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LAW AND PRACTICE OF FINANCIAL APPEAL BODIES (ESAS' BOARD OF APPEAL, SRB APPEAL PANEL): A VIEW FROM THE INSIDE

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Abstract

This paper offers some lessons drawn from the first years of experience of both the joint Board of Appeal (BoA) of the European Supervisory Authorities and the Appeal Panel (AP) of the Single Resolution Board. The paper outlines their institutional design and the main substantive and procedural issues that have arisen in the cases so far decided by both bodies. It offers a view "from the inside", which shows not only the certainties of appeal bodies, but also their many challenges. The paper also discusses design strengths and weaknesses of the current EU adjudicatory system of public law disputes in the Banking Union and the Capital Markets Union, bearing in mind the importance of independent review, and the Vaassen criteria for "courts". The paper concludes by offering preliminary stocktaking and reflections on a possible way forward to enhance the complementary (and supporting) role of financial appeal bodies to the EU courts.

1. Introduction

What is the use of an administrative body to review the acts of a European agency? Can these bodies be successful in the law of finance? How can they be improved? A definitive answer would be possible if there were a single blueprint and the same institutional design for all of these bodies, and for what

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they are supposed to do. Unfortunately, there is not. Being hybrid bodies, they combine features from two archetypes: the advisory committees, which contribute to an agency's decision internally, before that decision is adopted, and the courts, which – independently from the agency – revise and annul that agency's decisions after they are adopted. A combination of both is good for policy experimentation and academic debate, but the effects are hard to measure.

What seems not debatable, however, is that "appeal bodies" (to use a generic, all-encompassing term) are the tool of choice of European lawmakers in areas characterized by (i) technically complex decisions (ii) adopted by EU agencies, i.e. where the EU has moved beyond policy formulation into the potentially more intrusive implementation. Appeal bodies are a visible part of the policy architecture in fields such as trademarks,[1] plant varieties,[2] chemicals,[3] or aviation.[4] Recent reforms (which will be considered in subsequent sections of this paper) limit review by the Court of Justice in cases decided by such appeal bodies and then reviewed by the General Court.[5] This suggests that (some) appeal bodies offer sufficient safeguards to justify the exclusion of an ultimate judicial review by the highest court, i.e. to justify their being treated as courts, or quasi-courts, of first instance.

Crucially for our purposes, appeal bodies are also the tool of choice to scrutinize agency action in financial supervision (and resolution). This offers a unique viewpoint to analyse the role of appeal bodies for several reasons. First, financial supervision has been the stage of the most drastic re-distribution of competences from Member States towards the EU in the past decades. In the Eurozone, the largest banks are now supervised by the European Central Bank (ECB), and their crises are managed by the Single Resolution Board (SRB). In the EU, new "authorities" (European Supervisory Authorities, or ESAs) have been created in banking (European Banking Authority, or EBA), securities markets (European Securities and Markets Authority or ESMA) and insurance and occupational pensions (European Insurance and Occupational Pensions Authority or EIOPA) from former "committees" of national authorities, and their governance recently reformed

1. Art. 66 et seq. Regulation 1001/2017 on the European Union trademark, O.J. 2017, L 154/1.

2. Art. 67 et seq. Regulation 2100/94 on Community plant variety rights, O.J. 1994, L 227/1.

3. Art. 89 et seq. Regulation 1907/2006 on the Registration, Evaluation, Authorization and Restriction of Chemicals (REACH), O.J. 2006, L 396/1

4. Art. 105 et seq. Regulation 2018/1139 on common rules in the field of civil aviation and establishing a European Union Aviation Safety Agency, O.J. 2018, L 212/1.

5. Regulation 2019/629 of 17 April 2019 amending Protocol No 3 of the Statute of the Court of Justice. O.J. 2019, L 111/1, especially new Art. 58a, introduced by Art. 1 of the Regulation.

to represent European interests better.[6] Their input is critical in all matters pertaining to those markets, and they decide directly on critical matters of financial markets' infrastructures, such as rating agencies or central counterparties (CCPs). Second, the authorities' decisions are subject to review by three appeal bodies: the Joint Board of Appeal (BoA) for the ESAs, the Administrative Board of Review (ABoR) for the ECB, and the Appeal Panel (AP) for the SRB, arguably to improve their decision-making, review their legality, and bolster their legitimacy. Yet, being the first line of legal control to balance such a dramatic organizational (and constitutional) overhaul, raises the stakes for appeal bodies. Third, recent reforms have limited ECJ review in cases decided by "older" appeal bodies, but not by the "newer" financial appeal bodies. This suggests: (1) for EU lawmakers, when it comes to restricting judicial review by the highest court, "we are not there, yet" in the field of finance; and (2) only experience will determine whether financial appeal bodies merit the same treatment as older appeal bodies.

This provides the framework for our inquiry. Insightful academic studies have already outlined the conceptualization challenges for (financial) appeal bodies in the abstract, and their institutional design differences, looking from outside their founding norms.[7] Yet, what is still missing is a concrete view of

6. Amended proposal for a Regulation amending Regulations 1093/2010 (EBA Regulation), 1094/2010 (EIOPA Regulation) and 1095/2010 (ESMA Regulation) Brussels, 12 Dec. 2018, COM(2018)646 final, 2017/0230(COD) recital (21) and "Grounds for the proposal", No. 1.5.1. "Governance". For the final political agreement between Council and Parliament, see. e.g. Press Release "Capital Markets Union: European Parliament backs key measures to boost jobs and growth", Brussels, 18 April 2019, <www.europa.eu/rapid/press-release_IP-19-2130_en.htm?locale=en> (all websites checked 23 Nov. 2019).

