisprudence of the CJEU over time. Although the CJEU took a relatively narrow view of the Board’s competency in the *SV Capital* case, the reasoning proceeded by analogy to the rules applicable to the justiciability of challenges to the refusal by the EC to commence investigations – there is no reason to suppose that the CJEU will take a narrow view of the powers of the Board of Appeal generally.

Decisions of the Board of Appeal may be challenged before the CJEU in accordance with article 263 of the Treaty on the Functioning of the European Union.¹⁹ Proceedings may also be brought before the CJEU in cases where there is no right of appeal to the Board of Appeal. Appeals go to the General Court of the European Union in the first instance. Where both the Board of Appeal and the CJEU have jurisdiction, it is not entirely clear whether a party must appeal to the Board of Appeal first, although there is commentary in support of this view,²⁰ and it is submitted that it is correct in principle. The expertise of the Board of Appeal should be recognised in the decision-making process even if the matter ultimately ends up going to the CJEU, given that the Board is particularly well suited to find facts and narrow the issues, thereby doing much to save time and expense in further hearings.

6. Procedure of the Board of Appeal

A right of appeal is only of value if the appeal body is independent in its decision making. Although the Board of Appeal forms part of the ESAs, its duty of independence and impartiality is expressly enshrined in article 59 of each of the founding Regulations.²¹ As explained above, there is also a right of appeal from the Board of Appeal to the CJEU which serves as a further guarantee of the Board of Appeal’s duty of independence.

Members of the Board of Appeal are precluded from taking part in any appeal proceedings in which they have any personal interest, or if they have previously been involved as representatives of one of the parties, or if they have

¹⁷ All of the decisions can be found on the European and Securities Markets Authority – ESMA Library, available at https://www.esma.europa.eu/databases-library/esma-library?f%5B0%5D=im_esma_sections%3A355 (accessed on 8 March 2018).

¹⁸ C-577/15, [2016] EUECJ C-577/15.

¹⁹ Article 61 of each of the founding Regulations. See n15 above.

²⁰ Miroslava SCHOLTEN and Michiel LUCHTMAN (eds), *Law enforcement by EU authorities: Implications for political and judicial accountability* (Edward Elgar Publishing Limited, 2017), p76.

²¹ See n15 above.

participated in the decision under appeal, but these are only examples. Conflicts may arise on other grounds – the issue is dependent on the particular facts.

Parties to the proceedings are notified of the composition of the Board of Appeal at the outset of the appeal process, and are entitled to challenge any member of the Board on conflict grounds. The members of the Board of Appeal are further required to make in writing each year a public declaration of commitment and a public declaration of interests, thereby undertaking to act independently and in the public interest.

Observing due process is an essential feature of the work of the Board of Appeal.²² This is established in the process set out in the founding Regulations²³ and in the Rules of Procedure.²⁴ All the usual principles apply throughout the conduct of the proceedings. Due process requires parties to have a proper opportunity to state their case, and sufficient time to do so. This has significance in interpreting and applying the time limit set out in article 60.2 of the founding Regulations. Experience has shown that transparency is a practical issue, and that it is often necessary to establish at the outset there can be no unilateral communication between any party and the Board of Appeal.

The Rules of Procedure adopted pursuant to the founding Regulations provide for the conduct of the appeal from the exchange of written materials between the parties, through to the Board of Appeal giving its decision. In practice, procedural directions are essential to enable the appeal process to run efficiently. Directions may be given by the full Board, or by the President on behalf of the Board, and may be made either on the application of one of the parties to the proceedings, or on the Board's own initiative.

The directions part of the appeal process is generally conducted by e-mail. There is no direct contact between the Board of Appeal and the parties, with all communication via the Secretariat of the Board. The Secretariat is provided through the Joint Committee of the ESAs, by rotation each year. In 2017, the Secretariat was provided by the EBA and in 2018, by the ESMA. Given the limited case load of the Board, a permanent secretariat is not required, and the founding Regulations provide for assistance via the Joint Committee. In the event an appeal is brought against the authority which provides the Secretariat in that year, the notice of appeal will be copied to the authority which provides the Secretariat for the following year, since no ESA can administer an appeal brought against its own acts.²⁵

²² For an analysis of the underlying legal issues in the Single Supervisory Mechanism context, see Marco LAMANDINI, David Ramos MUÑOZ, and Javier SOLANA Álvarez, 'Depicting the Limits to the SSM's Supervisory Powers: The Role of Constitutional Mandates and of Fundamental Rights' Protection', 79 *Quaderni di Ricerca Giuridica* (October 2015), pp1-119.

²³ Recital 51 in each of the founding Regulations. See n15 above.

²⁴ Available at https://eiopa.europa.eu/Publications/Administrative/boa_2012_002_-_rules_of_procedure_final.pdf (accessed on 8 March 2018).

²⁵ Article 4 of the Rules of Procedure, *ibid*.

Although an appeal does not have suspensive effect, the Board of Appeal may suspend the application of a decision if it considers that circumstances so require. This power has not been invoked to date.²⁶

In determining an appeal, the Board of Appeal is constituted by six members or alternate members, with two individuals from each of the ESAs, one of whom is usually the rapporteur. Under the founding Regulations, parties are entitled to make oral representations although, in practice, they have often been content to present their cases in writing. Hearings are held at the premises of the ESA that is providing the Secretariat (unless the appeal involves the ESA in question) and a transcript is taken by professional transcribers. If required, translation facilities are provided. To date, this has not proved to be necessary.²⁷

In general, an appeal will be brought in the language of the decision of the ESAs. To date, this has been the English language. In the case of *FinancialCraft Analytics Sp. z o.o. v European Securities and Markets Authority*,²⁸ the language of ESMA's decision was in English but the notice of appeal was submitted in the Polish language—though a departure from the norm, the appellant was fully within its rights to do so. The issue of language was the subject of discussions between the Board of Appeal and the parties through the Secretariat. Directions were given by which translations of documents submitted in Polish in respect of the original application to ESMA were to be used for the appeal, and the notice of appeal itself was sent to the Translation Centre for the Bodies of the European Union to be translated into English. This need for a translation led to a delay in the process of the appeal, but the case did show that language itself need not be a major issue if handled practically. Had the appeal gone to a hearing (it was decided on the papers) it may have been necessary to provide simultaneous translation, but again, that would have been the subject of discussion and appropriate directions.

Once the President considers the evidence to be complete, the parties are notified and the Board of Appeal commences its deliberation process. At that point in time, under the Board's Rules of Procedure, the appeal is lodged, and the appeal is to be decided within two months under Article 60.2 of the founding Regulations.²⁹

In reaching its decision, it does not appear that the Board of Appeal is restricted to reviewing the legality of the process by which the ESA in question reached its decision. The Board is constituted under the founding Regulations as

²⁶ As of the date this paper was written i.e. 8 March 2018.

²⁷ Ibid.

²⁸ BoA 2017 01, available at: https://www.esma.europa.eu/sites/default/files/library/boa_2017_01_financialcraft_analytics_sp_z_o_o_vs_esma_boa_decision.pdf (accessed on 8 March 2018).

²⁹ A reading of the founding Regulations that commences the two month period on the filing of the appeal at the relevant Authority risks jeopardising due process, or even causing an impossibility, as in the *FinancialCraft* appeal mentioned above, where the translation of the Notice of Appeal was received from the Translation Centre for the Bodies of the European Union more than two months from the filing of the appeal with ESMA. The Board of Appeal has recommended to the European Commission that the issue is, if necessary, clarified by an amendment to the Regulations.

a board of *appeal*, and this implies a review on the substance as well as the form of the decision in question (i.e. a merits appeal). Having said that, in accordance with widely recognised public law principles, the supervisory authority is accorded a “margin of appreciation” in its decision making, or to use the French term, “la marge d’appréciation”, signifying a margin of assessment, appraisal or estimation.

Deliberations are conducted in private. Once the Board of Appeal has reached its decision, this is sent by the Secretariat to the parties who have seven days to provide suggested corrections of any mistakes which are of a clerical nature only. The parties have no right to re-open any substantive arguments. It is important to note that under the terms of the founding Regulations, the decision of the Board of Appeal must be reasoned and made public.³⁰ This is done by posting the decision on the websites of the ESAs.

The Rules of Procedure also provide that the parties may request any information or document in connection with proceedings before the Board of Appeal to be treated with confidence.³¹ Such a request may be met by anonymising or redacting part of the decision.

7. Current developments

Each of the three ESAs — the European Banking Authority (EBA), the European Insurance and Occupational Pensions Authority (EIOPA) and the European Securities and Markets Authority (ESMA) — is seen to have played a valuable role since their establishment. Reform proposals published by the EC in September 2017³² are intended to strengthen the role of the ESAs in (among other things) promoting sustainable finance and FinTech, with ESMA given direct supervisory power in respect of certain benchmarks, prospectuses, and investment funds, and a greater role to play in co-ordinating market abuse investigations. Such proposals serve to improve the mandates, governance and funding of the ESAs, and mark a significant step towards a full Capital Markets Union and further integration of financial regulation and supervision at the EU level. It is therefore possible to envisage an increase in the work of the Board of Appeal over time.

8. Conclusion

The Administrative Board of Review of the ECB, the Appeal Panel of the Single Resolution Board, and the Board of Appeal of the ESAs all have distinct mandates. Yet they all share the common aim of providing an independent review of regulatory action in the field of EU financial supervision. These bodies have the advantage of expertise in a highly-specialised field, and can play an important

³⁰ Article 60.7 of each of the founding Regulations. See n15 above.

³¹ Article 26. See n24 above.

³² See n2 above.

role in developing practice and jurisprudence alongside national and EU courts. Their potential is to provide a means of dispute resolution which combines relative speed and procedural informality at a lower cost than court proceedings. An additional advantage is that even if the matter does eventually proceed further, the key issues will have been identified, and the court process thereby facilitated. It is to be expected these highly-specialised bodies will continue to play an integral role in further strengthening the integration of financial regulation and supervision in the European Union.

**INTERPLAY OF ADMINISTRATIVE REVIEW AND JUDICIAL
PROTECTION IN EUROPEAN PRUDENTIAL SUPERVISION.
SOME ISSUES AND CONCERNS***

René Smits

1. Introduction: scope of the presentation – 2. Administrative review: contours, briefly – 3. Administrative review: issues, mainly – 4. Transparency: comparatively – 5. Subsequent cases at the European Courts – 6. L-Bank and Trasta judgments after administrative review – 7. Concluding remarks – 8. Postscript

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1. *Introduction: scope of the presentation*

This paper provides a brief outline of the main contours of administrative review of prudential decisions of the European Central Bank (ECB) (section 2), a short discussion of the main issues facing the Administrative Board of Review (ABoR) of the ECB (section 3) and, before section 5 on the follow-up of cases before the European Courts, a section 4 on transparency in the SSM context. Of the cases before the Luxembourg courts, two stand out: *L-Bank* and *Trasta*. As ABoR's Vice-Chair, Professor Concetta Brescia Morra, goes deeper into one of the issues prominent in *Trasta*, this paper will present the *Trasta* case and focus on the issues in *L-Bank* (section 6). In its concluding remarks (section 7), I will make some proposals for the European legislator and the ECB to enhance the administrative review process and the interplay between administrative and judicial review. Developments after the presentation of this paper are briefly discussed in a postscript on the *Arkéa* and *Trasta* cases.

2. *Administrative review: contours, briefly*

Those who would like to see an ECB decision in the area of prudential supervision reviewed have two tracks to follow: to request administrative review and, thereafter, to challenge the resulting second decision by the ECB in court, or to go to court directly. Considerations of *costs* and *timing* may decide the route.

In a Guide to costs,¹ adopted on the basis of Article 23(2) ABoR Establishment Decision,² the ABoR set the *costs* at very low levels: €500 for natural persons, and €5,000 for legal persons. The Guide helpfully specifies that the latter cost applies to supervised entities and other legal persons such as associations of consumers or creditors.

The *timing* is set out in the SSM Regulation,³ which sets a two-month maximum limit for the ABoR to submit its Opinion to the Supervisory Board,⁴ and in the ABoR Establishment Decision, which gives the Supervisory Board ten or twenty working days after the receipt of the ABoR Opinion to submit a new decision to the Governing Council: ten days in the case of a draft decision of identical content and twenty days when the draft abrogates or amends the original decision.⁵

¹ *Guide to the costs of the review*, at: https://www.bankingsupervision.europa.eu/organisation/governance/shared/pdf/abor_cost_guide/guidecostsreview.en.pdf.

² Decision of the European Central Bank of 14 April 2014 concerning the establishment of an Administrative Board of Review and its Operating Rules (ECB/2014/16) (2014/360/EU): ABoR Establishment Decision, OJ L 175/47, 14 June 2014.

³ Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, OJ L 287/63, 29 October 2013.

⁴ Article 24(7) SSM Regulation. Two months are the limit: ABoR is to “express an opinion within a period appropriate to the urgency of the matter and no later than two months from the receipt of the request”.

⁵ Article 17(2) ABoR Establishment Decision.

Naturally, going against the supervisor in formal proceedings is a step not easily chosen. The supervisor will continue to oversee the business of the challenger, and may react by intensifying its supervision. A good relationship with the supervisor, which continues after settling the dispute at hand, may dispel banks to request administrative or judicial review of a decision they disagree with. It is, therefore, remarkable that there have been quite a number of review cases before the ABoR and before the General Court. Below, I will come back to the judicial challenges. Still, when set against the total number of supervisory decisions, the ‘review rate’ is very low, indeed. With the actual number of prudential decisions given in the Annual Report 2016 as 1,835, out of a total of 2,686 authorisation procedures,⁶ plus the many thousands⁷ fee decisions each year,⁸ one can calculate the review rate as follows: the number of review requests (8), divided by the number of supervisory decisions (1,835 + 3,099 = 4,934) = 0.16%, or one in every 617 decisions gets subject to ABoR review. That was for 2016; in 2017, the number of cases submitted to ABoR review dropped by 50% as ABoR had only 4 cases.

Administrative review may be fast, cheap and independent, but it does not amount to judicial scrutiny. ABoR proceedings are part of a second decision-making procedure at the ECB, and the Opinion of the Board will be known to the applicant⁹ and to the ECB but not to the outside world. Unless there is follow-up judicial review, in which case the General Court and, on appeal, the Court of Justice, will take cognizance of the ABoR Opinion. This opacity of ABoR’s contribution is an issue I will come back to.

Before a supervisory decision has been taken, the affected party will have been involved in discussions with the ECB. If the applicant for review is a significant institution, such discussions are a feature of on-going supervision. If review is requested by another applicant – say, a non-significant institution (withdrawal of the authorisation, refusal to accept new shareholders), or an intended board member (rejected as not fit and proper) – there will also have been prior exchanges with the ECB. Due process is required pursuant to the SSM Regulation,¹⁰ implying the right to be heard and the right of defence, including access to the ECB’s file. Reasoning (motivation) of prudential decisions is prescribed. The SSM Framework Regulation¹¹ sets out what this means for

⁶ *ECB Annual Report on supervisory activities 2016*, pages 53 and 35 (footnote 24).

⁷ One for each bank supervised in the Euro Area at the consolidated level, which numbered 3,099 as at end-2016; see Table 4 of the *ECB Annual Report on supervisory activities 2016*, page 35.

⁸ Which contain an ABoR and judicial review clause at the end; see for the 2017 sample fee notice: https://www.bankingsupervision.europa.eu/organisation/fees/notice/shared/pdf/fee_notice_templates/fee_notice_template_2017.en.pdf.

⁹ Article 18 ABoR Establishment Decision on notification of the Opinion adopted by ABoR, the new draft decision submitted by the Supervisory Board and the new decision adopted by the Governing Council.

¹⁰ Article 22 SSM Regulation.

¹¹ Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation) (ECB/2014/17), OJ L 141/1, 14 May 2014.

“ECB supervisory procedures”:¹² it extensively regulates the right to be heard (Article 31), access to the files (Article 32), motivation of ECB decisions (Article 33), and their notification (Article 34). Thus, a request for administrative review will normally see the applicant and the ECB engage, for a second time, in a hearing: before the ABoR.

A hearing is conducted in many ABoR review cases as it allows for a dialogue between the ECB staff responsible for the decision under challenge and the applicant, under guidance of the ABoR members. The term ‘members’ is core here: the Alternate members do not attend the hearing and do not take part in the deliberation phase of the proceedings. Once an Alternate has been called to sit in a case, he will, of course, attend the hearing and vote on the Opinion.

As described elsewhere,¹³ ABoR proceedings are divided in three phases: (a) the preparatory phase, which includes the assessment of the admissibility of the request; (b) the examination phase, which may also entail an oral hearing and the collection of the relevant evidence, and (c) the deliberative phase, ending with the adoption of the opinion and its submission to the Supervisory Board. Alternate members do not take part in the oral hearing and the subsequent deliberations and voting.

Upon receipt of the ABoR Opinion, the Supervisory Board is to propose a new decision to the Governing Council, after assessing the ABoR’s views but not limited to the grounds for review brought forward by the applicant: the Supervisory Board “may take other elements into account in its proposal for a new draft decision”.¹⁴ Such new elements may be particularly relevant when the situation of the bank has changed since the adoption of the ECB’s first decision, or new elements have surfaced that were unknown, or considered less relevant at the time the first ECB decision was taken. Suppose the bank has been put into resolution, or the seriousness of the issue has come to be seen under a different light: the Supervisory Board may then wish to reconsider its original decision even if ABoR did not find any fault with it, as taken at the time of its adoption.

Two elements of ABoR review stand out from this discussion: in its examination of a case, ABoR, unlike subsequently the Supervisory Board when assessing what second decision to propose, is bound to the grounds relied upon by the applicant in its notice of review.¹⁵ Also, as is usual in administrative review, the ABoR assesses the ECB’s “procedural and substantive conformity with [the SSM Regulation]”¹⁶ as matters stood when the ECB first acted (*ex tunc* review). Subsequent developments are irrelevant. Of course, the ABoR, being neither deaf

¹² Article 2(24) SSM Framework Regulation.

¹³ Concetta BRESCIA MORRA, René SMITS and Andrea MAGLIARI, *The Administrative Board of Review of the European Central Bank: experience after two years*, *European Business Organization Law Review*, at: <https://doi.org/10.1007/s40804-017-0081-3>.

¹⁴ Article 17(1) ABoR Establishment Decision.

¹⁵ Article 10(2) ABoR Establishment Decision.

¹⁶ Article 10(1) ABoR Establishment Decision.

nor blind, will see and hear what may have happened after the decision under review has been adopted. In salient cases, the ABoR might wish to consider whether it is wise to share its appreciation thereof with the Supervisory Board when presenting its Opinion. Usual practice has it that the Chair of ABoR presents the Opinion before the Supervisory Board at its meeting discussing the follow-up decision that the Supervisory Board wishes to propose to the Governing Council.

3. *Administrative review: issues, mainly*

Elsewhere,¹⁷ the issues the ABoR has faced have been extensively discussed. Suffice it here to cite from this contribution that they concern the ‘significance’ of a supervised entity; corporate governance; the outcome of the Supervisory Review & Evaluation Process (SREP),¹⁸ under which the competent authority reviews the arrangements, strategies, processes and mechanisms implemented by the supervised entity in order to comply with the requirements set out in the CRR¹⁹ and CRD IV²⁰ and, as a result, may impose higher capital and liquidity requirements than statutorily prescribed in view of the riskiness of a bank’s business, as well as other supervisory measures;²¹ the fit and proper (FAP) assessment of members of the management body;²² and withdrawals of the authorisation.²³ As stated before, authorisation²⁴ and withdrawal of authorisation are Euro Area-wide competences of the ECB in respect of all credit institutions, as is the assessment of acquisition of qualifying holdings.²⁵ Recently, sanctions have been added as an issue the ABoR has dealt with.

A recurring theme, for the SSM as a whole and the ABoR, is the reliance on national law. As long as prudential rules are not laid down exclusively in legal acts with direct effect, i.e. couched in EU regulations and European Banking Authority (EBA) and ECB implementation and guidance, this aspect of the SSM will continue to bother us. This would be less of a hindrance, if national law

¹⁷ See the joint article with Concetta BRESCIA MORRA and Andrea MAGLIARI in footnote 13 above.

¹⁸ Regulated in Articles 97-101 CRD IV.

¹⁹ Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012, OJ L 321/6, 30 November 2013.

²⁰ Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC, L 176/338, 27 June 2013.

²¹ See Articles. 102-104 CRD IV and Article 16(2) of the SSM Regulation.