7. Compare the seminal contribution by Blair, "Board of Appeal of the European Supervisory Authorities", University of Oslo, Research Paper Series No. 30 (2012); see also Lamandini, "The ESAs' Board of Appeal as a blueprint for the quasi-judicial review of European financial supervision", 6 ECL (2014), 290. More recently Cassese, "A European administrative justice?", and Blair and 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", in Bank of Italy, *Judicial Review in the Banking Union and in the EU Financial Architecture*, *Quaderni di Ricerca Giuridica della Consulenza Legale*, No. 84, June 2018, pp. 1–99 (in particular pp. 9–16 and pp. 17–28, respectively). Compare also the provisional report produced in 2015 by the Max Planck Institute Luxembourg for Procedural Law in the context of the "appeal prO.J.ect" led by Matteo Gargantini, dealing with the governance and functioning of boards of appeal of the EU agencies (on file with the authors, namely Gargantini, as to the institutional balance, Dimitropoulos and Feinäugle, as to the organizational aspects of the Boards of Appeal, Sirakova and Ortolani, as to the procedural guarantees and procedural dynamics). This prO.J.ect – after a pause of a few years – has been recently jointly resumed by the Max Planck Institute, the University of Bologna and the University of Utrecht, together with the Chair and Vice-Chair of the EUIPO Board of Appeal and is currently ongoing. See also De Lucia, "A microphysics of European administrative law: Administrative remedies in the EU after Lisbon", 20 EPL (2014), 277;

their practical experience, both as part of a "legal-health check-up" of the new financial architecture, and as preliminary evidence of whether financial appeal bodies may follow the trail of their forebears. Our article tries to (partly) fill that gap and offer a view that is (i) practical, i.e. based on the bodies' actual decisions reviewing the actions of authorities, and (ii) from the inside, since we have participated in most of those decisions. Based on the appeal bodies' now-relevant body of precedent, our study provides a first vantage point to assess how matters are evolving, and how practical problems reflect conceptual ones. Alas, for our analysis of appeal bodies *as quasi-courts* to be meaningful we will discard the ABoR, which does not fit into that definition (as we will discuss in detail below). Our analysis proceeds as follows. In section 2 we analyse the features of the BoA and the AP, and their differences with ABoR. Sections 3 and 4 provide a discussion of the cases decided by the BoA and the AP. Section 5 points to some institutional weaknesses in the current design of both appeal bodies. Section 6 concludes by offering a possible way forward.

2. Financial appeal bodies in a nutshell. Board of Appeal, Appeal Panel, and their parallels and differences among themselves and with ABoR

An essential feature of the European System of Financial Supervision, of the Single Supervisory Mechanism and of the Single Resolution Mechanism is the coexistence of administrative and judicial review mechanisms as checks-and-balances to ensure the overall legitimacy of the three ESAs and the two Eurozone Banking Union mechanisms. This is shaped, however, in different forms. First, we analyse the Joint Board of Appeal (BoA) of the European System of Financial Supervision (2.1), then the Appeal Panel of the Single Resolution Board (2.2), and then the SSM Administrative Board of Review (ABoR) and justify the exclusion of the latter from this study (2.3).

2.1. *The ESAs' Board of Appeal*

The BoA is a *joint* body of the three ESAs charged with the internal administrative review of appeals relating to ESAs' decisions. It combines

Witte, "Standing and judicial review in the new EU financial markets architecture", 1 *Journal of Financial Regulation* (2015); Chirulli and De Lucia, "Specialised Adjudication in EU Administrative Law: The Boards of Appeal of EU Agencies", 40 EL Rev. (2015), 832; Lamandini, "Il diritto bancario dell'Unione", (2015) *Banca, borsa tituli di credito*, 441.

elements of internal administrative self-control and judicial review, broadly along the lines of similar bodies in other EU agencies such as those dealing with trademarks, patents, plant varieties, aviation safety, chemicals,[8] as well as EUROPOL and EUROJUST, and backed by earlier work of the European Commission.[9] Quasi-judicial review in the law of finance has, however, its distinct features, which result in an *ad hoc* role and function, as will be discussed in sections 3 to 5 below.

The BoA is composed of six members and six alternates, all "individuals of high repute with a proven record of relevant knowledge and professional experience" in the relevant fields (banking, insurance, pensions, securities and financial services), excluding current staff of the authorities or national or Union institutions involved in the activities of the Authority.[10] In its first composition, the Board has had a British High Court Judge (Chairman), two former Chairpersons of national financial markets authorities (one of them also an ex-Chairman of CESR, the Committee of European Securities Regulators), three law of finance academics, three former high officials at national supervisory authorities, and some members of market associations or practitioners. Subsequent replacements contributed further academic expertise. The last replacement saw the appointment of three law of finance professors, including one of the present authors (previously an alternate), and one alternate who was a former member of the ESMA Stakeholders Group.

The appointment procedure was recently amended as part of the 2019 reform of the ESAs. Members are additionally required to have a proven record of relevant knowledge of EU law and international professional experience, to be nationals of a Member State with a thorough knowledge of at least two official languages of the Union, and not to be Stakeholders' Group members.[11] Perhaps more importantly, candidates shortlisted by the European Commission, *may*, before being appointed by the Management Board of the Authority, *be invited* by the European Parliament to "make a statement before it and answer any questions put by its Members",[12] an invitation that also applies to appointed members of the BoA, "whenever so requested",

8. As to the European Chemicals agency, see Bolzonello, "Independent administrative review within the structure of remedies under the treaties: The case of the Board of Appeal of the European Chemicals Agency", 22 EPL (2016), 565; Bronckers and Van Gerven, "Legal remedies under the EC's new chemicals legislation REACH: Testing a new model of European governance", 46 CML Rev. (2009), 1823.

9. See COM(2002)718 final and COM(2005)59 final; more recently, Joint Statement 12 June 2012.

10. Art. 58 Regulations 1093, 1094 and 1095/2010 (hereinafter ESAs Regulations).

11. New Art. 58(2) ESAs Regulations as amended.

12. New Art. 59(3) ESAs Regulations as amended

excluding statements or Q&As on "cases decided by, or pending before the BoA".[13]

The Board is a joint body of the three ESAs, which ensures consistent views and cross-sector cooperation, an aspect reflected in the fact that each of the authorities (ESMA, EBA and EIOPA) appoints two Members and two alternates. Each Management Board chooses from a short list proposed by the Commission following a public advertisement and after consultation with the Board of Supervisors, which balances transparency with discretion (Commission to shortlist, authority to choose) and is now supplemented with European Parliament scrutiny.

There are two important points about the BoA's institutional design and role. First, EU policymakers see the benefits of an independent review body, to balance the growing competences of EU agencies, but have not taken the logical further step of ensuring that all the elements of structural independence are present (as discussed below in section 5.2.). Second, the BoA is asked to review decisions on breaches of Union law, which normally means adjudicating on the composite structure relating national authorities and EU authorities; and decisions on the ESAs' exercise of their powers. These decisions are of a very different nature, and require the BoA first to reflect about its own role, a task which is not facilitated by the novelty of the mechanism, and the paucity of details in the institutional framework (see section 3 below).

2.2. *The Appeal Panel of the Single Resolution Board*

There are two other administrative review bodies in the EU law of finance, for the Eurozone Banking Union, inspired by the Joint BoA experience, each with distinct features. Here we focus on the Appeal panel (AP) of the Single Resolution Board (SRB), which was established by Article 85 of Regulation 806/2014 (SRMR).[14] It mirrors ABoR (see below) in its composition: 5 members and two alternates, of high repute and with a proven record of relevant knowledge and professional experience, *including resolution experience*.[15] Like BoA members, AP members and alternates are appointed

13. New Art. 58(3) ESAs Regulations as amended.

14. Herinckx, "Judicial protection in the Single Resolution Mechanism", in Houben and Vandenbruwaene (Eds.) *The Single Resolution Mechanism (*Intersentia, 2017), pp. 77–118 (subsequent citations refer to the paras. rather than the pages of this work); Morais da Silva and Tomé Feteira, "Judicial review and the banking resolution regime. The evolving landscape and future prospects", in Bank of Italy, op. cit. *supra* note 7*,* p. 55.

15. Art. 85 of SRM Regulation.

for a five-year term (which may be extended once) by the SRB Board following a public call for expressions of interest published in the Official Journal. The European Commission does not shortlist candidates nor does the European Parliament request statements from them. Yet, members "shall not be bound by any instructions" and shall "act independently and in the public interest".[16]

Unlike the BoA, there are no formal provisions on nationality of the members, but the AP's first composition reflected geographical diversity within the Union, with seven different Member States' nationalities (one of the present authors sat in the initial group and still sits as a member), with two women in the group, and a variety of expertise (three law professors, an experienced international lawyer, two former senior central bank officials with finance and resolution expertise (one of them a former ABoR member and the other the former Chair of the German stability mechanism for banks' restructuring after the financial crisis).[17] Partial replacement resulted in former alternates becoming members and two new alternates being appointed (among them, the other present author).

Functionally, the AP resembles the BoA of the ESAs. It may confirm the SRB decision or remit the case to it, and the Board shall be bound by the decision of the AP and it shall adopt an amended decision regarding the case concerned.[18]

Although its role is closer to being quasi-judicial, the AP's remit is narrow, and comprises only the subject matters expressly mentioned in Article 85(3) SRMR, which nonetheless includes some relevant matters, e.g. Minimum Requirement of Eligible Liabilities (MREL) determinations, impediments to resolvability, or access to documents; it does not include all the decisions the Board may adopt (notably, the adoption of a resolution scheme by the Board, or the determination of *ex ante* contributions to the Single Resolution Fund). Actually, the reasons for such a limited scope of review remain elusive.

The AP's first act after its appointment at the end of 2015, was to adopt its Rules of Procedure, and it started operations on 1 January 2016. The Rules are aligned with those of the BoA, with some differences, e.g. (a) they underscore the Secretariat's functional separation and segregation of duties from all other SRB activities so that "no information passes from the Secretariat to the Board or any affiliated authority" (Art. 4); (b) hearings are "held in private, unless exceptional circumstances require otherwise" (Art. 18(5)); (c) and decisions are published only in anonymized form and in a format that preserves the

16. Art. 85(2) and (5) SRM Regulation.
17. Blair, op. cit. *supra* note 7, 4.
18. Art. 85(8) SRM Regulation.

confidentiality of sensitive information (Art. 24). So far this has not prevented the publication of the adopted decisions with only minor redactions.

The AP offers some points to reflect upon. First, its design shows, as did the BoA's, that EU policymakers are torn between the benefits of independent review, and the reluctance to fully implement structural independence (see section 5.2 below). Second, the AP design is inspired, but not determined, by the Joint BoA experience. To some extent this is understandable, since the agencies under review are very different: in contrast with the ESAs' relatively limited powers, the SRB has an ample and intrusive mandate, which may justify a prudent approach towards the competences for administrative review if the goal is to ensure that EU Courts retain the central review role. Yet, the AP's remit does not reflect a very clear plan. That gives rise to confusion amongst the appellants themselves as to what can (and cannot) be reviewed (see e.g. section 4.1. below), and to challenges in some cases due to the contrast between the breadth and relevance of the issue at stake, and the narrowness of the scope of review (section 4.3. below). Finally, the fact that beyond a common basic idea, each system is approached in an *ad hoc* manner, as an extension of the logic of each agency mandate, rather than a common logic of administrative review, creates problems of compartmentalization (section 5.1. below).

2.3. *The SSM's Administrative Board of Review (ABoR) and its exclusion from this study*

The Administrative Board of Review (ABoR)[19] was established by Article 24 of Regulation 1024/2013 (SSMR) and is composed of five members and two alternates. ABoR must perform "an internal administrative review" of "the procedural and substantive conformity with Regulation No. 1024/2013 of ECB decisions";[20] most of its rules on composition, independence and procedure mirror those of the ESAs' BoA. There are many practical similarities in the scope and intensity of BoA and AP review and that of ABoR,[21] which has shown "the incidence of independent scrutiny".[22]

19. Brescia Morra, Smits and Magliari, "The Administrative Board of Review of the European Central Bank: Experience after two years", 18 EBOR (2017), 567–589; Smits, "Interplay of administrative review and judicial protection in European prudential supervision: Some issues and concerns", in Bank of Italy, op. cit. *supra* note 7*,* pp. 29–52.

20. Art. 24(1) SSMR.

21. Morais da Silva and Tomé Feteira, op. cit. *supra* note 14, p. 62.

22. Smits, op. cit. *supra* note 19, p. 47. This despite the relatively low number of cases compared with the number of supervisory decisions. Ibid. p. 32.

Yet, there are also crucial differences.[23] A distinctive feature of the ECB review process is that the ABoR does not take a "decision", but rather "expresses an opinion",[24] which is *not binding* on the ECB. The ABoR, like the BoA and AP, can "remit the case" for the preparation of a new draft decision by the ECB Supervisory Board. The new draft decision "shall take into account the opinion of the Administrative Board of Review" and then be submitted to the Governing Council, which then adopts the final decision. Yet, the draft new decision of the Supervisory Board can abrogate the initial decision, or replace it with an amended decision, but also replace it with a decision of identical content. The Supervisory Board may persist in its initial view despite the ABoR's contrary opinion, if there are reasons, in its view, to do so. The new Governing Council decision (adopted by tacit consent if not objected to within 10 days), is not subject to further review by the ABoR.