²² For which Article 91 CRD IV provides the legal framework.

²³ Articles 18 and 67(2)(c) CRD IV, and Articles 80-84 SSM Framework Regulation.

²⁴ Articles 4(a) and 14 SSM Regulation and Articles 73-79 SSM Framework Regulation.

²⁵ Articles 4(c) and 15 SSM Regulation and Articles 85-88 SSM Framework Regulation.

faithfully and coherently implemented CRD IV but, alas, this is not the case.²⁶ Numerous are the issues of wide differences, in law and in practice, on such issues as FAP authorisations, governance and the treatment of bank holding companies. FAP assessments and bank holding supervision have been flagged as issues that need urgent legislative attention, even after the introduction of the CRD/CRR package.

4. *Transparency: comparatively*

In a recent paper for a conference in London,²⁷ I called for more transparency in the SSM and made a few suggestions on how to improve transparency of ABoR's functioning. My proposed improvements on this point followed the Commission's exhortations in its *SSM Review Report*:²⁸

“It would be useful to take advantage of the growing jurisprudence developed by the ABoR by ensuring more transparency over the work undertaken by the ABoR, for instance through publication on the ECB's website of summaries of ABoR decisions and with due observance of confidentiality rules.”

Without repeating here what I said in London, let me recall that there are two institutions that can enhance transparency: the ECB and the Court.

The ECB may permit the outcome of ABoR proceedings to become public:²⁹ the Governing Council may authorise the President of the ECB to make the outcome of ABoR proceedings public. Also, the ECB may amend the ABoR Establishment Decision as long as it remains within the confines of Article 24 SSM Regulation,³⁰ which is silent on publication of ABoR opinions. In the paper for the London conference, I proposed that the ECB may wish to give interim accounts of ABoR's work (not waiting for the annual report in which

²⁶ These discrepancies exist beyond the area of Options and Discretions (OND) which the ECB has vigorously addressed in its campaign to unify Euro Area prudential rules. See Regulation (EU) 2016/445 of the ECB of 14 March 2016 on the exercise of options and discretions available in Union law (ECB/2016/4), OJ L 78/60, 24 March 2016; Guideline (EU) 2017/697 of the ECB of 4 April 2017 on the exercise of options and discretions available in Union law by national competent authorities in relation to less significant institutions (ECB/2017/9), OJ L 101/156, 13 April 2017; and Recommendation of the ECB of 4 April 2017 on common specifications for the exercise of some options and discretions available in Union law by national competent authorities in relation to less significant institution (ECB/2017/10), OJ C 120/2, 13 April 2017.

²⁷ Reflections on Euro Area banking supervision: context, transparency, review and culture *A contribution to the conversation on the SSM after three years*, paper for the Conference The European Banking Union and its relationship with the law: reflections three years on, London (UK), 23 October 2017.

²⁸ *Report from the Commission to the European Parliament and the Council on the Single Supervisory Mechanism established pursuant to Regulation (EU) No 1024/2013*, {SWD(2017) 336 final}, Brussels, 11.10.2017, COM(2017) 591 final, page 5, at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017DC0591&from=EN>.

²⁹ Article 22(2) of Decision ECB/2014/16 of 14 April 2014 concerning the establishment of an Administrative Board of Review and its Operating Rules (2014/360/EU), OJ L 175/47, 14 June 2014 (ABoR Establishment Decision).

³⁰ Article 24(10) SSM Regulation instructs the ECB to adopt a decision with ABoR's operating rules.

1.5 page is devoted to ABoR) by giving quarterly statistics on the number of review requests and ABoR Opinions adopted, as well as the latter's nature, i.e. proposing abrogating the ECB's decision, its confirmation or its replacement with an amended decision³¹; whether suspension of the decision has been sought, and granted (or not); the subject matter of the contested issue (e.g., significance, SREP,³² FAP,³³ corporate governance). More is hardly possible without publishing confidential information, contrary to the injunctions of the ABoR Establishment Decision³⁴.

The place of the ABoR in the decision-making process at the ECB makes disclosure of the exact contents or a summary of its Opinions before the decision-making is complete awkward and, after the second decision, likely to influence possible follow-up proceedings in Luxembourg. After all, should ABoR have found no faults with the original decision, this would help the ECB and hinder the applicant while the reverse would be true if the ABoR had found that the decision needed to be abrogated or amended. The ABoR's Opinion is known to the Court, of course, so it is only the *public* disclosure that may have an incidence on the outcome.

This brings us to what the Court may do. The Court may divulge information on pending cases which includes the fact that these cases are post-ABoR proceedings, something that will be clear from the file. The file will contain the (second) ECB decision against which the applicant militates in court and the preceding ABoR opinion. Even if an applicant seeks redress in Luxembourg fighting the first ECB decision against which it also initiated administrative review, the Court will be aware of the on-going ABoR proceedings, albeit not in a position to divulge them. But for all 'regular' cases of going to Luxembourg via Frankfurt, the Court should feel free to include the existence of prior ABoR proceedings in the information it provides to the general public, even before the adoption of the judicial decision.³⁵ This falls short of presenting a summary but it makes life easier for those who would like to follow administrative review, and for ABoR members who seek to give information about the work they undertake. Therefore, I call on the Court to deliver us from darkness and add a qualification as <post-ABoR proceedings> to the summary of relevant cases on the Curia website and in the Official Journal. Where the ECB can't help, the Court should.

³¹ Article 16(2) ABoR Establishment Decision mentions three options for ABoR to propose to the Supervisory Board; the first decision may be "abrogated, replaced with a decision of identical content, or replaced with an emended one".

³² SREP: Supervisory Review and Evaluation Process: Articles 104-107 CRD IV, and Article 4(1)(f) SSM Regulation. See: <https://www.bankingsupervision.europa.eu/about/ssmexplained/html/srep.en.html>, and the *SSM SREP Methodology Booklet* at: https://www.bankingsupervision.europa.eu/ecb/pub/pdf/srep_methodology_booklet_2016.en.pdf?486e2833820b13c740ffb49a0ee57672.

³³ Fit And Proper assessments. See the ECB's *Guide to fit and proper assessments*, at: https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.fap_guide_201705.en.pdf.

³⁴ Article 22 ABoR Establishment Decision.

³⁵ That is, in the publication on the *Curia* website or the information published in the *Official Journal*.

5. *Subsequent cases at the European Courts*

What can one say now, based on public sources, on the follow-up cases of ABoR proceedings before the Courts in Luxembourg? Two cases can be identified as such: the *L-Bank* Case (T-122/15), that lead to ground-breaking findings on the attribution of competences within the SSM but which is subject to appeal, and the *Trasta* Case (T-698/16), on which more below as the Order of the General Court on the admissibility of shareholders is bound to attract the interest of the Commission and may be challenged by the ECB. (Developments since the presentation of this paper at the November 2017 Rome conference are discussed in the postscript at the end of this paper.)

Without disclosing confidential information, I can say that more cases pending in Luxembourg are familiar and not just because Federico Della Negra and I undertake an effort to make the case law on banking union transparent. We seek to provide a regular update of the list of cases published on the EBI website.³⁶ This list, originally made available in September 2017, has been updated in January 2018. The latest list includes over 100 cases against the Single Resolution Board (SRB) and/or the Commission and/or the ECB concerning the resolution of *Banco Popular* in Spain. As simply listing these cases hardly improves transparency, they are classified according to several attributes: the number of defendants (single, i.e., just the SRB or multiple, i.e., also the Commission and/or the ECB), the claims (requests to annul the resolution decision,³⁷ claims for damages³⁸, requests for a new calculation, and/or requests to declare provisions of the SRM Regulations inapplicable as incompatible with higher norms of EU law).³⁹

There are also cases pending at the European Courts that have not previously been before the ABoR. A number of cases are pending against the ECB on prudential issues: 18 as of 1 September 2017 among which there are four groups of connected cases: the French banking industry against the ECB on a particularly French issue (the prudential treatment of protected public savings accounts); *Crédit Agricole* challenging the ECB on governance issues; *Credit Mutuel Arkéa* challenging the ECB on governance⁴⁰, and the two *Trasta* cases⁴¹. Individual stand-alone cases concern a challenge by Mr. Silvio Berlusconi of the ECB's refusal to authorise a qualifying holding in *Banca Mediolanum* because of a tax fraud conviction⁴² in application of Articles 22 and 23 CRD IV; and a case on the ECB's withdrawal of the authorisation of a Maltese bank by the credit institution and its shareholders.⁴³ Since September 2017, a few cases have been initiated against the ECB, one of which comes within the purview of this

³⁶ See: <https://ebi-europa.eu/publications/eu-cases-or-jurisprudence/>.

³⁷ Article 263 TFEU.

³⁸ Article 340 TFEU.

³⁹ Article 277 TFEU.

⁴⁰ This case has led to a judgment of the General Court which is also discussed in the postscript.

⁴¹ See section 6 for a discussion of the case.

⁴² Case T-913/16 (*Fininvest and Berlusconi v ECB*).

⁴³ Case T-321/17 (*Niemelä e a. v ECB*).

paper as it concerns banking union.⁴⁴ It relates to an alleged failure to carry out supervisory duties in respect of *Banca di Credito Cooperativo di Frascati*, and a failure to instruct the *Banca d'Italia* to take certain measures. The case invokes Italian law with which I am unfamiliar⁴⁵ and highlights the issue of the application of national law by the ECB.

(Cases against the ECB in other capacities, i.e. on monetary policy, its task of guardian of the euro and its role in the troika imposing conditionality on debtor States are not included in the list at the EBI website and are beyond the scope of this paper. Neither are cases on access to information, one of which originates with a financial-sector counterparty but relates to monetary policy).⁴⁶

A brief overview of the connected cases shows the major issues which are before the Court.

The French banking industry against the ECB

Six cases by French banks⁴⁷ against the ECB concern its apparent dismissal of an application for authorisation to exclude certain public-sector exposures from the calculation of the leverage ratio. This concerns regulated savings in the form of the *Livret A* and connected deposits with the *Caisse des Dépôts et Consignations* (CDC). The French banks allege that the ECB incorrectly assesses the prudential risk associated with these exposures and thus renders a provision⁴⁸ of the CRR ineffective that allows specifically for the exclusion from the calculation of a bank's assets of certain exposures to a public entity. In Case T-751/16, Finland has been given leave to intervene in support of the ECB.⁴⁹

⁴⁴ Case T-641/17 (*Ferri v ECB*).

⁴⁵ Legislative Decree No 72 of 2015 (on the resolution power of the *Banca d'Italia*; see: <https://www.bancaditalia.it/compiti/risoluzione-gestione-crisi/index.html?com.dotmarketing.htmlpage.language=1>) and Legislative Decree No 385 of 1993, the *Consolidated Law on Banking*; see: <https://www.bancaditalia.it/compiti/vigilanza/normativa/index.html?com.dotmarketing.htmlpage.language=1>.

⁴⁶ Case T-730/16 (*Espírito Santo Financial Group v ECB*) on access to information on the ECB's suspension of *Banco Espírito Santo S.A.*'s Eurosystem monetary policy counterparty status and obliging it fully to repay its debt to the Eurosystem. See the Judgment of the General Court 26 April 2018; ECLI:EU:T:2018:234.

⁴⁷ Numbers 11-16 on the list: Case T-758/16, (*Crédit Agricole v ECB*); Case T-768/16, (*BNP Paribas v ECB*); Case T-757/16 (*Société générale v ECB*); Case T-751/16 (*Confédération Nationale du Crédit Mutuel v ECB*); Case T-745/16 (*BPCE v ECB*); and Case T-733/16 (*Banque Postale v ECB*).

⁴⁸ Article 429 (14) CRR: "Competent authorities may permit an institution to exclude from the exposure measure exposures that meet all of the following conditions: (a) they are exposures to a public sector entity; (b) they are treated in accordance with Article 116(4); (c) they arise from deposits that the institution is legally obliged to transfer to the public sector entity referred to in point (a) for the purposes of funding general interest investments." Article 116(4) CRR: "In exceptional circumstances, exposures to public-sector entities may be treated as exposures to the central government, regional government or local authority in whose jurisdiction they are established where in the opinion of the competent authorities of this jurisdiction there is no difference in risk between such exposures because of the existence of an appropriate guarantee by the central government, regional government or local authority."

⁴⁹ Order of 16 May 2017 in Case T-751/16 (*Confédération Nationale du Crédit Mutuel v ECB*); ECLI:EU:T:2017:361.

Credit Mutuel Arkéa

Two cases by *Credit Mutuel Arkéa* against the ECB⁵⁰ relate to a SREP decision and concern the governance of the group. The publicly available information shows that this French bank challenges SREP decisions of two dates (5 October 2015 and 4 December 2015). Usually, a two-month period between the dates of decisions challenged may lead one to surmise ABoR proceedings were conducted in between: a second decision normally follows a first when the ABoR has opined on the matter. A hearing has been held in these cases on 6 June 2017⁵¹. The ABoR has, indeed, reviewed *Arkéa*'s challenge to an earlier SREP decision, as the judgments in these cases bear out (see the postscript).

Crédit Agricole

Another four cases⁵² all originate from the *Credit Agricole* group and concern issues of governance: the cumulative functions of the Chair and the CEO and the time allotted to the function of bank director plus the four eyes principle. The ECB is alleged to have misconstrued Article 13 CRD IV (*Effective direction of the business and place of the head office*) and Articles L 511-13 (four eyes principle) and L 511-52 (sufficient time allocation requirement for directors of a credit institution) of the French *Code monétaire et financier*. Also, infringement is alleged of Articles 13 and 88 (*Governance arrangements*) CRD IV, and of Article L 511-58 of the French *Code monétaire et financier* (on the cumulative functions of the Chair and the CEO). ECB decisions of 29 January 2016 were attacked by the four banks. A hearing has been held in these cases on 23 October 2017.

6. *L-Bank and Trasta judgments after administrative review*

This section discusses two follow-up cases that have led to remarkable outcomes already. It should be emphasised at the outset that both decisions are subject to appeal. *Disclosure*: I have been involved as an Alternate Member of ABoR in the preparatory stages of both reviews.

L-Bank Case

In *L-Bank*, the General Court resoundingly rejected a challenge by a German bank of its qualification as a significant institution. In doing so, it also determined that the prudential supervisory powers that the SSM Regulation attributed to the ECB in Article 4 (**Tasks conferred on the ECB**) are exclusive and have only partially been delegated by Article 6 (**Cooperation within the SSM**) to National Competent Authorities (NCAs) who, when exercising those powers, do not act

⁵⁰ Numbers 2 and 3 on the list: Cases T-712/15 and T-52/16 (*Crédit Mutuel Arkéa v ECB*).

⁵¹ While at the time of presenting this paper more was not publicly known, judgments have been rendered since which are briefly discussed in the postscript.

⁵² Numbers 5-8 on the list: Case T-133/16 (*Caisse régionale de crédit agricole mutuel Alpes Provence v ECB*); Case T-134/16 (*Caisse régionale de crédit agricole mutuel Nord Midi-Pyrénées v ECB*); Case T-135/16 (*Caisse régionale de crédit agricole mutuel Charente-Maritime Deux Sèvres v ECB*); Case T-136/16 (*Caisse régionale de crédit agricole mutuel Brie Picardie v ECB*). See the Judgment of the General Court 24 April 2018; ECLI:EU:T:2018:219.

under national law but as per this delegation. The paragraphs below are largely taken from my paper⁵³ for the Conference **The New ECB in Comparative Perspectives**, held at the European University Institute, 19-20 September 2017. As is well-known, the Council⁵⁴ conferred executive tasks in the area of prudential supervision on the ECB and delineated the banking sector of the Euro Area in two classes: significant and less significant institutions (LSIs). The former would fall completely under the supervision of the ECB, whereas the latter would remain under national supervision.⁵⁵ The twin tasks of authorising all banks in the Euro Area and of assessing the suitability of their shareholders were conferred on the ECB,⁵⁶ in addition to its task of direct supervision of significant banks. The ECB should ensure consistency among the elements of the SSM.⁵⁷ The ECB may decide to exercise supervision directly itself.

When the effective date of prudential supervision by the ECB came near (4 November 2014),⁵⁸ several significant entities resisted being submitted to the ECB's supervision. One such bank, *Landeskreditbank Baden-Württemberg – Förderbank*, requested a review of the decision determining it to be significant and went to court after being unsuccessful at the ABoR. The resulting judgment of the General Court contains a number of important points. It establishes that, for a request to be classified as less significant⁵⁹ to be successful, the applicant needs to prove that direct ECB supervision is *less able* to ensure achievement of the SSM Regulation's objectives than national supervision; a significant entity cannot escape ECB purview by showing that national supervision is *just as able* to achieve the SSM Regulation's objectives. These latter are repeatedly described as: consistent application of high prudential standards.⁶⁰

The *L-Bank* judgment is most noticeable for its finding that the tasks of the ECB are of an exclusive nature and that the functions of the NCAs concern

⁵³ Competences and alignment in an emerging future *After L-Bank: how the Eurosystem and the Single Supervisory Mechanism may develop*, published as ADEMU Working Paper 77 on the ADEMU website: <http://ademu-project.eu>.

⁵⁴ Article 127(6) TFEU. Note that, since the Maastricht Treaty, the activation of a prudential task for the ECB had required a legislative act by the Council and assent of the European Parliament (Article 105(6) EC Treaty: "The Council may, acting unanimously on a proposal from the Commission and after consulting the ECB and after receiving the assent of the European Parliament, confer upon the ECB specific tasks concerning policies relating to the prudential supervision of credit institutions and other financial institutions with the exception of insurance undertakings."), whereas the Lisbon Treaty reduced Parliament's role to a merely consultative one.

⁵⁵ Article 6(4) SSM Regulation.

⁵⁶ Article 4(1)(a) and (c) SSM Regulation, in conjunction with Article 6(4).

⁵⁷ Article 4(5) SSM Regulation.

⁵⁸ Article 33(2) SSM Regulation.

⁵⁹ In accordance with Article 70 Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation) (ECB/2014/17), OJ L 141/1, 14 May 2014.

⁶⁰ As in Article 5(b) SSM Regulation, and recitals 12 and 83: "supervision of the highest quality, unfettered by other, non-prudential considerations". "Consistent application of high supervisory standards" is also referred to in several provisions of the SSM Framework Regulation, notably in Article 70, which was at the core of the case.

the exercise of delegated powers. Basing itself on the wording of Article 4(1) SSM Regulation, “that, [w]ithin the framework of Article 6, the ECB shall... be exclusively competent to carry out, for prudential supervisory purposes, the following tasks in relation to all credit institutions established in the participating Member States’, followed by a list of nine tasks.”,⁶¹ the General Court finds “that it is apparent from the examination of the interaction between Article 4(1) and Article 6 of the [SSM] Regulation (...) that the logic of the relationship between [ECB and NCAs] consists in allowing the exclusive competences delegated to the ECB to be implemented within a decentralised framework, rather than having a distribution of competences between the ECB and the national authorities in the performance of the tasks referred to in Article 4(1) of that regulation.”⁶²

Concerning the core provision at issue, the Court finds: “Similarly, under Article 6(4), second subparagraph, of that same regulation the ECB has exclusive competence for determining the ‘particular circumstances’ in which direct supervision of an entity which should fall solely under its supervision might instead be under the supervision of a national authority.” The General Court concludes as follows: “It follows from all the foregoing that the Council has delegated to the ECB exclusive competence in respect of the tasks laid down in Article 4(1) of the [SSM] Regulation and that the sole purpose of Article 6 of that same regulation is to enable decentralised implementation under the SSM of that competence by the national authorities, under the control of the ECB, in respect of the less significant entities and in respect of the tasks listed in Article 4(1)(b) and (d) to (i) of the [SSM] Regulation,⁶³ whilst conferring on the ECB exclusive competence for determining the content of the concept of ‘particular circumstances’ within the meaning of Article 6(4), second subparagraph, of that same regulation, which was implemented through the adoption of Articles 70 and 71 of the SSM Framework Regulation”.⁶⁴

Reading the recitals of the SSM Regulation underpins the Court’s interpretation.⁶⁵ Among these recitals is no. 28: its reservation of certain tasks to national authorities notably fails to include any of those enumerated in Article 4(1), or the direct supervision of LSIs.⁶⁶ The General Court sees the ECB having

⁶¹ Paragraph 20 of the *L-Bank* judgment.