The rationale for this difference is, first, the relevance of the ECB's independence, outlined under Article 130 TFEU, and SSMR Article 19 and recitals (30) and (79); and, second, Article 263(5) TFEU, which allows the establishment of pre-judicial control mechanisms (which would also operate as an additional condition of admissibility for an action for annulment before the GC) only for Union agencies, bodies or offices, but not for Union institutions, like the ECB.[25] Thus, no matter its relevance, the ABoR is more an internal administrative feature than a quasi-judicial body. This impression crystallized once it was acknowledged by the GC first, and then the ECJ, in the *Landeskreditbank* case, where the Courts considered the arguments given by ABoR to justify the Supervisory Board's decision not as a "review" of that decision, but as part of the institution's compliance with the duty to state reasons, i.e. a fully internal feature.[26] For these reasons, its decisions are not published, even in redacted version, and its experience cannot be part of this study. This is regrettable, because in this way, its very important activity remains in the shadow and aggravates the compartmentalization problem among the different appeal bodies (see section 5.1. below).

23. See 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 della Ricerca Giuridica della Consulenza Legale*, No. 81, July 2016, pp. 109–132; Morais da Silva and Tomé Feteira, op. cit. *supra* note 14, p. 61.

24. Art. 24(7) SSMR.

25. Art. 263(5) TFEU reads as follows: "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".

26. Case T-122/15, *Landeskreditbank Baden-Württemberg* v. *BCE*, EU:T:2017:337; Case C-450/17, *Landeskreditbank Baden-Württemberg* v. *BCE,* EU:C:2019:372.

3. The cases decided by the Board of Appeal

The experience of the BoA is still limited in terms of workload, with eleven decisions so far,[27] although this is likely to increase due to the new supervisory competences and sanctioning powers of ESMA after recent reforms. Furthermore, the complexity of cases alone seems to confirm the adequacy of expert review in this context. Cases can be grouped into two main classes: decisions on a breach of Union law, where the main issue turned out to be the admissibility of the appeal (3.1.), and decisions concerning credit ratings (3.2.).

3.1. *Decisions on breach of Union law, and admissibility: The BoA's quest for a place in the review system*

BoA cases on a breach of Union law show that they typically arise in contexts where supervisory competences are exercised by national authorities, the ESAs are asked to scrutinize that exercise, and the BoA is asked to review the decision whether or not to scrutinize. It is no surprise that the more substantial points were raised on the appeal's admissibility. In *SV Capital* v. *EBA,*[28] the BoA had to discuss the overruling of an EBA decision *not* to start proceedings for a breach of Union law on its own initiative, when it had been requested to do so by an applicant. The problem was whether the EBA had correctly decided that Union law requirements on "suitability" apply only to persons who *effectively direct* the business of the credit institution. The BoA held that "suitability" requirements encompass "key function holders", such as the heads of branches, a reading consistent with EBA Guidelines, which, though not legally binding, were still a persuasive source. The BoA concluded that the fact that the suitability assessment by (national) competent authorities is

27. Decisions of 24 June 2013 and of 14 July 2014, *SV Capital* v. *EBA I and II*; Decision of 10 Jan. 2014, *Global Private Rating Company* v. *ESMA*; Decision of 10 Nov. 2014, *IPE* v. *ESMA*; Decision of 3 Aug. 2015, *Onix Asigurari* v. *EIOPA*; Decision of 7 Jan. 2016, *Andrus Kluge, Boris Belyaev, Radio Elektroniks OÜ and Timur Dyakov* v. *EBA*; Decision of 3 July 2017, *FinancialCraft Analytics* v. *ESMA*; Decision of 30 April 2018, *"A"* v. *ESMA;* Decision of 10 Sept. 2018, *B.* v. *ESMA;* Decision of 27 Feb. 2019, *Svenska Handelsbanken, Skandinaviska Enskilda Banken, Swedbank, Nordea Bank* v. *ESMA*. All decisions are accessible at <www.esma.europa.eu/it/page/board-appeal>. For a comment on the *Global rating* decision, Gargantini, "La registrazione delle agenzie di rating. La decisione della Commissione di ricorso delle Autorità europee di vigilanza finanziaria nel caso Global Private Rating Company 'standard Rating' Ltd c. Autorità europea degli strumenti finanziari e dei mercati (10 gennaio 2014)", 8 *Rivista di diritto societario* (2014), p. 416. Access to the full content of all decisions is available at the EBA, ESMA and EIOPA webpages.

28. BoA 2013-008.

somewhat discretionary does not mean that suitability of key function holders lies exclusively within the ambit of national law.

The case was remitted to the EBA to rule on the merits, and the EBA still rejected the complaint, finding that there were insufficient grounds for initiating an investigation under Article 17 of the EBA Regulation. A second appeal was then lodged before the BoA against that decision. The BoA dismissed the appeal, finding that the EBA's holding was reasonable, and the appellant's right to be heard was respected, but it found that the EBA's decision not to initiate an investigation was *reviewable*, because, by stating that the prior complaint was admissible, it went beyond a mere communication of information or advice of non-action.

The case was taken before the General Court[29] and, on appeal, before the ECJ.[30] In its judgment, the GC Court confirmed the EBA's view, but crucially, raised the issue of reviewability of its own motion, mostly to clarify that the EBA decision not to act was *not reviewable*, and therefore the BoA's decision had to be annulled on grounds of lack of competence.

In subsequent cases, the BoA diligently applied the General Court's precedent, also addressing some additional variations concerning admissibility, e.g. who is an "addressee" of a decision, or has "direct and individual concern" in it, and what is a "decision". In *Kluge* v. *EBA*,[31] the appellants sought to appeal under Article 60(1) EBA Regulation the authority's decision *not to* open an investigation on alleged breaches of Directive 2006/48 by the *Finantsinspektsioon*, the Estonian Financial Supervisory Authority, in its supervision of *AS Eesti Krediidipank,* a credit institution. The EBA relied on *SV Capital* to object to the BoA's competence, arguing that private individuals, like the appellant, may request the EBA to initiate an investigation against a competent authority, but if the EBA refuses, they lack a right of appeal because they are not among the "qualified" entities listed in Article 17(2) EBA Regulation and thus are not "addressees" of the decision. The appellants asked the Board not to rely on the General Court's reasoning, in light of the appeal at the time still pending before the ECJ, or, alternatively, to stay the proceedings. Although the Board has the power to grant a stay if there is good reason to do so, it dismissed the application in this case: the ECJ decision did not seem imminent, and the GC's view was the only valid criterion then. The BoA followed *SV Capital* and found that it lacked competence to decide on the appeal.[32]

29. Case T-660/14, *SV Capital OÜ* v. *EBA*, EU:T:2015:608.
30. The appeal was dismissed in Case C-577/15 P, *SV Capital OÜ* v. *EBA*, EU:C:2016:947.
31. BoA 2016/001.
32. The BoA also added that EBA Internal Processing Rules do not give any appellant rights not afforded by the EBA Regulation.