⁶² Paragraph 54 of the *L-Bank* judgment (underlining added, RS). The Court uses the term ‘Basic Regulation’ when referring to the SSM Regulation; the quotes in this paper employ the usual citation of this fundamental legal act.

⁶³ So, all tasks except those listed in Article 4(1)(a): authorising credit institutions and withdrawing authorisations, and Article 4(1)(c): assessment the acquisition and disposal of qualifying holdings in credit institutions.

⁶⁴ Paragraph 63 of the *L-Bank* judgment (underlining added, RS).

⁶⁵ Notably, it reads recital 37 (which includes the following: “in order to ensure high-quality, Union-wide supervision, national competent authorities should be responsible for assisting the ECB in the preparation and implementation of any acts relating to the exercise of the ECB supervisory tasks.”) such “that direct prudential supervision by the national authorities under the SSM was envisaged by the Council of the European Union as a mechanism of assistance to the ECB rather than the exercise of autonomous competence.”

⁶⁶ Paragraph 57 of the *L-Bank* judgment.

“important prerogatives even when the national authorities perform the supervisory tasks laid down in Article 4(1)(b) and (d) to (i) of the [SSM] Regulation”,⁶⁷ which it considers “indicative of the subordinate nature of the intervention by the national authorities in the performance of those tasks”.⁶⁸ The ECB’s competence to issue regulations, guidelines or general instructions to NCAs is relevant and, while there is no “possibility for the ECB to issue individual guidelines to a national authority, that is compensated for by the possibility offered by Article 6(5)(b) of the [SSM] Regulation⁶⁹ to remove direct prudential supervision of an entity from the competence of a national authority”.⁷⁰

In rejecting a comparison with competition law competences that *L-Bank* brought forward and which the Court finds inapplicable, the judgment⁷¹ makes quite clear that “under the SSM the national authorities are acting within the scope of decentralised implementation of an exclusive competence of the Union, not the exercise of a national competence (underlining added, RS).”

These considerations place the division of powers in the SSM and, thereby, the relationship between the ECB and the NCAs in a different light: exclusive competences at the centre, partially delegated to the State agencies involved in the SSM.

The *L-Bank* judgment highlighted the role of the ABoR, adopting its Opinion as part of the reasoning for the ECB’s second decision. The Court reads the ECB’s second decision in the light of the ABoR Opinion and includes the Opinion among the reasoning (motivation) of that second decision.

Allow me to quote paragraph 127 of the *L-Bank* judgment: “in so far as the contested decision ruled in conformity with the proposal set out in the Administrative Board of Review’s Opinion, it is an extension of that opinion and the explanations contained therein may be taken into account for the purpose of determining whether the contested decision contains a sufficient statement of reasons.” Calling the second ECB decision, adopted after the ABoR’s Opinion, “an extension” of ABoR’s findings,⁷² may be a bold translation of the original French text.⁷³ The language sounds less encompassing in the original French: « *dans la mesure où la décision attaquée a statué dans un sens conforme à la*

⁶⁷ Again, all tasks except those listed in Article 4(1)(a): authorising credit institutions and withdrawing authorisations, and Article 4(1)(c): assessment the acquisition and disposal of qualifying holdings in credit institutions.

⁶⁸ Paragraph 59 of the *L-Bank* judgment.

⁶⁹ “(...) (b) when necessary to ensure consistent application of high supervisory standards, the ECB may at any time, on its own initiative after consulting with national competent authorities or upon request by a national competent authority, decide to exercise directly itself all the relevant powers for one or more credit institutions referred to in paragraph 4, including in the case where financial assistance has been requested or received indirectly from the EFSF or the ESM;” (underlining added, RS)

⁷⁰ Paragraphs 60-61 of the *L-Bank* judgment.

⁷¹ Paragraph 72 of the *L-Bank* judgment.

⁷² Paragraph 31 of the *L-Bank* judgment.

⁷³ Which merely states: “*l’avis de la commission administrative de réexamen, dans le prolongement duquel s’inscrit la décision attaquée*”.

proposition figurant dans l'avis de la commission administrative de réexamen, elle s'inscrit dans le prolongement dudit avis et les explications qui y figurent peuvent être prises en compte aux fins d'examiner le caractère suffisamment motivé de la décision attaquée » (underlining added, RS). Yet, the Court clearly makes the ABoR's input part of the process of adoption of the ECB's second decision and relies on ABoR's findings to assess the reasoning of the ECB in the second round. This underscores the sensitive nature of revealing the ABoR's findings at an early stage.

On appeal,⁷⁴ *L-Bank* alleges that the General Court misinterpreted the provisions on significance of the SSM Regulation and the SSM Framework Regulation (relying on the English text only and not applying the principle of proportionality); also, it alleges distortion of the ECB decision, disregarding the alleged lack of reasoning by the ECB, and procedural errors by bringing in issues not discussed during the proceedings (probably, the issue of exclusive ECB competences, RS). If confirmed on appeal, *L-Bank* is a watershed on prudential powers at the EU level.⁷⁵

Trasta Case

In *Trasta*, two cases are on-going: one⁷⁶ against the ECB's first decision on the withdrawal of the authorisation of *Trasta Komerbanka AS* (hereafter also: TKB), and the other⁷⁷ against the second decision after ABoR proceedings.

Trasta is a less significant bank that was originally licensed in 1991 by the *Finanšu un kapitāla tirgus komisija* (Financial and Capital Markets Commission (FCMC)) of Latvia. On a proposal of the FCMC, the ECB withdrew the license on 3 March 2016. On 14 March, liquidation proceedings were started in Latvia, and on 17 March the liquidator appointed over *Trasta* revoked all powers of attorney. On 3 April, ABoR was requested to review the withdrawal of the authorisation. It gave its Opinion ("decision" states the Court) on 30 May: "By a decision of 30 May 2016, the board of review held that the allegations of procedural and substantive breaches entailed by the contested decision were unfounded and that that decision was sufficiently reasoned and proportionate, while recommending that the governing body of the ECB clarify certain elements."⁷⁸ On 13 May 2016, i.e. before the ABoR Opinion, "the lawyer representing TKB during the administrative proceedings brought an action for annulment of the contested decision on behalf of TKB and, as a precaution, on behalf of six of its direct and indirect shareholders."⁷⁹ The ECB adopted a second decision withdrawing

⁷⁴ Case C-450/17 P.

⁷⁵ See my paper mentioned in footnote 53 above.

⁷⁶ Number 9 on the list: Case T-247/16 (*Trasta Komerbanka and others v ECB*).

⁷⁷ Number 10 on the list: Case T-698/16 (*Trasta Komerbanka and others v ECB*).

⁷⁸ Paragraph 7 of the Order.

⁷⁹ Paragraph 8 of the Order.

the licence on 11 July 2016. As indicated, this second decision is the subject of separate appeal proceedings in Luxembourg.⁸⁰

In its Order of 12 September 2017, the Court starts with testing the interest of the bank itself (TKB) and its shareholders in the proceedings, and finds that both have an interest: if the original ECB decision were annulled, TKB and the shareholders could claim damages for the three month-period between the original withdrawal of the licence and the withdrawal after the ABoR Opinion.⁸¹ However, because the power of attorney granted by TKB to its lawyers had been withdrawn, validly according to the Court, upon researching⁸² and applying Latvian law,⁸³ TKB's appeal is thrown out because the bank is not validly represented by the attorney who initiated proceedings.

The Court attaches importance to the fact that the District Court in Riga hearing the liquidation proceedings “rejected TKB’s application to maintain its directors’ power of attorney for the purpose of adopting decisions relating to the administrative proceedings before the ECB and the judicial proceedings before the Court of Justice of the European Union”.⁸⁴

The Court finds that accepting the withdrawal of the power of attorney does not violate EU law, notably, the right to effective judicial protection: “The application of Latvian law does not lead to all banks whose approval was withdrawn being deprived of a remedy, but to the responsibility for seeking that remedy being entrusted to the liquidator.” Thus, the Court refuses to hear TKB’s case.⁸⁵ The Court considers that the ECB could not have prevented the opening of liquidation procedures by the FCMC which led to the liquidator becoming capable of withdrawing the director’s powers, including their power to request administrative (ABoR) or judicial review (CJEU).

Acknowledging that this Order is an interim step in pending proceedings and that it is appealed, I note that the General Court treads rather lightly the effective judicial protection of a credit institution. By finding that the liquidator, installed at the behest of the supervisory authority, has the power to determine whether an appeal can be lodged against the withdrawal of the license, the bank is effectively barred from taking action. It is unlikely that a liquidator will challenge the supervisory authority’s decision to withdraw the authorisation, the very basis for his functioning in this capacity.

⁸⁰ Case T-698/16 (*Trasta Komerbanka and others v ECB*).

⁸¹ Paragraphs 21-23 of the Order.

⁸² “(...) it is for the General Court to determine the applicable national law and, moreover, to determine whether, by virtue of that right, the liquidator has the power to revoke the authority to act and whether it did revoke it” (paragraph 25 of the Order).

⁸³ According to the Directive on Reorganisation and Winding up of Credit Institutions (2001/24/EC), “the law of the Member State in which a credit institution has been authorised applies to the respective powers of the credit institution and its liquidator” (paragraph 26 of the Order).

⁸⁴ Paragraph 34 of the Order.

⁸⁵ Paragraph 50 of the Order: “There is therefore no need to adjudicate on TKB’s application.”

Perhaps because it bars the credit institution itself from taking judicial action, the shareholders are given room to do so: the Court examines whether its shareholders have a separate, own claim to make. A shareholder “must show that it has a legal interest in bringing proceedings separate from that possessed by an undertaking which it partly controls and which is concerned by a European Union measure. Otherwise, in order to defend its interests in relation to that measure, its only remedy lies in the exercise of its rights as a member of the undertaking which itself has a right of action”.⁸⁶ So, only when shareholders cannot defend their interests through their powers in an undertaking, is there room for them to operate independently from the company in court.⁸⁷ As TKB’s liquidation prevents its shareholders from exercising their shareholders’ right to make TKB bring an action against the withdrawal of the banking licence, the Court finds that the shareholders have an interest in bringing a case.⁸⁸ This does not suffice to hear their case, as their ‘interest’ is separate from their *locus standi* before the court,⁸⁹ so an analysis follows of the individual and direct concern of the withdrawal decision to the shareholders.

The *Plaumann* formula states that “persons other than those to whom a decision is addressed may claim to be individually concerned only if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of those factors distinguishes them individually just as in the case of the person addressed (underlining added, RS)”.⁹⁰ The Court finds that the shareholders were “identified or identifiable at the time when it was taken on the basis of criteria specific to the members of the group”; the withdrawal of TKB’s banking license “affects the shareholder applicants in their particular capacity as shareholders of the bank whose authorisation has been withdrawn and differentiates the 42 direct shareholders of that bank from any other person”.⁹¹

The Court continues: “(...) for a person to be directly concerned by the measure at issue, the measure must directly affect the legal situation of the individual and leave no discretion to the addressees of that measure who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from the EU rules alone, without the application of other intermediate rules”.⁹² Relying on earlier case law that “shareholders cannot be regarded as directly and individually concerned by a decision in so far as it does not, of itself, affect the substance or extent of the rights of the shareholders, either as regards their proprietary rights or the ability, conferred on them by

⁸⁶ Paragraph 53 of the Order.

⁸⁷ Paragraph 54 of the Order.

⁸⁸ Paragraphs 55-58 of the Order.

⁸⁹ Paragraph 52 of the Order.

⁹⁰ Paragraph 60 of the Order, with a reference to Case 25/62 (*Plaumann v Commission*); EU:C:1963:17.

⁹¹ Paragraph 62 of the Order.

⁹² Paragraph 64 of the Order, referring to a judgment of 13 October 2011 in Cases C-463/10 P and C-475/10 P (*Deutsche Post and Germany v Commission*); EU:C:2011:656.

those rights, to participate in the management of the company”,⁹³ the Court applies this test to the *Trasta* shareholders. It finds that withdrawing the licence “prevent[s TKB] from achieving its object and having an economic activity”, thereby directly affecting the shareholders.⁹⁴ Not content with this finding, the Court elaborates and mentions “the intensity” of the withdrawal: the right to receive dividends becomes “illusory”, and the exercise of voting rights becomes “essentially formal”.⁹⁵ Moreover, there is no need for provisional measures at State or EU level for the withdrawal of the banking licence to have effect.⁹⁶ So, the direct shareholders are directly affected, as well. Thus, they have standing.

The indirect shareholder contesting the ECB’s decision, Ivan Furstin, profits from this: his position is not separately examined.⁹⁷ In a conclusion that I personally find hard to follow, the Court finds that the action by “the applicants, who are direct (my underlining, RS) shareholders of TKB, are directly and individually concerned by the contested decision” is admissible.⁹⁸ As the list of shareholders is not attached to the Order, an outsider cannot assess what the Court may mean by this: first apparently accepting the indirect shareholder and then excluding him?

This Order, or a decision on appeal, will have major consequences for the admissibility of shareholders in other cases, such as competition law cases. Also, it may influence the stance of ABoR on admissibility of shareholders. It is too early to elaborate on these issues, and not appropriate to comment on matters that are pending.⁹⁹ Again, differences show up in national laws, this time concerning the follow-up of a withdrawal of a banking licence, such differences leading to possibly divergent outcomes, also in terms of review and protection against the withdrawal of an authorisation. Access of affected parties to judicial and administrative review even of altogether sound supervisory decisions is a fundamental element of a well-functioning democratic community of law.

7. *Concluding remarks*

Administrative and judicial review of prudential decisions is on-going and developing.

Numbers do not tell the whole story, for several reasons:

- Numbers of individual cases may conceal clusters of issues: the 19 cases

⁹³ Paragraph 65 of the Order, referring to paragraph 35 of the judgment of 28 October 1993 in Case, T-83/92 (*Zunis Holding and Others v Commission*); EU:T:1993:93.

⁹⁴ Paragraph 66 of the Order.

⁹⁵ Paragraph 67 of the Order.

⁹⁶ Paragraph 68 of the Order.

⁹⁷ Paragraph 70 of the Order.

⁹⁸ Paragraphs 71-72 of the Order.

⁹⁹ As discussed in the postscript, the decisions on admissibility are challenged from three sides at the CJEU.

before the General Court mainly concern four issues;

- Numbers may conceal actual outcomes: any impression that the ABoR fails to opine differently from the ECB is false as, even when the ultimate outcome is considered in accordance with the required standard (procedural and substantive conformity with the SSM Regulation and the principles and rules referred therein – including the EU Charter of Fundamental Rights), the Opinion is likely to have suggested material improvements, notably on motivation (reasoning);
- Administrative review has an impact way beyond an actual case: the ABoR may question the approach taken by the ECB which, in turn, may lead to changes in procedures and approaches. Never underestimate the incidence of independent scrutiny.

The lack of harmonisation and convergence, that is, the absence of a real, Union-wide *single* rulebook is striking; it consumes resources in the review process (as it undoubtedly does in supervision proper) and may lead to outcomes that are far from satisfactory on a comparative basis: equal treatment relies on equality of business conditions and prudential regulation and enforcement across Europe. I refer to the observations by Andrea Magliari, Concetta Brescia Morra and myself in our article on the ABoR after two years, which highlights the national discrepancies and notes two areas of concern: FAP testing and bank holding company supervision. We still have a long way to go.

Permit me, here, to support, the call for completion of banking union by Nicholas Véron in his recent study for the European Parliament¹⁰⁰ in which he excellently makes a case for sovereign concentration charges and for a European Deposit Insurance System (EDIS) that is fully mutualised, as per the Commission's original proposals, thus not following its recent backtracking.

The absence of transparency on review cases is an issue that is not easily resolved but on which steps may be undertaken, even within the current legal context. If the ECB does not act, the *mantram* is: *Luxembourg help us!* It is submitted that the Court can increase transparency on banking union-related cases by identifying that these are post-ABoR, if they are, in its immediate postings on pending cases.

Far too early, but not something to leave out of sight completely: an alignment of financial sector review mechanisms¹⁰¹ may yield better results than the current patchwork of different pathways. The labyrinth facing the applicant may be explicable to the legal expert who understands why we have so many different regimes but must be baffling to financial sector operators and the public at large.

RS, 19 November 2017

¹⁰⁰ Nicolas VÉRON, *Sovereign Concentration Charges: A New Regime for Banks' Sovereign Exposures*, Bruegel, 17 November 2017, at: http://bruegel.org/wp-content/uploads/2017/11/IPOL_STU2017602111_EN.pdf.

¹⁰¹ Differing, for valid reasons but with puzzling variations in outcomes, between legal acts adopted by the EBA, by the ECB and by the SRB.

8. *Postscript*

Since the presentation of the draft paper at the Rome Conference, developments have taken place that are briefly touched upon here: judgments in the *Arkéa* case and appeals against the *Trasta* order.

The *Arkéa* judgments

On 13 December 2017, the General Court gave two judgments in cases instituted by *Crédit Mutuel Arkéa* (*Arkéa*) against the European Central Bank (ECB). Both cases concerned a SREP decision adopted in respect of the *Crédit Mutuel* group, of which *Arkéa* forms a part, in recent times an unwilling part because of a dispute between it and the central body of this group of French cooperative banks, the *Confédération Nationale du Crédit Mutuel* (CNCM) and another group of mutual banks (the *CM11–CIC* group). It should be noted that several other judicial and administrative bodies have been involved in the ongoing strife¹⁰² within the *Crédit Mutuel* group: the *Autorité de la Concurrence* (the French national competition authority),¹⁰³ the *Tribunal Administratif de Rennes* and the French *Conseil d'État*,¹⁰⁴ the *Tribunal de Grande Instance de Paris* and the *Cour d'Appel de Paris*.¹⁰⁵ Even the *Crédit Mutuel* trademark is the subject of judicial proceedings in Luxembourg.¹⁰⁶ Recent developments seem to indicate a rupture: *Arkéa* chairman Jean-Pierre Denis is reported to have proposed to the Board to leave the CNCM.¹⁰⁷

The existence of two, largely identical judgments derives from the fact that the applicant has acted against the ECB's SREP decision of 5 October 2015 (Case T-712/15), which was the result of review by the Administrative Board of Review (ABoR) of a SREP decision of 17 June 2015, and, subsequently, proceeded against a further ECB decision of 4 December 2015 (Case T-52/16), in which the ECB amended its 5 October decision by lowering the own funds

¹⁰² Called "*La guerre des Crédits Mutuels*" by a French information service on banking [CBanque](#).

¹⁰³ See: *Décision n° 16-D-30 du 21 décembre 2016 relative à des pratiques de la Confédération Nationale du Crédit Mutuel dans le secteur bancaire*. The *Autorité de la Concurrence* declared the complaint by *Arkéa* against the CNCM and the CM11-CIC group for allegedly entering into anti-competitive agreements and carving up markets inadmissible.

¹⁰⁴ In proceedings in which the CNCM requested, and was granted, an injunction against *Arkéa* to provide it with data for the establishment of a group-wide recovery and resolution plan.

¹⁰⁵ This appeals court is reported to have declared invalid the procedure by which the CNCM was to convert from an "*association*" into a cooperation and, then, to request authorisation from the ECB as a credit institution. However, the CNCM has a different reading of this recent (16 January 2018) judgment.

¹⁰⁶ See Case T-13/18 (*Crédit mutuel Arkéa/EUIPO - Confédération nationale du Crédit mutuel (Crédit Mutuel)*), and *La marque « Crédit Mutuel » au cœur d'un conflit intra-groupe*, LinkedIn post of 30 November 2017 by Nathalie PACAUD, at : <https://fr.linkedin.com/pulse/la-marque-cr%C3%A9dit-mutuel-au-c%C5%93ur-dun-conflit-nathalie-pacaud>.

¹⁰⁷ *La Tribune on-line*, 17 January 2018: *Big bang en vue : Arkéa se prépare à quitter le Crédit Mutuel*. See, also: *Crédit Mutuel Arkéa : l'indépendance est maintenant sur les rails*, Ouest-France, 19 January 2018, at: <https://www.ouest-france.fr/bretagne/credit-mutuel-arkea-l-independance-est-maintenant-sur-les-rails-5511120> and *Crédit Mutuel Arkéa. Une caisse contre le départ de la Confédération*, Ouest-France, 13 February 2018, at : <https://www.ouest-france.fr/bretagne/credit-mutuel-une-caisse-contre-le-depart-de-la-confederation-5561541>.

requirement imposed on the applicant from 11% to 10.75%. Textual differences of the two judgments reflect the distinct proceedings but, by and large, the judgments are identical. In this paper, references are to the judgment¹⁰⁸ in Case T-712/15. This postscript is based on the French text of the judgment and employs my own translations into English that I did not systematically check against the provisional translation which just came out.

Disclosure: I have been a voting member in the ABoR review proceedings.

The main point of contention between *Arkéa* and the ECB is the latter's indirect supervision of *Arkéa* through the CNCM, with *Arkéa* claiming it should be supervised directly and separately from the *Crédit Mutuel* group. Three main lines of arguments are maintained by the applicant: the CNCM is not a credit institution and, hence, cannot fall under the supervision of the ECB (which the Treaty allows to effect prudential supervision of credit institutions only); there is no 'group'; and the 11% CET1 capital requirement resulting from the SREP decision is unlawful. On the existence of a 'group', the relevant provisions are Article 2(21)(c) SSM Framework Regulation and Article 10(1) CRR. Article 10 CRR allows supervisory authorities to waive the application of CRR provisions for credit institutions within the same Member State which are permanently affiliated to a central body which supervises them when three conditions have been met: (a) the commitments of the central body and the affiliated institutions are joint and several, or entirely guaranteed by the central body; (b) the solvency and liquidity of the central body and all affiliated institutions are monitored as a whole on the basis of consolidated accounts; and (c) the central body's management may issue instructions to the management of the affiliated institutions. Article 2(21)(c) SSM Framework Regulation refers to the conditions laid down in Article 10 CRR for one of its definitions of a 'supervised group'.

The Court methodically addresses the applicable provisions, applying a literal, teleological and contextual interpretation and dissecting, one by one, the arguments of *Arkéa*. Doing so, it fully finds for the ECB. As the scope of this paper does not permit a more in-depth annotation of the *Arkeá* judgments,¹⁰⁹ I here only enumerate the following seven main points that I derive therefrom:

1. The role of ABoR's Opinion in the assessment of the ECB's second decision confirmed

The Court strongly confirms the role of ABoR as it imputes to the ECB the reasoning in ABoR's Opinion when the second decision is in line with this Opinion, and assesses the ECB's motivation for this second decision also on the basis

¹⁰⁸ The numbers of paragraphs in the judgment in Case T-712/15 jump with one digit to those in Case T-52/16.

¹⁰⁹ More on the Court's reasoning in my *Short note on the Arkéa judgments* of 19 January 2018, at: <https://ebi-europa.eu/wp-content/uploads/2018/01/Note-on-the-Arke%CC%81a-judgments-for-publication-final.pdf>.

of the ABoR Opinion.¹¹⁰ The Court extensively quotes¹¹¹ and endorses¹¹² ABoR's findings. Notably, when referring to the ECB's reasons to effect consolidated supervision of the *Crédit Mutuel* group through the CNCM, the Court notes: "that, if the reasons for which the ECB decided to organize consolidated supervision of the *Crédit Mutuel* group through the CNCM are not explicitly stated in the contested decision, the [ABoR] provided grounds on this point, which have been transcribed in paragraphs 8 to 10 [of the judgment] above."¹¹³

2. Objectives pursued by consolidated supervision identified

These ends are: to enable the ECB to understand the risks likely to affect a credit institution which does not originate from it, but from the group to which it belongs; and: to avoid a fragmentation of the prudential supervision of the entities who make up these groups by different supervisory authorities.¹¹⁴

3. A central body of a group in the sense of Article 10 CRR does not have to be a credit institution

Neither the SSM Regulation nor the CRR require that a central body qualifies as a credit institution.¹¹⁵

4. Sanctioning power vis-à-vis a central body absent in the SSM Regulation

The ECB does not have sanctioning powers vis-à-vis a central body under the SSM Regulation.¹¹⁶ The Court quotes ABoR's consideration that it is not necessary for the ECB to have the complete arsenal of supervisory or sanctioning powers over the parent entity of a group to exercise prudential supervision on a consolidated basis.¹¹⁷

5. Supervisory discretion to grant a waiver (or not) when Article 10(1) CRR's conditions are met

An individual waiver from the requirements of prudential supervision remains a discretionary power even when the conditions laid down in Article 10 CRR are fulfilled.¹¹⁸

6. Even potential risks identified by the ECB may justify imposing an extra own funds requirement

¹¹⁰ Paragraphs 49 and 50 of the judgment in Case T-712/15.

¹¹¹ Paragraphs 9-11 of the judgment in Case T-712/15.

¹¹² Paragraphs 51; 70; 120; 130-131; 147-148; 157-158 of the judgment in Case T-712/15.

¹¹³ Paragraph 51 of the judgment in Case T-712/15.

¹¹⁴ Paragraphs 59, 61 and 64 of the judgment in Case T-712/15.

¹¹⁵ Paragraphs 107 and 151 of the judgment in Case T-712/15.

¹¹⁶ Paragraphs 89-92 of the judgment in Case T-712/15.

¹¹⁷ Paragraph 9 of the judgment in Case T-712/15.

¹¹⁸ Paragraphs 67 and 100 of the judgment in Case T-712/15.

Article 97 CRD IV grants supervisory authorities the power to impose extra guarantees in relation to “risks to which the institutions are *or might be* exposed”; this necessarily entails the possible taking into account of future events likely to alter their risk profile.¹¹⁹

7. Article 16 SSM Regulation: wide powers for the ECB

The Court’s wide reading becomes clear from the following two quotes:

“(…) it follows from a joint reading of Article 16 (1) (c) and (2)(a) of the [SSM Regulation] that, in the event that prudential examinations carried out by the ECB show that the own funds and liquidity held by a credit institution do not ensure sound management and risk coverage, the ECB is entitled to require a credit institution to go beyond these minimum requirements”.¹²⁰

“the purpose for which the powers referred to in Article 16 (2) of the [SSM Regulation] were conferred on the ECB, as stated in paragraph 168 above, can in particular be found in the need to remedy a situation in which the own funds and liquidity of a credit institution do not ensure sound management and risk coverage”.¹²¹

The *Trasta* appeals

The General Court’s Order of 12 September 2017 is subject to three appeals: by the bank and its shareholders (Case C-669/17),¹²² by the ECB (Case C-663/17 P)¹²³ and by the Commission (Case C-665/17 P).¹²⁴ *Trasta* and its shareholders “claim that the General Court erred in assuming that TKB’s remedy is entrusted to the liquidator. The appellants claim that this assumption is irreconcilable with Article 263 TFEU and the guarantee of an effective remedy as well as a number of related principles”. Their further claims relate to the relationship between a company and its shareholders (the appellants “claim that the General Court erred in assuming that the shareholders’ action is a substitute for the shareholders’ ability to defend TKB’s license through an action by TKB itself”) and to further substantive and procedural issues.

The European Commission attacks the admissibility decision on principled grounds. It contests that “[t]he General Court has erroneously considered that it was necessary to declare admissible an application for annulment brought by shareholders of a credit institution in liquidation against a decision to withdraw the authorisation of the credit institution in order to provide an effective remedy. In so doing, it has neglected the other remedies available to the credit institution, in the form of a timely application for annulment and of a request for interim

¹¹⁹ Paragraph 167 of the judgment in Case T-712/15.

¹²⁰ Paragraph 168 of the judgment in Case T-712/15.

¹²¹ Paragraph 212 of the judgment in Case T-712/15.

¹²² OJ C 42/8, 5 February 2018.

¹²³ OJ C 32/16, 29 January 2018.

¹²⁴ OJ C 42/6, 5 February 2018.

measures, and to the shareholders, in the form of an action for damages against the European Central Bank before the European Courts and possibly in the form of other actions before national courts.” The Commission’s appeal concerns core elements of standing under Article 263 TFEU: the condition of legal interest in bringing proceedings and the conditions of individual and direct concern.

The European Central Bank also opposes the General Court’s findings that “the shareholder applicants had an interest and legal standing in the General Court regarding the action for annulment of the contested decision”. The General Court allegedly misconstrued “case law requiring that shareholders show that they possess a separate interest in bringing proceedings against a Decision addressed to the undertaking which they partly controlled”. According to the ECB, shareholders cannot be said to have a legal interest in a bank having a licence which differs from the bank’s own legal interest in having that licence.¹²⁵ The possibility to obtain damages or dividends would not substantiate a legal interest separate from that of the credit institution. Shareholders may be admitted in a claim for damages in a liability suit against the ECB. The ECB also pleads that the shareholders were neither individually nor directly concerned, so they do not have *locus standi*. The ECB emphasises the difference between *economic* losses and the *legal* position of those suffering them.

One may expect the proceedings on admissibility to precede any appeal on the substance of the case. The resulting admissibility approach of the CJEU will also determine access to administrative review as the ABoR might be expected to follow the case law of the Court on substantive and procedural matters.

¹²⁵ I present this plea, formulated case-specific, i.e. relating to *Trasta Komercbanka*, in general terms here.

JUDICIAL REVIEW AND THE BANKING RESOLUTION REGIME THE EVOLVING LANDSCAPE AND FUTURE PROSPECTS*

*Luís Silva Morais, Lúcio Tomé Feteira***

1. Introduction – 2. Resolution measures – 3. Review of resolution measures by the AP of the SRB: some issues concerning the scope, nature and intensity of the review – 4. Review of resolution measures by NRAs (some brief notes) – 5. Conclusions

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1. Introduction

At the eve of the 2007 financial crisis, it was clearly noticeable that the integration of Europe's financial sector was progressing at an uneven pace on at least two accounts. On the one hand, the banking industry displayed a greater degree of integration (certainly commensurate with its importance in the functioning of most of the Member States' financial sectors)¹ vis-à-vis the insurance sector and financial markets.² On the other hand, financial integration had not been accompanied by the adoption of the necessary regulatory safeguards to curb down perverse incentives arising from the decoupling between increasing financial integration and national-bound regulation and supervision.³ The causes and effects of the 2007 financial crisis, as well as its economic and financial repercussions in the EU – both widely versed and researched topics⁴ that we shall skip altogether –, demanded swift action from the EU at different levels.

One of such levels – and indeed one of the most significant – concerned the reform of the regulatory and supervisory framework in place,⁵ an initiative which led to the creation of the Banking Union.⁶ The setting-up of the Banking Union involved a combination of enhanced harmonization of the regulatory framework for the banking industry – achieved through a number of legislative initiatives dealing with prudential requirements, depositor protection and rules for managing failing banks – with a new institutional framework designed to achieve greater integration. The latter consisted in the creation of the Single Supervision

¹ Depending on whether the predominant source of funding is direct (financial markets) or indirect (banking), financial systems can be divided into market-based or banking-based financial systems. In most of the Member States, companies and households are highly dependent upon banking funding, thus making them more exposed to lack of liquidity in the event of a banking crisis. For a reference to the distinction in general, see ROSS LEVINE, "Bank-Based or Market-Based Financial Systems: Which is Better?" in *Journal of Financial Intermediation*, October 2002, vol. 11, issue 4, pp. 398-428; with specific references to the European context, see instead Jakob DE HAAN, Sander OOSTERLOO and Dirk SCHOENMAKER, *Financial Markets and Institutions: a European Perspective*, 3rd edition (CUP: 2015).

² For a brief account of the history of financial integration in the EU, see DE HAAN/OOSTERLOO/SCHOENMAKER (2015).

³ On this topic see John ARMOUR *et alii*, *Principles of Financial Regulation* (OUP: 2016).

⁴ For further references see European Commission / Directorate-General of Economic and Financial Affairs, "Economic Crisis in Europe: Causes, Consequences and Responses", *European Economy* (2009), available at: http://ec.europa.eu/economy_finance/publications/pages/publication15887_en.pdf

⁵ We refer both to regulation and supervision of the financial sector since the prudential oversight of the financial sector is a strong and indeed determinant component of regulatory intervention, unlike other economic sectors where the supervisory dimension is less relevant; on this point, see Luís SILVA MORAIS, "Lei-Quadro das Autoridades Reguladoras – Algumas Questões Essenciais e Justificação do Perímetro do Regime face às Especificidades da Supervisão Financeira", in *Revista da Concorrência e Regulação (C&R)*, N.º 17, Janeiro/Março, 2014, pp 99 ss.; and from the same author, *Models of Financial Supervision in Portugal and in the Context of the European Union*, Part VI of *White Book on the Regulation and Supervision of the Financial System*, Banco de Portugal (Bank of Portugal), Lisboa, 2016, available at https://www.bportugal.pt/sites/default/files/anexos/pdf-boletim/livro_branco_web_en.pdf

⁶ See Communication from the Commission to the European Parliament and the Council "A Roadmap to the Banking Union" COM (2012) 510 final, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52012DC0510&from=EN>

Mechanism (SSM)⁷ and the Single Resolution Mechanism (SRM),⁸ together with the third institutional pillar that was also envisaged but is still missing.⁹

The topic of this paper is the SRM, in particular the review of resolution measures by the Appeal Panel (AP) of the Single Resolution Board (SRB). Although the novelty of resolution regime and measures is usually addressed from a substantive perspective, their application has also involved changes and particular challenges at the procedural level which are becoming more apparent as litigation concerning SRB decisions is increasing and starting to take shape (especially in the wake of the resolution of Banco Popular determined by the SRB in the 7 of June of 2017).¹⁰ In addition, national experiences with enforcement of resolution regimes that are largely coincident with EU rules also provide important insights on the complex legal issues associated with the review or scrutiny of resolution measures with significant relevance for the EU legal discussion in this field (as it happened, *e.g.*, with the extensive litigation arising from the resolution of *Banco Espírito Santo* in Portugal, which was based on a pre-BRRD national resolution regime composed of rules which largely anticipated the BRRD).¹¹

We will focus on three main aspects concerning the review of resolution measures adopted by the SRB and, to a lesser extent, by national resolution authorities (NRAs): scope, nature and intensity. For this purpose, we will start by defining what are resolution measures (II), before moving to the analysis of scope, nature and intensity of the review undertaken by the SRB (III) and, albeit

⁷ Council Regulation (EU) no. 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies related to the prudential supervision of credit institutions; and Regulation (EU) No. 468/2014 of 16 April 2014 of the European Central Bank establishing the framework for cooperation within the Single Supervisory Mechanism and national competent authorities and with national designated authorities (SSM Framework Regulation).

⁸ Regulation (EU) No. 806/2014 of 15 July 2014 of the European Parliament and of the Council establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) no. 1093/2010. This regime is related with the EU Directive determining the adoption by EU member States of resolution rules - 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 (hereinafter 'Banking and Resolution Directive' or 'BRRD').

⁹ The European Deposit Insurance Scheme (EDIS) was meant to be the third institutional pillar of the Banking Union, but the Commission's proposal is yet to be converted into binding legislation due to well-known disagreements between the Member States. The proposal for the creation of the EDIS builds on the system of national deposit guarantee schemes already in place (see Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes) but reinforces and harmonises insurance cover for all retail depositors of the Banking Union protection

¹⁰ See Decision to take resolution action in respect of Banco Popular Español, S.A., Official Journal of the European Union, C 222/3, 11.7.2017 (2017/C 222/0).

¹¹ On the relevance of the case law arising from this precedent of the BES resolution case of 2014 in Portugal, see, *inter alia*, Luís SILVA MORAIS, *Procedural Safeguards and Review of Resolution Measures in light of practical experiences at National Level* – Presentation at European Banking Institute (EBI) Conference (With Malta Financial Services Authority/MFSA) *Reflections on Competent Authorities' "Measures" in EU Banking Law* – Event organised under the auspices of the Malta Presidency of the EU, Malta, 9 June 2017 – available at the website of European Banking Institute (EBI) - <https://ebi-europa.eu/>

in rather brief fashion, by NRAs (IV). This paper will conclude with some final considerations on future developments in this topic (V).

2. *Resolution measures*

The SRM establishes a uniform framework of rules and procedures for the resolution – i.e. the orderly restructuring – of banks when the latter are failing or are likely to fail. The application of such rules is trusted upon the SRB,¹² a Union agency with a composite membership,¹³ and is financed by a Single Resolution Fund (SRF) whose composition, purpose and deployment are subject to strict legal limitations.¹⁴ The financial entities that are subject to the resolution mechanism under the SRB's scope of authority include significant Eurozone banks or groups – which are under direct supervision of the ECB –, as well as cross-border groups.¹⁵ Remainder Eurozone banks and groups are subject to the authority of NRAs.¹⁶

The competences attributed to the SRB in this context are typical of 'second generation' resolution regimes to the extent that they reflect an emphasis on *ex ante* measures aimed at making the restructuring of the ailing financial entity easier (resolution plans) and display a concern for the restructuring/reorganisation of the financial institution instead to its liquidation.¹⁷ Such competences are replicated by NRAs, under internal legislation that implements the BRRD.

For the purposes of this paper, we will refer globally (*'lato sensu'*) to the *measures* adopted by the SRB, and by national resolution authorities under the powers granted by Regulation no. 806/2014 and internal legislation that implements the BRRD, as *resolution measures*. The latter comprise not only the measures involved in the implementation of the resolution mechanism, both in its *preventive dimension* (including decisions on the removal of impediments to resolvability and decisions on *minimum requirements for own funds and eligible*

¹² Article 1/2nd paragraph of Regulation 806/2014.

¹³ See articles 42/1 and 43 of Regulation 806/2014.

¹⁴ See articles 67 to 79 of Regulation 806/2014.

¹⁵ Article 7/2 of Regulation 806/2014. As referred in the provision, *significance* is determined on the basis of the criteria laid down in article 6/4 of Regulation no. 1024/2013.

¹⁶ Article 7/3 of Regulation 806/2014. This general rule does not exclude the possibility of the SRB exercising the relevant powers *in lieu* of NRA; such is the case of the need to ensure the consistent application of high resolution standards (article 7/4 of Regulation 806/2014), of upward devolution of competence to the SRB on the initiative of NRAs (article 7/5 of Regulation 806/2014), and in cases where the resolution action requires the use of the SRF (article 7/3 of Regulation 806/2014).

¹⁷ On the features and rationale of second-generation resolution regimes, see John ARMOUR, "Making Banking Resolution Credible", ECGI, Law Working Paper N° 244/2014 (February 2014), pp. 14-24 (available at: <http://ssrn.com/abstract=2393998>). Armour distinguishes between 'first-generation' resolution regimes (those that predated the 2007 financial crisis, which had US FDIC receivership regime as their model), and 'second-generation' resolution regimes that postdate the said financial crisis and were introduced to overcome the limitations of the existing resolution regimes.

liabilities,¹⁸ and its *executive* dimension, including the resolution tools),¹⁹ but also a second type of measures that, though not formally included in the resolution mechanism, are nonetheless *instrumental* for its implementation. We can include in this latter category decisions concerning access to documents relating to the resolution mechanism,²⁰ decisions on *ex ante* or *ex post* contributions to the SRF,²¹ decisions on the determination and collection of contributions to administrative expenses of the SRB²² and decisions on penalties for failure to comply or to cooperate with the SRB²³.

Overall, the implementation of resolution measures (*lato sensu*) – covering the *preventive* and the *executive* dimension of the resolution mechanism, as well as *instrumental measures* for the implementation of the latter – has far-reaching implications. In fact, resolution measures are, to different degrees, highly disruptive of the legal and financial *status quo* since they affect the interests and legal positions of a great number of different stakeholders (different categories of shareholders of resolved banks, depositors, creditors, other banks). Accordingly, there is an inherently contradictory feature in resolution 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. *It is therefore worth asking how do we set the legal pendulum for a proper balancing exercise between these two contradictory features, maximizing the positive, prevailing/stabilizing effects intended with resolution regimes.*

As far as we are concerned, due process in the adoption and implementation of resolution measures involving **(a)** adequate procedural safeguards and a **(b)** proper system of review of resolution measures are an essential part of the answer to such fundamental question underlying resolution regimes. This is, of course, particularly the case with *resolution tools*, most notably the bail-in tool,²⁴ but the *disruptive potential* is also present to different degrees in other measures. As aforementioned, it may appear paradoxical that the ultimate

¹⁸ Articles 10/1 and 12/1 of Regulation 806/2014.

¹⁹ Comprising the sale of business tool, the bridge institution tool, the asset separation tool and the bail-in tool (article 22/2 of Regulation 806/2014).

²⁰ See article 90/3 of Regulation 806/2014. As referred in this provision, decisions adopted by the SRB concerning access to documents are taken under the provision of article 8 of 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.

²¹ See articles 70 and 71 of Regulation 806/2014.

²² See article 65/3 of Regulation 806/2014.

²³ See article 38 of Regulation 806/2014.