The same rationale was applied in *B* v. *ESMA*,[33] an appeal against a decision of ESMA's Chair *not* to open a formal investigation against the Cyprus Securities and Exchange Commission (CySEC) under Article 17 of the ESMA Regulation, for alleged infringements of MiFID and EU rules on capital adequacy. The appellant alleged that it represented a number of clients damaged by the activities of a Cypriot investment firm.[34] On admissibility,[35] ESMA argued that the appellant was not a "qualified" entity referred to in Article 17(2) of ESMA Regulation as entitled to request an investigation, and thus the Board of Appeal was not competent to hear its appeal. The appellant suggested that ESMA might have been requested to open an investigation also by Article 17(2) entities, and asked for a copy of the ESMA conclusion, to which ESMA had denied access pursuant to an alleged exemption under Article 4(2) and (3) of Regulation 1049/2001 (Access to Documents Regulation). The Board acknowledged the appellant's personal interest in the decision, as well as the more general interest in transparency, but since ESMA had clearly stated that no Article 17(2) entity had requested an investigation, and there was no reason to doubt such statement, the Board concluded that it had no competence to hear the appeal.

IPE v. *ESMA* was another appeal against an ESMA decision not to open an investigation on its own initiative for an alleged breach of Union law[36] where the Board upheld the *SV Capital* v. *EBA* position that the power to investigate is discretionary. As another point, ESMA also argued that, for admissibility purposes, an appeal to the BoA under Article 60 of the ESMA Regulation should be treated similarly to a legality review under Article 263 TFEU or "failure to act" proceedings under Article 265 of the TFEU. The Board, however, emphasized that there is a difference between those remedies, and that, under the ESMA Regulation, both avenues are available. Nonetheless, the BoA noted that for the appeal to be admissible, the appellant had to show a "direct and individual concern" in the decision, which the appellant lacked, as it did not represent the interests of natural or legal persons who would be entitled to bring proceedings in their own right: it was a company assisting

33. BoA D/2018/02.

34. It also argued that that the fine imposed by CySEC was neither adequate nor dissuasive of further breaches, that numerous complainants were affected, and that, with no suitable means to resolve complaints at the national level, the lack of intervention by ESMA had a negative impact on investor protection in the EU, not limited to Cyprus.

35. ESMA also contended that the filing of the notice of appeal by email did not comply with Art. 7 of the BoA's Rules of Procedure nor with Art. 60(2) of the ESMA Regulation. The BoA considered the appellant's mistake not to be such as to invalidate the appeal.

36. 2014/BOA/05. This concerned the application of the Prospectus Directive by the *Commission de Surveillance du Secteur Financier* (CSSF) in Luxembourg.

private and institutional investors in recovering losses, and which would be remunerated by a success fee. Thus, the appeal was inadmissible.

In *Onix Asigurari* v. *EIOPA*[37] the issue was whether a communication sent by EIOPA to Onix on 24 November 2014 was a "decision", and thus whether the BoA was competent to hear an appeal against it. Onix was an insurance company authorized by Romanian authorities, which began to provide certain insurance services in Italy under Directive 92/49, and in 2013 was banned from continuing business in Italy by IVASS, due to concerns about Onix's sole shareholder. The appeal concerned EIOPA's refusal to conduct an investigation for a potential breach of Union law concerning the division of powers between home and host insurance supervisory authorities. The BoA remarked that no appeal had been brought against the actual "decision"[38] signed by the EIOPA's Chair, albeit not specifically addressed to either Onix or its shareholder. The later communication was not a "decision":[39] it merely engaged with matters raised by Onix in its correspondence, was not based on new factors, and did not re-examine the situation, but merely confirmed the earlier decision. Therefore, since the appellants had not appealed the initial decision, Article 17 of the EIOPA Regulation did not apply, and the Board had no jurisdiction on the appeal.

3.2. *Decisions on credit ratings*

BoA cases on (some of the) supervisory competences directly exercised by ESMA, e.g. those over credit rating agencies, look more promising as the focal point is not matters of competence and governance, but matters of substance, where the benefits of expert, swift review are easier to perceive. The first case was *Global Standard Rating* v. *ESMA*.[40] In 2012, the UK Financial Services Authority informed ESMA of concerns that the appellant appeared to be issuing sovereign credit ratings on its webpage, without being registered as a credit rating agency. Once the appellant applied to register under the Credit Rating Agencies Regulation (CRAR), ESMA's Board of Supervisors refused the application, and the refusal was appealed.

The Board of Appeal had to consider whether ESMA's decision to refuse registration was correct, and whether it was vitiated by procedural irregularities or unfairness. The BoA held that ESMA had notified the completeness of the application within CRAR time limits. On the substance of the refusal to register, it was the applicant's burden to make sure that the

37. BoA 2015/001.
38. EIOPA-14-267 of 6 June 2014.
39. EIOPA-14-653 of 24 Nov. 2014.
40. BoA 2013-14.

application's information was compliant. Even considering the relative novelty of the registration process, the rules gave sufficient guidance, and ESMA was not obliged to raise questions on the information provided, nor to remedy any deficiencies at the compliance stage. ESMA based its finding of non-compliance by the appellant on contentions that raised significant issues, *and* the refusal decision was fully reasoned as required by Articles 16(3) and 18(1) CRAR. The appeal was thus dismissed.

Similar steps were taken in *FinancialCraft Analytics* v. *ESMA*,[41] another refusal to register a credit rating agency. ESMA had concluded that an insufficient level of detail, inconsistencies and weaknesses in the application failed to comply with CRAR.[42] The appeal was unsuccessful for a number of reasons: ESMA's check was thorough; while some of ESMA's objections were minor, others were central to the refusal; and the appellant's responsibility was to demonstrate compliance with CRAR to the requisite level of detail during registration. Crucially, in terms of the BoA's approach, it was held that in respect of technical matters about credit rating, such as rating methodologies, ESMA was acting as a specialist regulator, and thus is entitled to its margin of appreciation; also, that the decision itself set out ESMA's reasons in a detailed manner, as required by Articles 16(3) and 18(1) CRAR.