²⁴ On this topic see, for example, Karl-Philipp Wojcik, “Bail-in in the Banking Union” in *Common Market Law Review* (2016) vol. 53, pp. 91-138.

goal of such a disruptive set of measures is to ensure financial stability,²⁵ but it is precisely the importance of banking activity within the overall structure and functioning of the financial system that requires short- and medium-term drastic measures to ensure long-term financial stability.²⁶

Financial stability is a typical example of a *public good* and, as a result, one to which beneficiaries have little willingness to contribute but are greatly interested in benefiting from.²⁷ The most obvious consequence is that the market cannot provide financial stability, so that regulation and supervision of the financial system have to be provided by the public entities. In the context of resolution measures, their role in ensuring long-term financial stability conflicts with the short- and medium-term individual interest of a great number of stakeholders. This inevitably leads to a *high-degree of litigation*, typically higher than the one which occurs in connection with *banking supervision measures (stricto sensu)*,²⁸ not only in core areas of the resolution mechanism – the resolution tools –, but also in adjacent areas that range from the *preventive dimension* of the resolution mechanism,²⁹ to the instrumental measures described above. Ultimately, litigation can extend from the resolution measures themselves to the role of supervisory

²⁵ In this sense, article 31/2 of 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 Council (henceforth “BRRD”).

²⁶ Resolution measures are a powerful illustration that ‘banking is essential, banks are not’.

²⁷ More in detail on this topic and on the implications for regulation and supervision of the financial sector, see Frank PARTNOY, “Financial Systems, Crises and Regulation” (May 9, 2014). Oxford Handbook of Financial Regulation, Chapter 5, 2014; San Diego Legal Studies Paper No. 14-154. Available at SSRN: <https://ssrn.com/abstract=2435332>

²⁸ Although the elements refraining banks and relevant stakeholders from judicially challenging banking supervisory measures when these were adopted essentially at national level may be losing ground with the transfer of supervisory competences to the EU level (through the SSM). See on this, *inter alia*, René SMITS, *Interplay of administrative review and judicial protection in European prudential supervision. Some issues and concerns* - Paper presented at the Conference on Judicial review in the banking Union organized by the Bank of Italy and EBI, Rome, 21 Nov 2017; J.C. LAGUNA DE PAZ, *Judicial Review in European Competition Law* (2014); Matthias LEHMANN, *Varying Standards of Judicial Scrutiny over Central Bank Actions*, in *ECB Legal Conference 2017 – Shaping a New Legal Order for Europe: A Tale of Crises and Opportunities*, ECB, December, 2017, pp 112.

²⁹ As regards the preventive dimension of resolution, the high financial overall impact e.g. of the key decisions establishing adequate levels of *minimum requirement for own funds and eligible liabilities* (‘MREL’) which are vital to ensure the resolvability of banks, and the extreme difficulty in striking the right balance between flexibility and hard requirements in setting MREL, may hypothetically be an appreciable incentive to litigation (in spite of the extensive and inherently positive dialogue developed between the SRB and the banking sector). On the challenges related with setting MREL see, *inter alia*, Dominique LABOUREIX, Vincent DECROOCQ, *Enhancing the Capacity to Apply a Bail-in Through the MREL Setting*, in *European Economy*, 2016, 2, pp 117; *European bank resolution: Making it work! Interim Report*, *Centre for European Policy Studies*, Report from the Task Force on Implementing financial sector resolution, January 2016, Chair and rapporteur Thomas F. Huertas

authorities in the application of resolution measures, including claims for damages against the said authorities.³⁰

The balance between the disruptive potential of resolution measures and its ultimate and prevailing stabilizing goal can only be achieved through procedural safeguards both at the level of the adoption and implementation of the said measures and at the level of *review of such measures*. The focus of this paper will be on the latter aspect, although it is not ignored that both dimensions are intrinsically related within an overall dimension of *due process* in the enforcement of resolution regimes, and should be viewed as part of wider set of questions concerning the structure and functioning of European agencies and, in particular, of their board of appeals.³¹

3. *Review of resolution measures by the AP of the SRB: some issues concerning the scope, nature and intensity of the review*

3.1 *Introduction*

The review of resolution measures rests upon a multilevel review system comprising the EU level, where decisions adopted by the SRB are subject to a quasi-judicial/administrative review³² by the Appeal Panel (AP) of the SRB³³ and/or to the judicial review of the Court of Justice³⁴; and the national level, where decisions adopted by national resolution authorities are subject to judicial review of national courts.

Addressing the issue of review of resolution measures calls for a multidimensional perspective that includes the institutional balances between (i) the AP and the SRB, (ii) the AP and the CJEU, and, admittedly to a lesser extent, between (iii) the AP and national resolution authorities. While in the interaction between the AP and the SRB, and between the former and the CJEU, the main questions relate to the *scope* and *intensity* of the review, as regards the interaction between the AP and national courts the most pressing issues have to do with the impact of the AP's decision on pending or future litigation before national courts.

³⁰ See article 87/3 of Regulation 806/2014. Generally on this topic, see Phoebus ATHANASSIOU, "Financial Sector Supervisor's Accountability: a European Perspective", ECB – Legal Working Papers Series no. 12, August 2011, available at: <https://www.ecb.europa.eu/pub/pdf/scplps/ecblwp12.pdf?6d0133a27c99e344d8a112e52d332605>

³¹ On these aspects, see report produced by the Max-Planck Institute Luxembourg for Procedural Law in the context of the APPEAL Project Seminar, dealing with the governance and functioning of boards of appeal of the agencies of the EU (on archive with the authors). For a summary of these findings, see the power point presentation prepared by Matteo GARGANTINI for the European Banking Institute's conference on "Reflections on Design and Implementation of the Banking Union" (Università degli Studi di Bologna, 17-18 September 2016), available at: <http://www.ebi-europa.eu/wp-content/uploads/2016/12/Gargantini.pdf>

³² This point concerns directly the issue of the *nature* of the review undertaken by the AP of the SRB and will be addressed infra at III./2).

³³ Article 85 of Regulation 806/2014.

³⁴ Article 86 of Regulation 806/2014.

Although the AP shares a number of common features with other boards of appeal, starting with a common ‘constitutional’ foundation (article 263/5 of the TFEU),³⁵ there are nevertheless a number of differences that make the comparison between the AP and other boards of appeal inevitable.³⁶ In addition, the fact that Regulation 806/2014 provides little guidance on the procedural aspects of the review that the AP is expected to undertake, particularly on the scope, nature and intensity of the latter,³⁷ is yet another reason to draw inspiration from other boards of appeal.

Notwithstanding the number of boards of appeal that exist under EU law,³⁸ it would seem that the nature of the subject-matter dealt by the AP of the SRB, which is reflected in its mixed composition, would recommend a closer comparison with the Administrative Board of Review (ABoR) of the SSM.³⁹ There are a number of salient differences between these two institutions,⁴⁰ to be sure, the most important of which concerning the *non-binding* effect of the opinions issued by the ABoR, which stands in contrast to the AP’s power to confirm or set aside the decisions of the SRB.⁴¹ However, such a difference, sizeable as it is, should not be taken out of the context in which the ABoR was created, somehow conditioned as it was by the political/institutional “inconvenience” of amending the Treaty to allow the Governing Council of the ECB – which is not a Union agency, as the SRB, but a EU

³⁵ “Acts setting up bodies, offices and agencies of the Union may lay down specific conditions and arrangements concerning actions brought by natural or legal persons against acts of these bodies, offices or agencies intended to produce legal effects in relation to them.”

³⁶ For an overview of the common traits and differences between the AP and other boards of appeal (such as those of Office for Harmonization in the Internal Market (OHIM), the Community Plant Variety Office (CPVO), the European Chemicals Agency (ECHA), the European Aviation Safety Agency (EASA), the Agency for the Cooperation of Energy Regulators (ACER), the Joint Board of Appeal of the European Supervisory Authorities (ESA) and the Administrative Board of Review of the SRM), see Paola CHIRULLI and Luca DE LUCIA, “Specialised adjudication in EU administrative law: the Boards of Appeal of EU agencies” in *European Law Review* (2015), vol. 40, no. 6, pp. 838-857.

³⁷ Procedural rules are generally confined to articles 85 and 86 of Regulation 806/2014 and to the Rules of Procedure approved by the AP (available at: https://srb.europa.eu/sites/srbsite/files/2017_rules_of_procedure_of_srb_appealpanel_en_v6.pdf). The latter, however, are fairly general in respect of several issues, including those of the scope, nature and intensity of the review.

³⁸ For a more detailed account of the subject, see the report of the APPEAL Project Seminar. See also Paola CHIRULLI and Luca DE LUCIA, “Specialised adjudication in EU administrative law: the Boards of Appeal of EU agencies” in *European Law Review* (2015), vol. 40, no. 6, pp. 838-857.

³⁹ Article 24 of Regulation 1024/2013.

⁴⁰ For an extensive analysis of the ABoR, including a comparison with the AP of the SRB and the Joint Board of Appeal of the European Supervisory Authorities (ESAs), see Concetta BRESCIA MORRA, “The Administrative and Judicial review of Decisions of the ECB in the Supervisory Field” in *Scritti sull’Unione bancaria, Quaderni di ricerca giuridica della Banca d’Italia*, n. 81, Luglio 2016, pp. 109-132.

⁴¹ The same happens with the Joint Board of Appeal of the ESAs; see, *inter alia*, BRESCIA MORRA (2016): 16-17-18.

institution enjoying a number of prerogatives⁴² – to be bound by decisions of the ABoR.⁴³ Conversely, there are a number of similarities between the two instances of appeal which deserve to be highlighted, namely as regards their composition, independence and procedural rules (although in this regard the regulation of the ABoR is more detailed) that, together with a common subject matter relating to the *supervision of the financial sector* (*'lato sensu'*),⁴⁴ advise a closer comparison between these two boards of appeal. As a result, notwithstanding the obvious differences between the ABoR's non-binding *opinions* and the AP's binding *decisions*, it would seem that the relative importance of the *nature of the review* (*administrative, quasi-judicial or judicial*) undertaken by each of these bodies should not be overemphasized, especially because it does not set aside the fact that there are a great deal of similarities as regards the *scope* and *intensity* of the review undertaken by both bodies.

3.2 *Scope of the review*

As regards the AP of the SRB, we should start by distinguishing two types of situations: those where the AP has jurisdiction because a direct appeal to the CJEU is not possible, which means that the review of the resolution measures adopted by the SRB involves a necessary intervention by the AP, which could be followed by an action for annulment brought before the General Court⁴⁵ and, eventually, by an appeal to the Court of Justice restricted to points of law;⁴⁶ and those where the AP has no jurisdiction, which means that the decisions of the SRB can be *directly* appealed to the CJEU. In both instances, prior exhaustion of administrative remedies is a pre-condition for lodging an appeal before the CJEU,⁴⁷ a feature that the AP shares with a number of other boards of appeal.⁴⁸

This means that the AP has no general appellate jurisdiction and *can only review a selected – albeit appreciable – number of decisions* that include:⁴⁹

⁴² On the features and role of the ECB as a EU institution see, *inter alia*, Règis VABRE (sous la direction de), *Banque centrale européenne: regards croisés, droit et économie* (Bruylant, 2016). We may argue that at certain points and in certain legal contexts some corollaries of the ECB and the ESCB as an institutional system set apart and independent may have been overrated. However it is largely beyond the limited remit of this Paper to discuss such fundamental issue. See, in general for an updated discussion of such issues, *ECB Legal Conference 2017 – Shaping a New Legal Order for Europe: A Tale of Crises and Opportunities*, ECB, December, 2017 (already quoted *infra*).

⁴³ On this point, see BRESCIA MORRA (2016): 17-18.

⁴⁴ We refer above to *supervision 'lato sensu'* since for all specific legal technical purposes *resolution* of financial institutions is a category and domain which is autonomous from *supervision* of financial institutions (in spite of the web of interconnections between the two domains).

⁴⁵ Under article 263 of the TFEU.

⁴⁶ See article 86/1 of Regulation 806/2014.

⁴⁷ Article 86/1 of Regulation 806/2014.

⁴⁸ For a reference to the relevant legislation concerning OHIM, CPVO, ECHA, EASA, etc., see CHIRULLI/DE LUCIA (2015): 835.

⁴⁹ See article 85/3 of Regulation 806/2014.

a) decisions on measures to address or remove substantive impediments to resolvability;⁵⁰

b) decisions on simplified obligations for certain institutions;⁵¹

c) decisions that determine the minimum requirements for own funds and eligible liabilities subject to write-down and conversion powers;⁵²

d) decisions on the application of penalties for failure to comply or to cooperate with the SRB;⁵³

e) decisions on the determination and collection of contributions to administrative expenses of the SRB;⁵⁴

f) decisions on *ex post* contributions to the SRF;⁵⁵ and

g) decisions concerning access to documents relating to the resolution mechanism.⁵⁶

Accordingly, the *scope* of the AP's jurisdiction is largely oriented towards the *preventive* dimension of the resolution mechanism, as well as to measures that we considered *instrumental* for the latter. *A contrario*, the *executive* dimension of the resolution mechanism is largely or essentially excluded from the review of the AP and is subject to the direct review of the CJEU under article 86/1 of Regulation 806/2014.⁵⁷

3.3 Nature of the review

By addressing the issue of the nature of the review undertaken by the AP we are also confronting a more complex issue concerning the *nature of the AP* as a highly specialized dispute resolution mechanism.⁵⁸

⁵⁰ Article 10/10 of Regulation 806/2014.

⁵¹ Article 11 of Regulation 806/2014.

⁵² Article 12/1 of Regulation 806/2014.

⁵³ Articles 38-41 of Regulation 806/2014.

⁵⁴ Article 65/3 of Regulation 806/2014.

⁵⁵ Article 71 of Regulation 806/2014. It should be noted that *ex ante* contributions (article 70 of Regulation 806/2014) are excluded from the scope of review of the AP.

⁵⁶ Article 90/3 of Regulation 806/2014.

⁵⁷ We do not consider here such executive dimension of the resolution mechanism *fully* excluded from the remit of the AP (rather *largely or essentially excluded*), because a number of issues with significant relevance for potential litigation arising from executive measures of resolution may be submitted to the AP, as it happens, notably, with access to file issues (which underly the bulk of cases submitted to the AP in the last quarter of 2017 in the wake of the June 2017 resolution of Banco Popular).

⁵⁸ Dealing with these issues from the tripartite perspective of nature, independence and governance of appeal bodies, see Georgios DIMITROPOULOS and Clemens A. FEINÄUGLE, "Organizational Aspects of the Boards of Appeal of the Agencies of the European Union" in MPI Luxembourg – APPEAL project Seminar, pp. 1-13.

The answer to the latter question could range from considering the AP a (regular) administrative body, an administrative tribunal⁵⁹ or a court of law (or almost jurisdictional institution). As a regular administrative body, the AP would be composed of experts and organically included in the agency whose decisions it is set to revise. Considering the AP as an administrative tribunal would, in turn, emphasize its *ad hoc* and specialized nature. Finally, as a court of law (or even, in a slight legal *nuance*, an *almost jurisdictional institution*), it would be expected that the members of the AP would enjoy a certain degree of independence arising from their selection procedure and extending to the exercise of their mandate, which in turn would be projected in the exercise of *full or general jurisdiction* over a general domain of action of SRB and the resolution mechanism. In fact, all these features are, to some extent - albeit to different degrees in the complex legal '*palette*' of intervention of this body - recognizable in the AP, thus making the exact definition of its nature a somewhat daunting, if at all useful, task.

It could be argued, even at risk of *oversimplification*, that producing such *exact definition of the nature of the AP* and thereby placing it, in connection/ comparison with other appeal bodies in EU law, in a specific legal box, may be a rather 'futile' quest, regardless of a much needed overall dogmatic elaboration in this domain (aimed at producing a systematic view of these appeal bodies in an overall context of innovative *frameworks of administrative arrangements* for the protection of rights of entities affected by actions of supervisory and resolution authorities, *e.g.* as per the very elaborated dogmatic construction undertaken by, *inter alia*, Sabino Cassese).⁶⁰ Accordingly, instead of *graduating* it more towards the 'administrative' or 'judicial' end of the spectrum, to a large extent the AP of SRB could possibly be acknowledged as a body having a '*sui generis*'/*hybrid nature*, its particularity lying in its *mixed attributes*, which do not qualify the AP as a tribunal but rather endowed it: with the *general attributes of a legal adjudicative body* (as per article 85 of Regulation 806/2014), albeit a considerably more flexible one, operating under *different requirements* (notably an adjudicative body *whose mandate is limited to confirm decisions or remitting it to SRB to adopt new decisions*, as per article 85/8 of Regulation 806/2014).

The AP integrates five effective members and two alternates who are selected on the basis of their expertise and experience for a 5-year term, with a possible extension for an additional term.⁶¹ Furthermore, the members of the AP have a mandate to act independently from the SRB and in the public interest,⁶²

⁵⁹ In the Anglo-Saxon tradition. On the origin and function of administrative tribunals in the UK, see CHIRULLI and Luca DE LUCIA (2015): 839-843; and, more in-depth, see Timothy ENDICOTT, *Administrative Law*, third edition (OUP: 2015).

⁶⁰ See on this Sabino CASSESE, *A New Framework of Administrative Arrangements for the Protection of Individual Rights*, in *ECB Legal Conference 2017 – Shaping a New Legal Order for Europe: A Tale of Crises and Opportunities*, ECB, December, 2017, p. 239.

⁶¹ Article 85/3 of Regulation 806/2014.

⁶² Article 85/5 of Regulation 806/2014.

as well as to take impartial decisions.⁶³ So, whatever the exact qualification of the AP, it seems that – as aforementioned - it has a hybrid or *sui generis* nature where independence, impartiality and technically specialized expertise stand out as defining traits, notwithstanding the fact that article 85 of Regulation 806/2014 depicts the AP as possessing the general attributes of legal adjudicative body.

3.4 Intensity of the review (the review standard)

The AP is bound by a standard of *legality* when reviewing the decisions of the SRB, which concerns both the admissibility of the appeal and the substance of the allegations made by the appellants.⁶⁴ The outcome of the AP's review may be that the decision taken by the SRB is confirmed – in which case the appellant has no option but to appeal further to the CJEU – or that the case is remitted to the SRB. It seems, however, that the AP is bound by the terms of the decision it is set to review, and thus barred from undertaking further investigations or collecting fresh evidence on its own initiative.⁶⁵

In any event, it should be noted that the decision of the AP is *binding*, including the amendments it proposes to the SRB.⁶⁶ Although not explicitly stated, both the scope and the intensity of the review carried out by the AP are shaped along the lines of the CJEU review of legality, including the *delimitation of those who may appeal against a decision of the SRB* (standing) and the *grounds for remittal*.⁶⁷ According to article 85/3 of Regulation 806/2014, standing is recognised to any natural or legal person, including resolution authorities, to whom the decision is addressed or to whom it is of direct and individual concern. Given the manifest coincidence between the wording of this provision and that of article 263/4th paragraph of the TFEU, it follows that the case law of the CJEU on the latter provision is in essence applicable. As a result, a “contested *decision* is of direct concern to an applicant if that decision directly affects the legal situation of the applicant or influences his or her material situation or has a foreseeable impact on his or her legal position”, whereas “a legal act of an EU institution or agency is of individual concern when it affects specific natural or legal persons by reason of certain attributes peculiar to them, or by reason of a factual situation that differentiates them from all other persons and distinguishes them individually in the same way as the addressee.”⁶⁸

⁶³ Article 3 of the Rules of Procedure of the AP of the SRB (available at: https://srb.europa.eu/sites/srbsite/files/2017_rules_of_procedure_of_srb_appealpanel_en_v6.pdf).

⁶⁴ Article 85/7 of Regulation 806/2014; see also article 9 of the Rules of Procedure on the decision by the AP regarding whether the appeal is admissible.

⁶⁵ Article 85/8 of Regulation 806/2014; the same limitation applies to the Joint Board of Appeal of the ESA and to the BoAR of the SSM.

⁶⁶ Article 85/8 of Regulation 806/2014.

⁶⁷ See article 263/2nd and 4th paragraphs of the TFEU.

⁶⁸ BRESCIA MORRA (2016): 15 (with references to the relevant case law of the CJEU); emphasis in italic added. More in detail on this topic, see Andreas WITTE, “Standing and Judicial Review in the New EU Financial Markets Architecture” in *Journal of Financial Regulation* (2015), vol. 1, issue 2, pp. 226-262.

One of the most distinguishing features of resolution measures are their complexity, a feature that explains and justifies that the selection of the members of the AP is made on the basis of technical expertise and professional experience. It could be argued, therefore, that this feature may allow the AP to engage more intensively and proactively with the review of the decisions adopted by the SRB thus contributing to the gradual emergence of a qualitatively renewed standard of review (albeit building on the ECJ standard of review and on recent evolutions of it in some fields, *e.g.* competition law enforcement). At the same time, this high-degree of specialization – commensurate with the subject matter’s complexity and the interdisciplinary background of the AP members –, also raises two additional questions, both relating to the integration of legal and scientific/technical assessment in the review undertaken by the AP or the CJEU.

In the first case, the question is whether the AP should limit itself to a *legal* assessment which, in the face of highly complex and technical elements concerning the regulation and supervision of financial markets, would limit itself to the appraisal of the legality and proportionality of the appealed decision. The option would be to make the best of the expertise of its members and venture into a technical assessment of the appealed decision, which would not rule out but rather, to some extent, complement the ‘legal’ assessment (although always within the borders of an overall discussion of *legality* issues, even within a more demanding *substantive* understanding of the *legality* at stake). This second option seems not only preferable on account of the nature of the subject matter,⁶⁹ but also fully in accordance with composition⁷⁰ of the AP, its mandate⁷¹ and scope of review⁷² expected from the AP.

As for the second question, it relates to the *standard of review* of the CJEU in cases that involve complex economic assessments.⁷³ The issue has notably been debated in the context of competition law cases that involve *complex economic assessments* related with a broad discretion enjoyed by the Commission, and where the CJEU has traditionally adopted a *limited standard of review*, although displaying in recent cases a somehow more *intrusive/proactive economic assessment* of the sustainability of legal reasoning at stake.⁷⁴ Generally in such cases, the CJEU limits its review to an assessment of compliance with procedural requirements, sufficiency of the statement of reasons, correct assessment of the

⁶⁹ Article 85/2 of Regulation 806/2014.

⁷⁰ Article 85/3 of Regulation 806/2014.

⁷¹ Article 85/5 of Regulation 806/2014.

⁷² Article 85/8 of Regulation 806/2014.

⁷³ As a general rule, the CJEU may review acts of EU institutions on the grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or any rule of law relating to their application and misuse of powers (article 263/2nd paragraph of the TFEU). Generally on these points, see Koen LENAERTS *et alii*, *EU Procedural Law* (OUP: 2015).

⁷⁴ See, *e.g.*, possibly in that direction, the recent ruling of the General Court of 26 October 2017 (case T-394/15, *KPN BV v European Commission*, ECLI:EU: T:2017:756), in which the Commission’s decision to allow a merger was quashed due to *lack of investigation by the Commission of some effects of the merger or at least lack of explanation of choice of not looking into certain effects*.

facts and inexistence of manifest errors or misuse of power by the Commission (although, as aforementioned, seeming to take further in some cases what may be construed as gradual fine-tuning of a *qualitatively more demanding/technical evaluation* of the *sufficiency of technical/economic assessments*).⁷⁵ In the same vein, it would seem that in the field of resolution measures, both the broad discretion enjoyed by the SRB and the complexity of the subject-matter advise the adoption by the AP of a limited standard of review along the lines of what the Court has adopted in competition law cases, possibly incorporating gradually in such standard of review a *more complex technical/economic assessment* of the legality issues underlying the reasoning of contested decisions.⁷⁶ For the time being, it is certainly premature to advance more definite considerations in this highly sensitive domain as regards potential corollaries arising from a gradual fine-tuning of a *qualitatively more demanding/technical evaluation of sufficiency of technical/economic assessments* of SRB (always bearing in mind also that such evaluations may never replace as such the decisions of SRB, given the undisputable overall limitations of the review at stake).

At a much general level, assuming a scenario in which (i) de iure condendo the competence of the AP of SRB might be expanded (within the framework of future reforms of the SRM Regulation), and in which (ii) an overall trend, towards more vigorous/intrusive review would assert itself in other cases of more complex economic assessment – that would go much beyond the AP of SRB and include other bodies of appeal and even the stance of the CJEU in certain fields of competition and sectoral economic regulation – we may posit if and to what extent the current bodies of appeal in EU law could become, in the foreseeable future, the embryo of Specialised Chambers of Appeal of a sui generis nature, more than purely administrative while definitely not judicial ones.

4. Review of resolution measures by NRAs (some brief notes)

As already mentioned, resolution measures adopted by national resolution authorities may be challenged before national courts, on the basis of national procedural rules. However, as regards the standard of review undertaken by national courts, recital 89 of the BRRD apparently introduces some limitations regarding the *intensity* of the review to the extent that it suggests that the “*complex economic assessments made by national resolution authorities*” in the context of crisis management should not go to waste and that national courts should use it as a base for reviewing the relevant measures. The complex assessment that supports the selection and application of resolution measures is, it would seem, outside the scope of review of national courts and the latter should confine their review to

⁷⁵ See, *inter alia*, cases C-295/12 P, *Telefónica and Telefónica de España v Commission*, EU:C:2014:2062, para. 54; C-413/06 P, *Bertelsmann and Sony Corporation of America v Impala*, EU:C:2008:392, para. 69; and C-12/03 P, *Commission v Tetra Laval*, EU:C:2005:87, para. 39.

⁷⁶ On this point with reference to the review of the ECB’s decisions in the supervisory field in the context of the SSM, see BRESCIA MORRA (2016): 30-35.

*“whether the evidence relied on by the resolution authority is factually accurate, reliable and consistent, whether that evidence contains all relevant information which should be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn therefrom.”*⁷⁷

Litigation before the national courts covers actions for annulment of resolution measures adopted by NRAs⁷⁸ but also, unlike what happens with the AP of the SRB, claims for damages brought against the NRAs. In addition, it may also include actions targeting the *ex ante* approval of resolution measures by NRAs (most notably the bail-in tool and the sale of business tool, as the potentially more contentious resolution tools), but subject to an expeditious procedure commensurate with the urgency of the measures at stake.⁷⁹

The possibility of plaintiffs challenging the validity of a resolution measure adopted by the SRB before national courts is, though improbable, not to be excluded, but in such an event the national court would have to submit a request for a preliminary reference to the CJEU since, in accordance with the *Foto Frost* jurisprudence,⁸⁰ national courts are barred from ruling on the validity of a Community measure.

As the case of the resolution of *Banco Espírito Santo* (BES) somehow evidences – in line with our previous considerations in the first part of this Paper bearing in mind that while such landmark national precedent was based on pre-BRRD national rules, those rules largely anticipated the BRRD regime - there is much to be expected in terms of litigation before the national courts. The issues raised, which invariably involve the compatibility of resolution measures with constitutional principles and rules with European law, will certainly produce a rich body of case law as such questions start being settled by national courts.

Accordingly, and in a nutshell, some fundamental references and indicators – from a ‘*law in action*’ perspective – related with major national case law arising from key national resolution cases occurring before the single resolution mechanism was fully operative but under BRRD-style national provisions, *may further enlighten and test the full potential and full range of consequences of review of resolution measures* as regards, namely, problems related with the compression of property rights and patterns to deal with these rights *vis-a-vis*

⁷⁷ Recital 89 states: “89. Crisis management measures taken by national resolution authorities may require complex economic assessments and a large margin of discretion. The national resolution authorities are specifically equipped with the expertise needed for making those assessments and for determining the appropriate use of the margin of discretion. Therefore, it is important to ensure that the complex economic assessments made by national resolution authorities in that context are used as a basis by national courts when reviewing the crisis management measures concerned. However, the complex nature of those assessments should not prevent national courts from examining whether the evidence relied on by the resolution authority is factually accurate, reliable and consistent, whether that evidence contains all relevant information which should be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn therefrom.”

⁷⁸ Which are confined to the less significant financial institutions; see article 7/2 of Regulation 806/2014.

⁷⁹ See article 85/1 of the BRRD.

⁸⁰ Case 314/85, *Firma Foto Frost v. Hauptzollamt Lübeck-Ost*, ECLI:EU:C:1987:452.

overriding requirements of public interest that justify intervention in banks (and also, largely underlying such discussion on property rights, the role of the proportionality principle and the corresponding procedural safeguards attached to it).

At a different level, the BES case may also serve to illustrate the potential for litigation regarding what we may loosely term (*brevitatis causae*) as ‘post-resolution’ issues (in connection with already finalised resolution procedures), bearing in mind *e.g.* a recent (2017) court case in which a bank operating in Portugal and participating in the Portuguese resolution fund challenged a contractual clause of the contract of sale of the bridge bank which had emerged from the resolution of the original BES to a third entity, alleging, *inter alia*, that such clause would require additional and excessive financial efforts from the resolution fund and its participating banks after the sale of bridge bank.

Although the discussion of these issues largely exceeds the remit of this paper, it serves to illustrate that an overall panorama of the review of resolution measures (still a domain of largely uncharted waters) will not be complete without taking into consideration the possible review of resolution measures at national level (something that would require an altogether autonomous paper).

5. Conclusion

The questions that we have discussed in this paper reflect a side of the resolution mechanism that is attracting growing attention from the literature: the *procedural side*. Along with the substantive dimension, the *procedural dimension* is slowly emerging as an indispensable element of the resolution mechanism and one that needs further elaboration. The existing body of rules on procedural issues is generally scarce and vague and further clarification is to be expected as litigation – both at the EU and the national level – increases. Subject matter affinity with the BoAR of the SSM and with the Joint Board of Appeal of the ESA advise a closer look at their future development and, where possible, taking advantage of mutual learning made possible by the cases brought before each of these bodies. Though largely restricted to less significant financial institutions, developments at the level of NRAs are not to be excluded from the scope of interest including those cases – such as the resolution of *Banco Espírito Santo* – that predate the BRRD but involve the application of national provision that anticipate some of the solutions of the BRRD to resolutions with major impact in the banking sectors affected.

On the whole, one of the most challenging issues concerning the review of resolution measures, taken together with the review of supervisory measures at EU level, concerns the evolving *standard of review* to be applied to this overall domain and the extent to which the intervention of newly instituted bodies of appeal characterized by a ‘*sui generis*’/hybrid nature, may lead to a fine-tuning of such *standard* towards a somehow more *intrusive/proactive economic assessment* of the sustainability of legal reasoning at stake (although always within the

confines of the *legality standard*, even if a substantively more demanding one). It is not to be excluded that such evolving *standard of review*, together with future developments *de iure condendo*, may pave the way to the emergence, within the foreseeable future, of *Specialised Chambers of Appeal of a sui generis nature*, an event that would change the jurisdictional landscape in certain areas of EU law, namely financial law (comprising supervision and resolution of financial institutions).

EUROPEAN RULES AND JUDICIAL REVIEW IN NATIONAL COURTS: CHALLENGES AND QUESTIONS*

*Marco Ventoruzzo***

1. Introduction – 2. A Sketched Framework of Judicial Review – 3. EU Rules in National Courts – 4. Conclusions

* Remarks made at the Conference jointly organized by Banca d'Italia and the European Banking Institute on "Judicial Review in the Banking Union and in the EU Financial Architecture", Rome, Italy, 21 November 2017.

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1. Introduction

A significant body of economic literature defines and measures empirically the legal degree of independence of central banks, a fundamental feature of the institutional design of the monetary and financial systems so relevant and well known that does not need to be discussed here.

The two more cited metrics – the Cukierman Index and the Grilli-Masciandaro-Tabellini Index – date back to the early 1990s, but are still commonly used, so they are very useful as a starting point. Those of you who know how these indexes are calculated, will remember that they consider different variables in terms of functional (economic) and political independence, and rank Central Banks accordingly. What is probably more interesting for our purposes today, is, however, what these and similar measures do *not* consider, rather than what they do consider, and for understandable reasons. They do not consider, in fact, judicial review of Central Banks acts.

This is correct because being subject to the rule of law, and the possibility of regulated subjects to seek judicial control of the activity of the central bank, is not only obviously necessary to protect individual rights, but also something that does not – and should not – infringe on independence as we intend it in this context. On the contrary: being subject (only) to the law can be seen as the ultimate sign of independence, representing its necessary reflection, *id est* accountability.

On the other hand, we cannot ignore that, as French scholars famously put it, “*juger l’administration c’est aussi administrer*”. While it is an established principle that a central bank must be (relatively?) untouched by other branches of the executive and legislative powers, and by politics more generally, a much more subtle question concerns possible “interference” in its decisions and policies by the judiciary. A grey area exists between the technical discretion of the monetary and supervisory authorities and the possibility of courts to second-guess their activity. Against this background, my goal is two-folds.

First, and here you will allow me to go a little bit beyond the title assigned to me, I would like to quickly draw a picture of judicial review of central bank acts with respect to the ECB and NCBs. I will briefly consider, also based on the limited legal literature available, whether the standards of review are or should be different for the different major competences of (most) central banks.

Second, also in order to bring the discussion closer to my specific competences (I am not an administrative law or EU law expert), I would like to address one issue concerning, so to speak, the “adjudication approach” or “style” of national courts when faced with EU legislation, regulation, or administrative acts emanating from EU authorities, or in any case based on or inspired by European law and administrative activities.

2. *A Sketched Framework of Judicial Review*

Let me start from the first issue. Imagine a matrix in which, in the first column, we list the major competences of the ECB and NCB: monetary policy and payment system management, SSM and SRM (we are of course aware that there is a degree of separation for the SRB, and also that macro prudential institutions are formally present in the EU perimeter, but let me simplify). In the first row, on the other hand, we distinguish jurisdiction, meaning the scope of the adjudication power of the courts and standard of review (there would be other interesting questions in terms of standing and remedies, but we do not have time). Each resulting cell deserves attention.

With respect to jurisdiction, similar observations can be made independently from the type of activity. The general rule is that national authorities' acts are subject to the jurisdiction of national courts, while the acts adopted by European institutions shall be reviewed by the European courts. The solution is however not as easy as it may seem, and such a rigid criteria might be questionable in the existing framework.

Indeed, the complexity arises for example from the fact that, as already mentioned, also outside the case of common procedures in a strict sense, NCBs acts are often based on ECB decisions that they implement. In these cases, it may be problematic to establish which judge has jurisdiction on the matter and under which law, national or European, the judgment must be issued.

The answer might depend, at least functionally, on the margin of discretion the ECB act leaves to the national act implementing it. If the national act merely implements the ECB decision, without any margin of discretion, one might wonder if the more formal approach pursuant to which a national court has jurisdiction is desirable, or whether the jurisdiction should be attributed to the ECJ. If, on the contrary, the national authority enjoys a certain margin of discretion, there is no doubt, formally and functionally, that the act shall be challenged before the national court and judged according to national law. Naturally, national judges can request a preliminary ruling to Luxembourg, and it is obvious to conclude that greater dialogue among courts will become increasingly necessary.

There is however also a deeper issue. It is clear that, in the current system, in some cases relatively similar if not identical issues will be judged in different courts, national courts or the ECJ, depending for example on the significance of the financial institution involved. This matter is even more delicate and practically relevant since the "significance" of a financial institution might change over time, with the additional consequences of different competent courts in different periods.

In this framework, in addition, one should also consider the recent ECJ judgment in the *Landesbank* case, which takes the view that (i) supervision on SSM institutions always lies within the ECB, while NCAs carry out the functions which belong to the latter for less-significant banks on a "decentralized

basis”; and that (ii) the ECB may at any time re-centralise those functions. This holding opens the door to a concept of “mobility” of jurisdiction that adds a further level of complexity to our analysis.

Now, different courts do not simply mean different precedents, styles, approaches to substantive issues, but also different procedural rules and, to some extent, injunctive powers. Notwithstanding the existence of shared principles, one might wonder if this circumstance, in itself, might lead to questionable differences of treatment.

With respect to review standard, on the other hand and again in very broad brush-strokes, together with other scholars, for example Professor Lehmann from Bonn University, I am of the opinion – strongly supported by the law – that the intensity of judicial review must be different in the areas of monetary policy, banks supervision and resolution. Logically this is due to essentially three variables. First, the compatibility of intense judicial intervention with the very functions attributed to the central bank and the importance of certainty, stability, and speed in certain areas and situations. Second, the highly technical nature of the discretion that the authority must exercise. Third, the ability of the specific acts to affect and prejudice individuals or specific organizations.

In this perspective, to the extent that a similar generalization is acceptable, a rough classification might lead us to say that the standard of review must be more deferential to the Central Bank with respect to monetary policy, and can be more intense with respect to supervisory decisions and acts. This seems correct especially when – such as with sanctions, authorizations, or suitability requirements – individual rights are at stake. The very fact that – simplifying – judicial “attacks” to the monetary powers of the ECB have concerned more the scope of its powers, rather than the merits of its decisions, indirectly confirms this observation.

Resolution powers falls somehow in the middle of this spectrum, especially due to the fact that time and stability of effects are often of the essence in the famous or infamous “week-end solutions”. The law clearly supports this claim. Consider that while *ex post* judicial review is mandatory under both the BRRD and the SRM, *ex ante* review is optional for Member States, and several jurisdictions have opted to avoid it. In addition, the very fact that remedies focus on monetary damages rather than injunctive relief, and the requirement of “expeditious” procedures indicate a more limited scope of action to review the merits of decisions in this field.

In any case, we are facing a new and complex matrix that underlines one of the most interesting and challenging issues for the development of the Banking Union and, more generally, a truly common market in the financial sector. Harmonizing substantive rules, either in a top-down or bottom-up fashion is difficult; but even more difficult is the equally important task of harmonizing – or even just coordinating – procedural rules and judicial review. In addition to the technical complexities, path dependency, cultural and historical factors play

probably an even bigger role along this dimension, but our discussion shows that this problem is no longer avoidable.

3. *EU Rules in National Courts*

Let me come now to the second question, more in line with the title of my talk and dealing, as mentioned, with judicial style and approach of national courts.

As we all know, and our topic today is one of the best examples, Italian courts, such as courts in other Member States, are increasingly called upon the task of interpreting and applying rules originated at the European level, both when these rules are directly applicable in the single jurisdictions, and when they require implementation through internal acts, based on texts elaborated in a multinational context. In addition, courts are or might be required to apply or work on administrative acts enacted by EU authorities or, as professor Brescia Morra discusses in this occasion, based on common procedures.

A part from more technical issues, these legal sources and documents, to use a broad expression, follow a legislative or regulatory “technique”, are based on ideas and principles, and even use a terminology that can be and often is quite different from what national judges have been trained and are used to apply. The very need to refer to concepts that might adapt to quite different legal traditions, compromising among heterogeneous approaches, leads to a regulatory approach that often combines very general and flexible substantive principles with detailed exemplifications. The very use of sources with different binding force, from Guidelines to Regulations, from Directives to Technical Standards, from Opinions to ECB decisions, illustrates this greater complexity.

It's a difficult to convey this concept in a straightforward way without sounding simplistic, but an interesting example are the relatively recent Suitability, or Fit & Proper requirements for banks directors and top managers enacted by the EBA and the ECB, which are currently being implemented in Italy. The very use of the form of Guidelines is telling of the overall approach. On the merits, these rules require, in many ways, a paradigm shift, in the sense that they do indicate some quite broad general substantive principles, but also elaborate long and detailed lists of specific situations and cases that might affect honorability, professional qualifications, or independence. Leaving aside specific criticisms to some options even just from a policy perspective, this combination of vagueness and specificity might attribute to supervisory authorities a very significant discretion in their role as gatekeepers, a discretion that consequently also imposes upon courts a non-formalistic approach.

This is not to say that our courts are used only to formalistic, black and white rules. I simply want to underline that, to work effectively, this transnational and European dialogue among legislatures, authorities and courts, requires new tools, new lenses, greater familiarity with comparative and international perspectives and, of course, the development of clear interpretations and precedents to

reduce the uncertainty that is almost necessitated by the very nature of the EU law-making and regulatory process.

I am not so naïve to think that is an utterly novel problem. As someone once quipped, «There are no new ideas, only ideas that have been forgotten».

However, the particular juncture we are in today, with an undeniable transfer of regulatory, executive, enforcement and judicial powers toward Brussels, Frankfurt or Luxembourg; and with a growing role of bureaucracies – in the best sense of the word –, requires judges to make a particularly significant effort not simply to find their way in a complex maze of different sources, but also to work on legal sources and documents often using a novel and – to be perfectly frank – not always impeccably rigorous language.