In the "Nordic banks" cases, which resulted from appeals by *S*venska Handelsbanken AB, Skandinaviska Enskilda Banken AB, Swedbank AB, and Nordea Bank Abp, the peculiarity of the problem was that it involved not an individual institution, but the Nordic debt *market*, and the focal point in law was what may be considered a "rating", as opposed to investment research and an investment recommendation.[43] ESMA's Board of Supervisors found a negligent infringement of CRAR in the four banks' inclusion of "shadow ratings" in their credit research reports, and followed it by public notices and fines on each bank. The banks appealed. The crux of the case concerned the ambiguity of Article 3(2) of CRAR, which excludes recommendations and "investment research" from consideration as "credit ratings". In the four cases, "shadow ratings" included in the banks' investment research and

41. BoA 2017/01.

42. This encompassed internal controls, conflicts of interest, independence of the credit rating process from business interests, rating methodology, models and key rating assumptions, credit rating process, and exemptions. Even though the appellant was a small company, which might have benefitted from CRAR exemptions, the arrangements to obtain such exemption had not been made.

43. The four cases were conducted in parallel, with a single hearing and four simultaneous decisions drafted in a single document. In *Scandinaviska Enskilda Banken AB* v. *ESMA,* the Board had decided first to dismiss a request for suspension of the application of the contested decision with a decision of 30 Nov. 2018.

recommendations, were creditworthiness assessments composed by the banks' credit analysts, based in whole or in part on the methodology of the "official" rating agencies, and using an alphanumerical rating. This, to ESMA, put them outside the investment research exemption under CRAR, and within the definition of "rating", even if the overall reports themselves could be characterized as MiFID investment research.

The BoA found no evidence of unlawfulness in the decisions under the principles of legal certainty and due process, and upheld ESMA's assessment that the activities of the appellants fell within CRAR provisions. Thus, the banks had to be CRAR-registered to undertake the activity, and absent such registration they had infringed the provisions. In reaching its conclusion, the BoA engaged not only in a literal interpretation, but also looked at the legislative history and purpose of the relevant provisions. The former was not very enlightening, but the latter was. This led the BoA to hold (para 262 of the 4 simultaneous decisions) that the effect of the banks' interpretation, should the BoA accept it, would be that market participants could easily circumvent CRAR restrictions:

> "simply by including credit ratings in documents containing recommendations or investment research or even 'opinions about the value of a financial instrument'. In other words, subject to the market abuse framework, anyone could at least in theory issue credit ratings so long as the ratings were included in a document that fell within the Article 3(2) definitions.… These ratings could not have the regulatory use set out in Article 4 (this Article expressly requiring that for regulatory purposes can be used credit ratings only if they are official and issued by registered credit rating agencies), but would nonetheless be (and present themselves as) credit ratings".

The BoA, however, concluded that due to the ambiguous wording of Article 3(2) CRAR, and the unusual circumstances in which the banks' practice had been carried out in the Nordic debt markets for many years, without any perception of CRAR impropriety, the infringements were not negligent. Thus, ESMA's Board of Supervisors could not impose fines, and the cases were remitted for the adoption of amended measures under Article 60(5) of the ESMA Regulation.

Finally, in *Creditreform AG* v. *EBA,*[44] the BoA dismissed an appeal filed by a credit rating agency which challenged the adoption by the Joint Committee of the ESAs of certain draft implementing technical standards (ITS) and applied for their suspension. The draft ITS which were subject to appeal,

44. BoA 2019/05.

proposed amendments to Commission Implementing Regulation 2016/1799 on the mapping of the credit assessments of external credit assessment institutions in accordance with Article 136(1) and (3) of Regulation 575/2013.[45] They included a proposal to amend the correspondence ("mapping" in the terminology of the Capital Requirements Regulation (CRR)[46]) between certain of the appellant's long-term corporate credit assessments and certain credit quality steps as set out in Section 2 of Chapter 2 of Title II of Part Three of the CRR. The appellant challenged the legality of this change. The BoA dismissed the appeal as inadmissible, holding that, under Article 15 of the ESAs Regulations, the European Commission is not bound by the draft ITS submitted by the ESAs, and has significant discretion as to the final determination of the content of such ITS at the stage of their endorsement. In the BoA's view, this meant that the draft ITS cannot undergo autonomous and direct judicial or quasi-judicial review, since they form part of a compound procedure and are just an element in the ordinary process of the adoption of the final decision by the European Commission. Those willing to challenge these acts can do so only by filing an application for annulment under Article 263 TFEU against the final decision adopted by the Commission, asking the General Court to consider also the alleged errors in fact or in law of the ESAs' preparatory act which may vitiate the Commission's final decision.

4. The cases decided by the Appeal Panel

Although comprising an even shorter timespan than the BoA, the abundant practice of the AP seems to confirm that expert review is appropriate in the law of finance, including the context of resolution. The AP has received 115 appeals in less than four years. A majority were beyond the AP remit and clearly inadmissible, and thus the AP adopted a majority of briefly motivated inadmissibility orders.[47] The roughly 30

45. Commission Implementing Regulation (EU) 2016/1799 of 7 Oct. 2016 laying down implementing technical standards with regard to the mapping of credit assessments of external credit assessment institutions for credit risk in accordance with Arts. 136(1) and 136(3) of Regulation (EU) 575/2013 of the European Parliament and of the Council, O.J. 2016, L 275/3.

46. Regulation (EU) 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) 648/2012, O.J. 2013, L 176/1.

47. This occurred e.g. with an initial batch of briefly motivated inadmissibility decisions, where the AP indicated that review of *ex ante* contributions to the SRF fell outside the AP's remit under Art. 85; see cases 2/16 to 4/16 and 6/16 to 14/16 (decisions of 18 July 2016). An application against the SRB requests for *ex ante* contribution has been recently dismissed by the GC on procedural grounds, Case T-446/16, *NRW Bank* v. *SRB*, EU:T:2019:445. Compare also,

decisions[48] in the cases where the appeals were not manifestly inadmissible are considered in some detail below, grouped into three main classes: (4.1.) decisions on administrative contributions to the SRB expenses; (4.2.) a decision on MREL determination; and (4.3.) decisions on access to documents in the context of the Banco Popular resolution.

4.1. *Decisions on contributions: Certainty versus proportionality*

The key point of the AP substantive decisions on administrative contributions to the SRB expenses is that, although the problems were full of minute details, the deeper issue underpinning them was the tension between legal certainty and proportionality. The rules that determine contributions must take into consideration the entity's circumstances (e.g. whether it is a licensed institution, its size, and risk profile) so as to render contributions proportionate. However, those contributions must also be based on clear-cut definitions and criteria that determine scope, time period and method of calculation, and which regulate special cases, such as banking groups. Appellant entities have raised interpretative issues about their subjective circumstances, or objective ones (e.g. the calculation), which allegedly rendered the contribution excessive or no longer due. The AP has sought to apply rules and balance principles, while respecting the margin of appreciation of the European Commission, which elaborates on the delegated and implementing regulations, and the Board, which interprets them.