Suitability rules applicable to board members are, as mentioned, an excellent example. There is no need, and time, for me to dwell into the technicalities. To illustrate my point, just think about the concept of “good repute” as articulated in the ECB guidelines, pursuant to which the mere existence of an inquiry or prosecution might be relevant to assess the propriety of the conduct, and acquittal, depending on the circumstances, might not be sufficient to re-establish a sufficiently good reputation. Alternatively, consider the concept of “independence of mind”, which seems to require Joint Supervisory Teams to assess quasi-psychological attitudes of directors or candidates. It is self-evident that a similar approach attributes very broad discretion to supervisory authorities and requires courts to develop quickly proper tests and doctrines to fill relatively vague and empty concepts and ensure greater certainty and consistency.

The approach seems also to require a more intense, and possibly less formal, dialogue between supervisors and supervised entities. This is not to say that previously the approach of national regulators was excessively formal, it is simply to suggest that regulated entities might encounter a different style and approach to what they might have been used to. It is hard to say whether this is more effective, efficient and certain, but it surely indicates a shift of perspectives.

Several areas of financial regulation present similar challenges. Just consider, to offer another example, the condition of “No Creditor Worse Off” in resolution procedures, which courts might be required to examine. Whether the condition is met is an extraordinarily complex issue, especially when dealing with international groups with creditors in different jurisdictions subject to different rules in terms of priorities and guarantees. This test requires a substantive economic, financial and accounting analysis, and a profound understanding of foreign law and international law.

The “Europeanisation” of financial markets and banking regulation requires a framework in which the applicable rules often indicate a substantive goal leaving a significant margin of discretion to supervisors and to the ECB or NCBs specifically. It is often necessary to employ a terminology that cannot avoid vagueness and flexibility exactly because it must adapt to different jurisdictions and legal traditions. Clearly enough, when applying principles and standards that

leave significant discretion, a certain consistency among regulators and courts of different countries is essential to avoid unjustified differences of treatment for similar cases simply based on the geographic location or significance of the regulated entity.

We do have excellent judges that can obviously cope with this different style, but the transition will not be easy or quick.

4. Conclusions

The new framework of bank supervision we are facing requires the ability to combine our old glasses with new ones, to harmonize the best of our traditions with new and complex technical issues, but also with a different legislative, regulatory, enforcement and judicial approach and even, so to speak, style.

On the one hand, we find a more complex matrix with respect to judicial review, one that still presents questions in terms of equal treatment, and that puts the accent on the delicate issue of harmonization of procedural rules and judicial approaches. On the other hand, we find national judges confronted with a new and somehow different legislative and regulatory style.

A part from more technical problems and specific solutions that might require amendments or fine tuning, the cultural keywords, or passwords, of this evolving and far from perfect scenario are, in my opinion, open and constructive dialogue among regulators, regulated subjects, and courts. We need to adapt to more flexible and substantive approaches without compromising an acceptable degree of certainty. And our legal culture must develop a deeper comparative, international and interdisciplinary awareness and knowledge.

I am aware that this is a fairly obvious conclusion. Far less obvious, however, is to transform these general ideas in a functional, coherent and concrete *modus operandi*.

**THE INTERPLAY BETWEEN THE ECB AND NCAs IN THE
“COMMON PROCEDURES” UNDER THE SSM REGULATION:
ARE THERE GAPS IN LEGAL PROTECTION?***

*Concetta Brescia Morra***

1. The judicial review of the decision taken within the SSM: division of competence between the CJEU and national courts – 2. The Interplay between the ECB and NCAs in the “common procedures” under the SSM – 3. The “common procedures” and the judicial review – 4. Conclusions

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1. *The judicial review of the decision taken within the SSM: division of competence between the CJEU and national courts*

The new structure of banking supervision in Europe put in place a pattern of integration that has never before been tested. The Single Supervisory Mechanism (SSM), established by the Council Regulation (EU) No 1024/2013 (hereinafter SSM Regulation), implementing Article 127(6) TFEU (Treaty on the Functioning of the European Union),¹ creates an original mode of interaction between the EU and the national administrations. An integrated system of administration was set up at the decision-making and the operational levels.²

To expand on this topic, lawyers face challenging questions. First what does it mean in legal terms that a SSM supervises the Euro area banking system? The SSM Regulation refers to a SSM to ensure that the Union's policy relating to the prudential supervision of credit institutions is implemented in a coherent and effective manner (Recital 12).

The Regulation states that SSM means the system of financial supervision composed by the European Central Bank (hereinafter ECB) and national competent authorities (hereinafter NCAs) of participating Member States. Specifically, the SSM Regulation confers on the ECB the task to carry out a lengthy list of tasks that represent most, if not all, the powers provided by the Union law to competent authorities for prudential supervisory purposes. Some of these powers are referred to as "exclusive competence" (e.g., the authorisation to take up the business activity of a credit institution) of the ECB, while according to Article 6 of the SSM Regulation "the ECB shall carry out its tasks within a single supervisory mechanism composed of the ECB and national competent authorities. The ECB shall be responsible for the effective and consistent functioning of the SSM... Both the ECB and national competent authorities shall be subject to a duty of cooperation in good faith, and an obligation to exchange information".

Article 6 establishes detailed criteria to assess if a bank is "of significant relevance". All other banks are classified as "less significant". Therefore, the same Article provides that the national competent authorities shall carry out and "be responsible" for the tasks of prudential supervision (with the exclusion of tasks entrusted exclusively to the ECB) and "adopting all relevant supervisory decisions" with regard to the credit institutions referred to as "less significant".

¹ According to Article 127(6), TFEU: "*The Council, acting by means of regulations in accordance with a special legislative procedure, may unanimously, and after consulting the European Parliament and the European Central Bank, confer specific tasks upon the European Central Bank concerning policies relating to the prudential supervision of credit institutions and other financial institutions with the exception of insurance undertakings*".

² See Edoardo CHITI, 'The relationship between national administrative law and European administrative law' in *Administrative Procedures, What's New in European Administrative Law?*, J. ZILLER (ed.), *European University Institute Working Paper* No. 2005/10; Luigi DONATO and Fabio RECINE, 'The Single Supervisory Mechanism. From the building stage to the race track', in *XX Rapporto della Fondazione Rosselli sul sistema bancario italiano*, (2015), Bancaria editrice Edibank, 251-276.

The role of the ECB and NCAs within this complex legal framework is not easy to assess. The SSM Regulation raises many doubts about the relationship between the ECB and NCAs. The General Court in the case *Landeskreditbank Baden-Württemberg Förderbank v ECB*³ affirmed that the ECB had been transferred the exclusive competence regarding the supervision of credit institutions in the Eurozone, with respect to the tasks set out in Article 4(1) of Council Regulation (EU) No 1024/2013. Thus, the national authorities are acting within the scope of decentralised implementation of an exclusive competence of the Union, not the exercise of a national competence.⁴

Nonetheless this legal construction, the SSM cannot be considered as an “institution”⁵ or an “agency” with legal personality.⁶ The SSM is a synthetic term used to refer to a complex system to coordinate the activities carried out by the ECB and those carried out by the NCAs.⁷

In the light of the above, the supervisory decisions cannot be ascribed to the SSM but must be ascribed to the ECB or to the NCAs according to the rules on the distribution of competences contained in the SSM Regulation. Therefore, we can establish, as a rule, which court has jurisdiction. According to Article

³ Judgement 16 May 2017 in *Landeskreditbank Baden-Württemberg Förderbank v European Central Bank (ECB)*, T-122/15, EU:T: 2017:337.

⁴ The Judgement is under appeal (Case C-450/17 P). The new ruling of the Court of Justice will be of foremost importance to have a conclusive interpretation of the SSM legal framework. If confirmed, the decision will be a watershed in defining the relations between European institutions and national authorities that cooperate within a “single mechanism” under the EU legal framework. Indeed, the Court rejected the comparison with the competition law competences that the bank brought forward and which the Court finds inapplicable (paragraphs 70-72). The Court underlines that the issue discussed in the case law to which L-bank refers in the competition field “...was the impact of the Commission’s exercise of its competences to implement EU competition law on the national competition authorities’ application of their national competition law. Yet in the present case, for the reasons set out in paragraphs 50 to 64 above, under the SSM the national authorities are acting within the scope of decentralised implementation of an exclusive competence of the Union, not the exercise of a national competence.”

⁵ Eddy WYMEERSCH, ‘The single supervisory mechanism or ‘SSM’, part one of the Banking Union’, in *Working Paper Research, National Bank of Belgium*, April 2014, n. 255, at 21.

⁶ Raffaele D’AMBROSIO, ‘Due process and safeguards of the persons subject to the SSM supervisory and sanctioning powers’, in *Quaderni di Ricerca Giuridica della Consulenza Legale della Banca d’Italia*, December 2013, No. 74, Rome, 9.

⁷ Similar arguments can be used to comment on the legal framework regarding the European System of Central Banks (ESCB). The ECB, together with national central banks, shall constitute the ESCB. The ECB together with the national central banks of the Member States whose currency is the euro, which constitute the Eurosystem, shall conduct the monetary policy of the Union (Art. 282(1) of the TFEU). Only the ECB shall have “legal personality” (Art. 282(3) of the TFEU and Art. 9 of the Statute of the ESCB and of the ECB – Protocol No 4 Annex to the Treaty). The ESCB shall be governed by the decision-making bodies of the ECB (Art. 282(2) of the TFEU). The national central banks are “an integral part” of the ESCB and shall act in accordance with the guidelines and instruction of the ECB (art. 14(3) Statute of the ESCB and of the ECB). According to the prevailing interpretation, these rules establish a centralised model to carry out the monetary policy function in Europe, where there is no room for the application of the principle of subsidiarity. See Chiara ZILIOLI and Martin SELMAYR, ‘The Law of the European Central Bank’, (2001), Oxford: Hart Publishing; René SMITS, ‘Recueil des Cours de l’Académie de Droit international de la Haye’, (2004), 3001, Martinus Nijhoff Publisher, The Hague, 313-422.

263 TFEU, the Court of Justice is competent to assess the legality of ECB acts;⁸ according to general principles,⁹ national courts and tribunals are competent to assess the legality of the acts of NCAs.

Given that with respect to “banks of significant relevance”, supervisory decisions will be taken by the ECB, then the CJEU is competent. NCAs shall be responsible for assisting the ECB with the preparation and implementation of any acts relating to the ECB tasks (Article 6(3) SSM Regulation), as detailed in Regulation No. 468/2014 of the ECB (hereinafter SSM Framework Regulation) establishing the framework of cooperation within the SSM between the ECB and the NCAs. In this role, the activities of the NCAs do not result in formal acts that are binding for third parties. The staff of the NCAs carries out preparatory or implementing activities for and on behalf of the ECB. The competence and responsibility for the decision lies with the ECB.

With respect to “less significant banks”, supervisory decisions will be taken by NCAs. The ECB shall issue regulations, guidelines or general instructions to NCAs for the purposes of ensuring consistency of supervisory outcomes within the SSM (Article 6(5)(a)), but if the decision is taken by the NCA, then national courts have competence.¹⁰

In the latter case, the CJEU could play a key role in the judicial review of a decision by national courts. According to Article 267 of TFEU, the CJEU has jurisdiction to give preliminary rulings concerning the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union. For instance, where an act has been taken by a NCA, on the basis of a general instruction of the ECB, a national court may request that the Court of Justice give a preliminary ruling on the validity or on the interpretation of the ECB decision.

The general rule on jurisdiction to review decisions within the SSM also applies in case of acts carried out by a national authority implementing a decision of the ECB, in situations where the implementation of the ECB decision is based on powers not provided by Union law. The SSM Regulation provides for two such cases. The first is contained in Article 9(1) which states that “to the extent necessary to carry out the tasks conferred on it by this Regulation, the ECB may require, by way of instructions, those national authorities to make use of their powers, under and in accordance with the conditions set out in national law, where this Regulation does not confer such powers on the ECB. Those national authorities shall fully inform the ECB about the exercise of those powers”. The second is provided by Article 18(5) concerning administrative penalties, which affirms that “... where necessary for the purpose of carrying out the tasks

⁸ See Koen LENAERTS, Ignace MASELIS, and Kathleen GUTMAN, ‘EU Procedural Law’ (2014), Oxford University Press, at 2.49.

⁹ See Koen LENAERTS, Ignace MASELIS, and Kathleen GUTMAN, ‘EU Procedural Law’ (see footnote 8), at 1.04.

¹⁰ See Koen LENAERTS, Ignace MASELIS, and Kathleen GUTMAN, ‘EU Procedural Law’ (see footnote 8), at 3.01-3.05 and at 6.01-6.34.

conferred on it by this Regulation, the ECB may require national competent authorities to open proceedings with a view to taking action in order to ensure that appropriate penalties are imposed in accordance with the acts referred to in the first subparagraph of Article 4(3) and any relevant national legislation which confers specific powers which are currently not required by Union law”. In the latter case, penalties are applied by the NCA.

According to some authors,¹¹ it is only where the national supervisor has no autonomous discretionary decision-making power (that is, where the national authority merely implements the decision addressed to it by the ECB), that the party could be considered to be directly affected by the ECB instruction and therefore to have the standing that entitles him/her to bring an appeal before the Court of Justice. If some autonomous decision-making power rests with the national authorities, the party affected by the decision may appeal it only before the national courts; the latter shall refer the question of the annulment of the ECB instruction to the CJEU by way of preliminary reference proceedings. Of course, to obtain the annulment or the suspension of the national decision the party must appeal the decision before the national courts.

2. *The Interplay between the ECB and NCAs in the “common procedures” under the SSM*

As mentioned above, the SSM Regulation conferred on the ECB the exclusive exercise of certain powers for all banks, whether they are “significant” or not. These powers are: the authorisation to take up the business of a credit institutions, the withdrawal of an authorisation and the decision on whether to oppose the acquisition of a qualifying holding. The SSM Framework Regulation establishes a detailed discipline of the procedures that must be followed for the exercise of these powers (Articles 73-88). Particularly, it provides for a strong cooperation between the NCAs and the ECB and refers to these procedures as “common procedures”. Notwithstanding that the ECB has the final decision, it is unclear if the general approach to establish jurisdiction, described previously, is a good fit for “common procedures”.

¹¹ On this point see Tomas M.C. ARONS, ‘Judicial protection of supervised credit institutions in the European Banking Union’, in Danny BUSCH and Guido FERRARINI ed. *European Banking Union*, (2015) Oxford University Press, 445-447. Arons refers to the *International Fruit* case, which dealt with agricultural measures, to infer that the standing of an addressee of a decision taken by the national financial supervisor at the instruction of the ECB is critically dependent on the degree of detail provided in the ECB instruction. In Arons’ opinion, if the ECB decision determines in detail which powers granted by national law have to be used and how those powers are to be used, the Court of Justice may have jurisdiction because there is no discretionary (material) decision making left for the national supervisor. See also Marco LAMANDINI, David RAMOS MUÑOZ, and Javier SOLANA ÁLVAREZ 2016, ‘The ECB powers as a catalyst for change in EU law: Part 1: The ECB Mandates’, *Columbia Journal of European Law*, 23, 2, 52 ff., affirming that the rules regarding standing established by the CJEU in the *Plaumann* case (Judgment in *Firma Plaumann & Co v Commission*, C-25/62, EU:C:1963:17) have resulted in the exclusion of any standing for private parties in almost all cases in which EU acts were not directly addressed to those parties, a result criticised by scholars.

A brief description of the various procedural steps in each procedure may be useful to better understand this matter.

The procedure to grant an authorisation to take up the business of a credit institution begins when the NCA receives the application. Then the NCA assesses whether the applicant complies with all the conditions for authorisation established in the national law implementing Directive 2013/36/EU (Directive of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms). The NCA shall reject applications that do not comply with the condition for authorisation laid down by the relevant national law and send a copy of its decision to the ECB. Otherwise, the NCA shall prepare a draft decision if the application is deemed to comply with all the conditions for the authorisation. The final decision is an ECB decision, even though the “Guide to banking supervision”¹² expressly provides that the ECB shall decide on the basis of “its own assessment” and the “NCA’s draft decision”.

The procedure to decide on the acquisition of a qualifying holding is similar to the previous procedure. The NCA receives the notification of an intention to acquire a qualifying holding in a credit institution. The NCA assesses whether the potential acquisition complies with all the conditions established in the national law implementing Directive 2013/36/EU. In this case the NCA has no autonomous power to reject the request. Therefore, the NCA shall prepare a draft decision to send to the ECB. The ECB shall decide on the basis of its own assessment and the NCA’s draft decision.

The procedure to withdraw the authorisation to take up the business of a credit institution can start from the NCA’s initiative or on the ECB’s own initiative. Even in the case of the ECB’s initiative, it shall consult with the NCA of the Member State where the credit institutions are established. Both the NCA and the ECB shall coordinate with the national resolution authority with regard to any draft withdrawal decision that is relevant to the national resolution authority. In making its decision, the ECB shall take into account its assessment, the NCA’s draft (where applicable), consultation with the relevant NCA and the national resolution authority (where the NCA is not the national resolution authority).

In all “common procedures”, the Framework Regulation entrusts an important role to national authorities. It should be noted that the rules to be applied are those contained in the national laws transposing the Directive 2013/36/EU. No doubt therefore the national authorities are better placed to accurately assess the compliance of the request with the provisions of national laws.

The NCA’s assessment is crucial but not decisive, because the NCA’s draft proposal is not binding for the ECB, except for the refusal to grant the authorisation to conduct the business activity. In the latter case, the NCA may

¹² See <https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssmguidebankingsupervision201411.en.pdf>.

reject the request based on its own assessment. The ECB should be kept informed *ex post*, but it is not involved in the decision.

In conclusion, there are two distinctive features of “common procedures”: the procedures involve different stages, some at the national level (submission of the application, the initial assessment by the NCA, the draft decision of the NCA) and some at the Union level (the ECB’s assessment and the final decision); the NCAs play a crucial role in the common procedures, that it is not limited to a mere investigation activity for and on behalf of the ECB as happens in the exercise of the other supervisory powers conferred on the ECB.

These points do not allow for interpreting “common procedures” as a plurality of proceedings carried out by the NCAs and by the ECB. The Framework Regulation outlines only one proceeding with various stages; the first ends with an act from the NCA which is non-binding on the final decision of the ECB.

3. The “common procedures” and the judicial review

3.1 Some cases on “common procedures”

Some cases currently pending before national courts and the CJEU highlight the legal issues that could arise in common procedures where the activities of the national authorities and those of a European institution are strictly intertwined. The situation is even more complicated because of the joint application of European and national law. The latter play a very important role in common procedures.

The most significant case for our purposes concerns the decision by an Italian company, Fininvest, to challenge the ECB’s decision to oppose the acquisition of a qualifying holding in a credit institution (Mediolanum bank). Currently there are three pending cases on the same matter: an appeal to obtain a declaration of invalidity before the Italian National Court (Consiglio di Stato) of the measures of inquiry and non-binding proposals adopted by the Bank of Italy; an appeal before the General Court of the European Union (Case T-913/2016) for the annulment of the ECB decision to oppose the acquisition; a request for a preliminary ruling from Consiglio di Stato before the CJEU (Case C-219/17) on the interpretation of Article 263(1),(2),(5) and Article 256(1) about the jurisdiction of CJEU.

According to Consiglio di Stato, considering the lack of a precedent in the case law of CJEU it is questionable whether “common procedures” could be interpreted as a plurality of proceedings carried out by the national authorities and by the ECB or only one proceeding composed of various stages; the first ends with an act from the NCA which is non-binding on the final decision of the ECB. Therefore, the request for a preliminary ruling is crucial to avoid possible conflicts of jurisdiction, on the one hand, in case that both the national court and the Union court deny their jurisdiction, thus undermining the right to effective judicial protection and, on the other hand, in the case that the

national court declares the invalidity of the (national) contested decision on the grounds of breach or circumvention of the ruling in Judgement No 882/2016 of 3 March 2016 of the Consiglio di Stato and the Court of Justice rejects the appeal against the final decision of the ECB.¹³

Another relevant case to better understand the legal implications of common procedures is the action brought on 22 May 2017 before the General Court by Niemelä and Others v ECB (case T-321/17). The main shareholders of Nemea Bank plc (a Maltese bank) lodged an action of annulment of the ECB decision to withdraw the banking licence.

According to the pleas in law, as summarised by the Court on the Curia website, the appellant argues that the ECB erred in law insofar as it relied on the directives of the Malta FSA as being final and conclusive notwithstanding that the latter remain subject to confirmation, reversal or variation by the Maltese Financial Tribunal. Moreover, the appellant argues that the ECB misused its powers in such a way as to deprive the supervised entity and other applicants of their rights of appeal under national law.

In both cases, the parties affected by an ECB decision, attaching foremost importance to the role played by the NCAs in common procedures, assume that the possibility to challenge the national stage of the “common procedure” before the national court is critical to ensure effective legal protection.

Another case, Order of the General Court in the *Trasta Komerbanka v ECB* case (Case T-247/16 of 12 September 2017), highlights how the intertwining of national proceedings (subject to national rules) and European proceedings (subject to EU rules) could hinder the exercise of the right of defence of a party affected by an ECB decision taken in the context of a “common procedure”.

In *Trasta Komerbanka*, a Latvian bank’s authorisation was withdrawn following a proposal by the Latvian NCA, by the ECB on the 3rd of March 2016. On the 14th of March 2016 a liquidation proceeding started under Latvian law and on the 17th of March the liquidator revoked all powers of attorneys.

On the 3rd of April, *Trasta* bank and its shareholders applied for an Administrative Board of Review (ABoR) in accordance with Article 24 of the

¹³ The case is even more difficult to solve because of a previous judgement by the Consiglio di Stato on a decision of the Bank of Italy (before the entry into force of the SSM, Bank of Italy was the competent authority) rejecting the request of Fininvest to not oppose the acquisition of a qualifying holding in the same bank, Mediolanum. Consiglio di Stato in its judgement No 882/2016 of 3 March 2016 annulled the decision of the Bank of Italy on the grounds that it was vitiated by an error in law. On this basis, Fininvest in the appeal before the Court of Justice alleged the infringement of the principle of legal certainty and the principle of *res iudicata* in relation to the Consiglio di Stato’s final judgment of 2016. Therefore, Fininvest sustained that the interpretation of the Directive 2013/36/EU by the ECB is detrimental to the *res iudicata* already in existence at a national level as a result of the final judgement of the Consiglio di Stato of 2016 in relation to the holding in the bank.

SSM Regulation,¹⁴ establishing that the person affected by an ECB's decision has the right, within one month of being notified of this Decision, to request the ABoR to carry out an internal administrative review of the decision. The ECB adopted a second decision withdrawing the licence to the *Trasta* bank on 11 July 2016. This second decision is the subject of a separate appeal.¹⁵

On the 13th of May, the lawyers representing the bank brought an action for annulment of the contested decision before the CJEU on behalf of Trasta and on behalf of six of its direct and indirect shareholders, under the conditions and within the time limits (two months) provided for in Article 263 of the TFEU to challenge a decision of a European institution.

The CJEU in its order on 12 September 2017 tested the interest of the bank itself and its shareholders to challenge the ECB decision. The Court concluded that, notwithstanding both having an interest in bringing proceedings against the ECB decision, the bank could not be validly represented by the lawyers of the bank because the power of attorney, granted by *Trasta* bank to its lawyers, had been withdrawn complying with the Latvian Law.

The Order of the Court, about the powers of the liquidator to revoke the power of attorney, considered decisive the decision of the Vidzeme District Court of Riga that, interpreting the Latvian Law, rejected *Trasta*'s application to maintain its directors' power of attorney for the purpose of adopting decisions relating to the administrative proceedings before the ECB and the judicial proceedings before the CJEU.

The appeal was deemed admissible by the Court on behalf of the shareholders, allowing them the right to exercise the right of defence. The Order is subject to three separate appeals: by the bank and its shareholders,¹⁶ by the ECB¹⁷ and by the Commission.¹⁸ The outcome of the appeals against the admissibility order will shed light on the *locus standi* of natural or legal person to bring an action for annulment against the decision of the ECB to withdraw the banking licence.¹⁹

¹⁴ On the internal review carried out by the Administrative Board of Review see Concetta BRESCIA MORRA, René SMITS, and Andrea MAGLIARI, 'The Administrative Board of Review of the European Central Bank: Experience After 2 Years', *European Business Organizational Law Review* (2017), 18, 568-589.

¹⁵ Case T-698/16 *Trasta Komerbanka and others v ECB*. The Court deemed admissible the appeal of the first ECB decision, even though the administrative review before the ABoR was pending (that would result in a new decision by the ECB on the case) affirming that the bank and its shareholders could claim damages for the three-month period between the original withdrawal of the license and the withdrawal after the ABoR opinion (paragraphs 21-23 of the Order) because the request for review before the ABoR does not have suspensive effects on the application of the contested decision.

¹⁶ Case C-669/17, OJ C 42/8, 5 February 2018.

¹⁷ Case C-663/17 P, OJ C 32/16, 29 January 2018.

¹⁸ Case C-665/17 P, OJ C 42/6, 5 February 2018.

¹⁹ More on the *Trasta* case in Renè Smits, 'Interplay of administrative review and judicial protection in European prudential supervision. Some issues and concerns', in this volume.

3.2 *The role of the NCA in the “common procedures” and the judicial review*

As described in par. 2, “common procedures” involve various stages, some at a national level and some at the Union Level. We will explore the issue of the jurisdiction to rule on the legality of these procedures, considering that the NCAs play a crucial role, but the final decision lies with the ECB.

It is indisputable that the NCA’s decision to reject the application to obtain the authorisation to take up a business activity that does not comply with the condition for authorisation is challengeable before the national courts. In this case the NCA has the final word and we are dealing with an act which is capable of adversely affecting third parties.

Different considerations arise in the case of a ECB’s final decision opposing the acquisition of qualifying holdings or to withdraw an authorisation based on the NCA’s draft decision. In this regard we must consider three arguments: “common procedures” are ultimately decided by the ECB; any substantial legal flaw in the NCA’s assessment becomes a flaw of the ECB’s final decision; there is no “interest” of the parties affected by the final decision to obtain the annulment of the “proposal” of the NCA before a national court.

On the first point, it should be emphasised that according to the SSM legal framework, the NCA proposal is a “preparatory act” that cannot be appealed according to the case law of the Court of Justice²⁰ because it is not a measure “definitely laying down the position of the competent authority”.²¹ Therefore, we should conclude that there is only one option: the appeal of the final decision before the CJEU.

On the second point, it is important to stress that any substantial legal flaw in the NCA’s assessment becomes a flaw of the ECB’s final decision whenever

²⁰ See Judgement of 11 November 1981, *IBM v Commission*, ECLI:EU:C:1981:264, par 10 where the Court affirms “In the case of acts or decisions adopted by a procedure involving several stages, in particular where they are the culmination of an internal procedure, it is clear from the case-law that in principle an act is open to review only if it is a measure definitively laying down the position of the Commission or the Council on the conclusion of that procedure, and not a provisional measure intended to pave the way for the final decision.”. See also Order of President of the Court of the First Instance, 24 March 2006, *Sumitomo Chemical Agro Europe e Philagro France v Commission*, T-454/05 R, EU:T:2006:94 par. 50 and Order 15 February 2012, *Internationaler Hilfsfonds v Commission*, C-208/11 P, EU:C:2012:76, par. 29.

²¹ See Judgement of 11 November 1981, *IBM v Commission*, ECLI:EU:C:1981:264, par. 9, according to which “any measure the legal effects of which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position is an act or decision which may be the subject of an action for annulment before the EU Court”.

the ECB takes over the assessment of the NCA.²² A person affected by the final decision of the ECB could challenge any error in law, or any manifest error of assessment or misuse of powers,²³ even if based on an error in law in the application of the national legislation.²⁴

In the next few paragraphs we will explore, in light of the Court’s case-law, if these findings also apply in the case of a person affected by a final decision of the ECB that challenges the infringement of a procedural rule in the NCA’s phase of the procedure, such as the violation of the right to be heard.

²² This argument is supported by the Judgement of the Court of the First Instance of 26 November 2002, *Artegodan GmbH and others v Commission* (Judgement of 26 November 2002, *Artegodan GmbH and others v Commission*, (joined cases T-74/00, T-76/00, T-83/00 to T-85/00, T-132/00, T-137/00 AND T-141/00, ECLI:EU:T:2002:283). The Court stated that the preparatory acts adopted by a European Agency that contribute to the final decision of a Commission’s decisions even if not binding on the latter can be subject to judicial review within the Judicial proceeding against the final decision of the Commission. The Court’s decision does not fit properly with the case at hand regarding the common procedure. Indeed, according to the Court, the procedure established by the law is characterised by the vital role accorded to an “objective and detailed scientific assessment” by the Agency of the substances in question. Although the Agency’s opinion does not bind the Commission, it is nonetheless extremely important so that any unlawfulness of that opinion must be regarded as a breach of essential procedural requirements rendering the Commission’s decision unlawful (see par. 197). The decision of the Court is based on the assumption that the Commission is not in a position to carry out scientific assessments of the efficacy and/or harmfulness of a medicinal product, the aim of the mandatory consultation of the national agency is to provide the Commission with the evidence of scientific assessment which is essential for it to be able to determine, in full knowledge of the facts, the appropriate measures to ensure a high level of public health protection. The latter assumption is not present in the common procedures according to the SSM Regulation, considering that the ECB carries its own assessment based on its technical expertise as supervisory authority. Anyway, even on the basis of this decision it is undisputable that if there is substantial fault in the NCA’s assessment that has influenced the ECB’s final decision, this fault could be challenged before the European Courts.

²³ According to well-established case law, where the Union courts review the legality of a complicated “economic assessment” made by the Commission or another institution and the institution concerned has a “broad discretion”, the review will be confined to whether the procedural requirements were complied with, whether the statement of reasons is sufficient, whether the facts were correctly stated and whether there was a manifestly wrong assessment or a misuse of powers” (the CJEU’s “limited standard”). See Judgment in *Telefonica and Telefonica de Espana v Commission*, C-295/12 P, EU:C:2014:2062, para 54; Judgment in *Commission v Tetra Laval*, C-12/03 P, EU:C:2005:87, para 39; Judgment in *Chalkor v Commission*, C-386/10 P, EU:C:2011:815, para 54; and Judgment in *Otis and Others*, C-199/11, EU:C:2012:684, paragraph 59); see also case Judgment in *Groupement des cartes bancaires (CB) v European Commission*, C-67/13 P, EU:C:2014:2204, para 46; Judgment in *Microsoft corp. v Commission*, T-201/04, EU:T:2007:289, paras 87-89. See also Judgment in *Ryanair v Commission*, T-342/07, EU:T:2010:280, para 30. See also Judgment in *Bertelsmann and Sony Corporation of America v Impala*, C-413/06 P, EU:C:2008:392, para 69 and Case C269/90 *Technische Universität München* [1991] ECR I5469, paragraph 14).

²⁴ The EU Court can exercise its powers to review the legality of the ECB’s decisions, whether those decisions are based on European Union law or on national law. There are no limits to the jurisdiction of the Court of Justice to rule on a decision by the ECB based on national law where Union law is composed of Directives and the national legislation transposes these directives (Article 4(3) SSM Regulation). As developed in the case law on the jurisdiction of the Court of Justice to deliver preliminary rulings on the interpretation of Union law, where the Court of Justice is not entitled to rule on facts or points of national law, there is nothing to prevent the Court from spelling out its understanding of the facts and points of national law as its starting point for its useful (specific) interpretation of the applicable provisions and principles of Union law (see Koen LENAERTS, Ignace MASELIS, and Kathleen GUTMAN, ‘EU Procedural Law’, (see footnote 8), at 6.20-6.21).

Indeed, the case law mentioned above affirming that no appeal can be made against “preparatory measures” refers to a preparatory act or a procedure involving various stages before the same European institution or authority or various stages before a European institution and a European agency. In any case, all the institutions or authorities taking part (for various purposes) in the procedure are European entities. Therefore, a party affected by a decision of these institutions or agencies will be allowed to challenge any procedural flaw happened in the preparatory phase of the proceeding before the European Courts.

We cannot reach the same comfortable conclusion in the case of a complex procedure where the preparatory phase is conferred on a national authority and the final decision is the responsibility of a European institution. According to the CJEU in case of a complex European proceeding where the measure adopted by a national authority “is part of the Community decision-making procedure” and the latter is binding on the “Community decision-taking authority”, “any irregularity” that might affect the opinion of the national authority “cannot affect the validity of the decision” of the Commission (*Oleificio Borrelli* case).²⁵ This conclusion is based on the assumption that the national measure is binding on the final decision of the Commission, therefore it is capable of adversely affecting third parties. The Court, premising that on the basis of the TFEU it has no jurisdiction to rule on the lawfulness of a measure adopted by a national authority, accordingly affirmed that national courts are competent, where appropriate after obtaining a preliminary ruling from the Court, to rule on the lawfulness of the national measure on the same terms on which they review any definitive measure adopted by the same national authority which is capable of adversely affecting third parties.

The *Oleificio Borrelli*’s legal principle, about the lack of jurisdiction of the EU Court to rule on the lawfulness of a measure adopted by a national authority, could result in a vacuum for legal protection in a case, like the “common procedures” at hand, where the national measure is not binding on the authority that has the responsibility to make the final decision. The national measure cannot directly affect third parties, so it cannot be challenged before national courts.

To get a better insight into the matter, we may recall other decisions where the Court, referring to preparatory act or procedure involving various stages at the national level and at the Union level, affirms its jurisdiction to review the “national stage” of the procedure. Whereas there are a very limited number of cases, we may consider applicable these precedents to the “common procedures”. The SSM legal framework provides a first stage of the procedure before the NCA and a final and decisive stage before a European Institution, the ECB.

In three cases the CJEU affirmed the Union Court was competent to assess whether proven flaws of national preparatory acts affect the final decisions adopted by Union institutions. We refer to *France Aviation* case (Judgement

²⁵ Judgement of 3 December 1992, *Oleificio Borelli v Commission*, ECLI:EU:C 1992:491.

of 1995),²⁶ *Mehibas Dordtselaan* case (Judgment of 2000)²⁷ and *Sweden vs EC* case (Judgement of 2007).²⁸

In the *France Aviation* case, the Court implicitly affirmed its jurisdiction in cases where the contested decision involved various stages at the national level and at the European level. Inter alia the Court states “...that the applicant’s right to be heard was complied with in so far as the procedure at issue enabled the applicant to put all its arguments to the French authorities and its case, which was transmitted by those authorities, was available both to the group of experts and to the Commission” (par. 29). We can draw from this paragraph of the decision that the EU Court has jurisdiction to rule on the legality, with respect to due process rules, of the national stage of the procedure, which culminates in a decision adopted by a European institution. This principle has been confirmed in the *Mehibas Dordtselaan* case although the final decision of the Court is substantially different from that of the case *France Aviation*. The Court, in the *Mehibas Dordtselaan*, concludes that the procedure appealed whilst “...effectively enables the person concerned to exercise his right to be heard during the first stage of the administrative procedure, which takes place at national level, in no way guarantees his rights of defense during the second stage of the procedure, which takes place before the Commission once the national authorities have communicated the case to it” (par. 44).

The Court takes a clear position for our purposes in case *Sveden v EC*. The Court refers explicitly to the legal principle expressed in the *Oleificio Borrelli* case, but it argues that in this case the complex procedure should be interpreted differently from what was done by the same Court in *Oleificio Borrelli*. Indeed, according to the Court, in the *Sveden* case the law did not aim to establish a division between two powers, one national and the other of the Community, with different purposes. The law “creates a decision making-procedure the sole object of which is to determine whether access to a document should be refused under one of the substantive exceptions listed in article 4(1) to (3) of the Regulation, a decision-making procedure in which both the Community institution and the Member State concerned play a part....”. Therefore “it is within the jurisdiction of the Community judicature to review...whether that refusal was validly based in those exceptions, regardless of whether the refusal results from an assessment of those exceptions by the institution itself or by the relevant member States”.

The complex procedure analysed in the *Sweden case* is very similar to the “common procedures” under the SSM Framework Regulation. Both, the NCA and the ECB play a part in a complex decision-making procedure, notwithstanding the final decision being the sole responsibility of the ECB. Therefore, considering

²⁶ Judgement of the Court of First instance of 9 November 1995, *France Aviation v Commission*, ECLI:EU:T:1995:187.

²⁷ Judgement of the Court of First instance of 18 January 2000, *Mehibas Dordtselaan v Commission*, ECLI:EU:T:2000:8

²⁸ Judgement of the Court of 18 December 2007, *Kingdom of Sweden v Commission of the European Communities and Others*, ECLI:EU:C:2007:802.

the NCA as “an integral part”²⁹ of the SSM, we must conclude that the EU courts have jurisdiction to rule on the legality of the national stage of the proceeding.

This conclusion is consistent with the principles of primacy of European law and of the uniformity in the application of the Union law. Indeed, well-established case law states that the general principles of “good administration”, like the right to be heard, the obligation of the administration to give reasons and the right to have access to the file, stated in Article 41 of the European Union Charter of Human Rights, should apply not only to the institutions and agencies of the Union but are applicable to all situations governed by EU law.³⁰ This is the case of national authorities exercising powers provided for by the SSM Regulation. Thereby, we can argue that there are no gaps in legal protection even in the case of a procedural flaw that happens at the national “stage” of the common procedures.

4. *Conclusions*

“Common procedures” represent interesting cases to understand the legal implications of entrusting banking supervisory tasks to a “single mechanism”, that is a complex system composed of the ECB, a European institution, and NCAs that all play a part in a multi-stage process to carry out a public function.

Words, such as “mechanism” are very useful for summarising the functional integration between national bodies and European institutions, but they pose many challenges to the authorities and institutions, not just concerning the cooperation among different authorities and institutions that are arranged in a non-hierarchical frame. Moreover, the complexity of the system gives rise to doubts about the jurisdiction to rule on the legality of the decisions taken within the SSM.

The NCAs play a significant role in the common procedures, because they submit a formal proposal to the ECB. Notwithstanding this, we conclude that “common procedures” should be interpreted as only one proceeding composed of various stages; the first ends with an act from the NCA which is non-binding on the ECB’s final decision. Therefore, the NCA’s proposal is a “preparatory act” that cannot be appealed before national courts. Only the final decision of the ECB can be appealed before the CJEU.

This conclusion does not limit the right of defence of a person affected by a supervisory decision within the SSM. Indeed, any substantial legal flaw in the NCA’s assessment becomes a flaw of the ECB’s final decision whenever the ECB takes over the assessment of the NCA. A person affected by the final decision of the ECB could challenge any error in law, or any manifest error of

²⁹ See Eddy WYMEERSCH, ‘The Single Supervisory mechanism or ‘SSM’. Part One of the banking Union’, (see footnote 5), at 22.

³⁰ Judgment of the Court (Grand Chamber), 26 February 2013, *Åklagaren v Hans Åkerberg Fransson*. (Case C617/10) ECLI:EU:C:2013:105), para 19-20.

assessment or misuse of powers, even if based on an error in law in the application of the national legislation. Furthermore, the parties affected by the final decision have no interest to obtain the annulment of the “proposal” of the NCA before a national court if the ECB’s final decision remains valid and continues to have a legal effect.

We have then explored whether the approach described above could result in a gap in legal protection of the party affected by the final decision adopted by the ECB in the case of a procedural legal flaw in the NCA’s phase of the procedure, such as the violation of the right to be heard.

To solve this issue, some decisions of the Court of Justice are very important regarding cases where national authorities and European institutions take part in a complex decision-making procedure. This case law of the Court (a very limited number of cases) establishes the principle that the EU courts have jurisdiction to rule on the legality of the national stage of the proceeding.³¹

Applying this principle to common procedures within the SSM, where we may consider the NCA as “an integral part” of the SSM, we must conclude that the interplay between the NCAs and the ECB within the SSM regulation does not give rise to gaps in legal protection.

³¹ This interpretation appears to be consistent with the view expressed by the Advocate General Manuel Campos Sánchez-Bordona in his Opinion in Case C-219/17 (*Silvio Berlusconi, Fininvest v. Banca d'Italia and Others*; see para. 3.1), published at the time this article went to press. The Advocate General takes the view that authorization to acquire or increase qualifying holdings in credit institutions is handled under a composite administrative procedure in which the final decision is a matter solely for the ECB and in which the NCAs act as the bodies responsible for the preparatory work for the decisions. So jurisdiction to judicially review the exercise of that concentrated power must lie exclusively with the General Court and the Court of Justice. The Advocate General adds that, in order to safeguard the right of interested parties to an effective remedy, the EU Courts will have to decide whether preparatory measures of the NCAs, the contents of which were subsequently taken by the ECB, are affected by flaws such as to have irreparably vitiated the entire procedure.

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