The first decision on the merits (in November 2016) concerned 2015–2016 contributions to SRB administrative costs under Article 65 SRMR and delegated Commission Regulation 1310/2014. The SRB sent a letter in March 2015 to all the banks included in a list of significant credit institutions under ECB direct supervision under Regulation 1024/2013, published by the ECB on its website on 4 September 2014, requesting payment of provisional instalments for contributions to SRB administrative costs. This was contested by one addressee, which meanwhile had been subject to national resolution measures (in Germany) and had ceased to be a bank in July 2015.

Thus, the key was the *subjective scope of application* of SRMR provisions, an issue which, though restricted in this case to provisional contributions to the SRB administrative costs, has wider implications. The AP partially sided with the appellant and remitted the case to the Board. It held that SRMR and Commission Delegated Regulation 1310/2014 limited their scope to entities

more recently, the annulment judgments of 28 Nov. 2019 in case T-365/16, *Portigon AG* v. *SRB,* EU:T:2019:824; Case T-377/16, *Hypo Voralberg Bank* v. *SRB*, EU:T:2019:823; and Case T-323/16, *Banco Cooperative Espanol* v. *SRB*, EU:T:2019:822.

48. All AP decisions, in anonymized version, are accessible at <www.srb.eu>.

referred to in Article 2 SRMR. Thus, if an entity originally included in the ECB list had ceased to be such during the relevant period, it could no longer be required to contribute to the SRB administrative costs. The scope of the rules had to be determined in light of their purpose, also because a literal reading made Commission Regulation 1310/2014 potentially incompatible with SRMR. The AP acknowledged that a regulation is presumed to be lawful and only the ECJ has the power to declare it invalid;[49] this cannot be done by national courts[50] or administrative authorities,[51] nor Union bodies[52] including authorities dealing with administrative appeal procedures, e.g. the AP.[53] Yet, the AP also held that between two possible readings, it should prefer the one which would preserve the lawfulness of the Commission Regulation should the Court decide on the issue.[54]

In 2018, the AP decided three other cases on the calculation of contributions to its administrative expenses for the year 2018 based, this time, on Commission Delegated Regulation 2361/2017.[55] In Case 4/2018, following an ECB declaration that an entity was failing or likely to fail, in February 2018 the SRB decided that resolution action was not necessary in the

49. Case C-362/14, *Schrems*, EU:C:2015:650, at para 61; Cases C-188 & 189/10, *Melki and Abdeli*, EU:C:2010:2016, at para 54; Case 101/78, *Granaria*, EU:C:1979:38, at paras. 4 and 5; Case 63/87, *Commission* v. *Greece*, EU:C:1988:285, at para 10; Case C-475/01, *Commission* v. *Greece*, EU:C:2004:585, at para 18.

50. Case C-362/14, *Schrems*, at para 62; Case C-456/13, *T&L Sugars,* EU:C:2015:284, at paras. 45–48; Case C-583/11, *Inuit Tapiriit Kanatami*, EU:C:2013:625, at paras. 92 and 96; Case C-344/04, *IATA*, EU:C:2006:10, at paras. 27–30; Case C-314/85, *Foto-Frost*, EU:C:1987:452, at paras. 14–17.

51. Case C-362/14, *Schrems*, at para 52; Case 101/78, *Granaria*, at para 6; Case C-533/10, *CIVAD*, EU:C:2012:347, at para 43.

52. Case T-13/97, *Losch*, EU:C:T:1998:230, at para 99; Case T-154/96, *Chvatal*, EU:T:1998:229, at para 112.

53. Case F-128/12, *CR* v. *Parliament*, EU: F:2014:38, at paras. 35, 36 and 40; Case T-218/06, *Neurim Pharmaceuticals* v. *OHIM*, EU:T:2008:379, at para 52; Case T-120/99, *Kik* v. *OHIM*, EU:T:2001:189, at para 55.

54. The AP also discussed whether the Board's request for contribution could legitimately encompass the entire year 2015, since the appellant had ceased to be a regulated entity in July 2015. On this the AP was prudent and held that the Commission Regulation could legitimately be construed, as the Board did, as setting contributions for a full calendar year. Yet it noted that *de lege ferenda*, an approach based on a *pro rata temporis* calculation, would be justified, more proportionate, and could be considered by the European Commission in the future. Indeed, such a *pro rata* system was eventually adopted by Commission Regulation 2361/2017 of 14 Sept. 2017 on the final system of contributions.

55. O.J. 2017, L 337/6. According to such Delegated Regulation, the SRB was required to calculate in 2018 the administrative contributions for 2018 as well as the *final* settlement for administrative contributions for the years 2015 to 2017, taking into account the provisional advances calculated and paid by the relevant entities under Regulation 1310/2014 in the previous years.

public interest,[56] and the entity was subject to liquidation under national law. The appellant argued that after such a decision it was no longer subject to the SRM; the SRB had ceased to provide any service to the appellant, which should not pay administrative contributions to the SRB, which, in turn, should recalculate its 2018 contribution to include only January, and not the entire year. The AP noted that when the SRB determined the 2018 administrative contributions, the appellant was still established as a credit institution. Furthermore, the determination of individual administrative contributions followed strict predefined criteria set out under the Commission Regulation (which comprised the entity's size and its risk model) in a list meant to be exhaustive, and non-discretionary. The facts alleged by the appellant fell outside those criteria and were thus irrelevant. Therefore, the bank had to pay administrative contributions until July 2018, when its bank licence was finally withdrawn.

Case 5/2018 concerned a group restructuring in 2017, by which the entity that previously paid the contributions ceased to be the parent company. The appellant claimed that this had implications: (i) on the obligor of the duty to pay future administrative contributions pursuant to Article 7(1) of Delegated Regulation 2361/2017 and Article 2 SRMR; and (ii) on the settlement of the balance due as final contribution for the years 2015–2017. It argued that, for later contributions, the annual calculation for 2018 was "disproportionate and not appropriate", because it was based on data at 31 December 2016, when September 2017 data would have been "significantly lower". The AP dismissed the appeal on the substance, and it also held that the SRB must raise contributions from the "contribution debtor".[57] In groups, there is a single debtor for the group, which is the same entity that must pay the supervisory fees to the SSM, or "fee debtor".[58] Since the appellant was the "fee debtor", it was also the entity liable for the final settlement payments.[59]

In case 6/2018, the appellant had undergone a comprehensive restructuring, and claimed that 2020 was the planned time for closure of its voluntary winding up process, a process during which the appellant had received funding from the German Deposit Guarantee Scheme. In the appellant's view, by failing to take these specific circumstances into consideration when calculating the administrative contributions, the SRB was indirectly imposing a burden on the other German banks which were members of the Deposit

56. Art. 18(1)(c) and (5) SRMR.

57. Arts. 8(1) and 5(4) of Commission Delegated Regulation 2361/2017.

58. Art. 2(3) of Commission Delegated Regulation 2361/2017, and Art. 4 of Regulation (EU) 1163/2014 (for the group's "fee debtor").

59. On the objection to the 2018 calculation of the annual administrative contributions, the AP noted that the calculation was in compliance with Art. 5(1) of Delegated Regulation 2361/2017.

Guarantee Scheme and which, however, already contributed to the administrative expenses of SRB pursuant to Article 65 SRMR. The AP dismissed the appeal, noting that the appellant was still a licensed credit institution as defined in Article 4(1) of Regulation 575/2013 and was therefore liable to pay administrative contributions. Events like those claimed by the appellant do not count as exemptions from the duty to pay.

4.2. *Decision on a Minimum Requirement of Eligible Liabilities (MREL) determination*

A second AP line of action, with one decision on 16 October 2018,[60] concerned MREL; another example of the importance, in a seemingly "dry" and technical field, of principles-based interpretivism (and of an occasional "policy-making partnership" between review bodies and regulators, if one considers that the matter was expressly regulated otherwise by the BRRD reform in 2019) on divisive issues.

MREL rules ensure that a bank has sufficient instruments to write-down or convert, so as to ensure an orderly resolution under the bank's proposed resolution strategy.[61] Thus, among all capital and liability instruments subject to write-down, MREL rules identify a narrower sub-set whose characteristics make such write-down particularly easy.[62] In this case, the Board made an MREL determination that was below 8 percent of total liabilities including own funds (TLOF). Since resolution rules provide that the single resolution fund (SRF) resources can be tapped only after capital/liabilities reaching 8 percent TLOF are bailed in,[63] the appellant was concerned that a target *below* that level posed the risk that at the point of non-viability (PONV) of the failing credit institution, authorities would have to implement the strategy without relying on SRF resources.

The Appeal Panel held that the Board's decision was justified. The MREL requirement was calibrated to ensure that the target of the relevant credit institution, *measured against its risk weighted assets*, compared in a balanced way with the average national banks and average Banking Union banks, and was *proportionate* in light of the bank's size, funding and business models and risk profile, the impact of that bank's failure on financial stability, and the

60. Decision of 16 Oct. 2018, in Case 8/18.

61. On MREL, see e.g. Lamandini and Ramos Muñoz, "Minimum requirement for own capital and eligible liabilities" in Santoro and Chiti (Eds.), *The Palgrave Handbook of European Banking Union Law* (Palgrave, 2019), p. 321.

62. Art. 45(4) BRRD (instruments issued and fully paid up, not owed to, funded, guaranteed, or funded by the institution, with more than one year maturity, not comprising deposits or derivatives).

63. Arts. 44(4) and 44(5) BRRD.

need to prevent competitive distortions. Yet, the threshold of bailed-in instruments equivalent to 8 percent TLOF could still be reached using not only MREL instruments but also liabilities that, although not qualifying as MREL, are nonetheless not excluded from bail-in,[64] e.g. those with a maturity of less than one year. Since this was a reasonable view, the Board could take the ultimate decision which had to be respected.

Thus, even MREL rules, which provide a (supposedly) clear calculation method, are open to interpretation on critical aspects that create tension between entity and resolution authority, as well as between resolution authorities themselves, which require weighing the goals of the provisions against the authorities' margin of appreciation.

4.3. *Decisions on access to documents in the Banco Popular resolution: Financial stability, democratic and judicial accountability, and the importance of details*

The largest AP caseload has focused on access to documents under Regulation 1049/2001 (Access to documents Regulation) connected to the Banco Popular resolution, with several rounds/batches of elaborated decisions (6 decisions on 28 Nov. 2017;[65] 1 decision on 23 March 2018;[66] 11 decisions on 19 June 2018;[67] 3 decisions on 28 Feb. 2019;[68] 4 decisions on 11 April 2019;[69] 3 decisions on 29 April 2019;[70] 3 decisions on 19 June 2019;[71] 1 decision on 9 Oct. 2019[72]). Again, despite their seemingly narrow and rules-based context,[73] the cases illustrate the tension between key policies, principles, and values. The different rounds of appeals showed a combination of case-specific details and general principles, and how minute details could decisively influence matters of principle.

64. The bail-in eligible liabilities are contemplated in Art. 44 BRRD (the bail-in sequence is in Art. 48 BRRD). The liabilities eligible to fulfil MREL are regulated under Art. 45(4) BRRD.

65. Decisions of 28 Nov. 2017 in Cases 38 to 43/17 and decisions 19 June 2018, in Cases 44 to 54/17 and 1 & 7/18.

66. Decision of 23 March 2018, in Case 2/18.

67. Decisions of 19 June 2018 in Cases 44/17 to 54/17 and 1 & 7/18.

68. Decisions of 28 Feb. 2019 in Cases 3/18, 14/18, and 15/18 and 22/18.

69. Decisions of 11 April 2019 in Cases 12/18, 1/19, 3/19, 4/19.

70. Decisions of 29 April 2019 in Joined Cases 9, 11, 13, 16/18 & 2/19; Joined Cases 10, 17 & 20/18; and Case 5/19.

71. Decisions of 19 June 2019 in Case 18/18, Case 19/18 and Case 21/18.

72. Decision of 9 Oct. 2019, in Case 6/19.

73. For a thorough discussion, see Smits and Badenhoop, "Towards a single standard of professional secrecy for supervisory authorities", (2019) EL Rev., 295–318, *passim*.

The most relevant issue of detail was the admissibility of "second appeals" against the Board's (new confirmatory) decisions to comply with prior AP decisions, i.e. when a first appeal had resulted in a decision against the Board, and the second appeal alleged that the Board, adopting an amended decision following the AP decision, had not complied with the latter. The AP held that such a "second" appeal was admissible. When adopting a revised decision to comply with AP findings, the Board was not extending the original decision: it was replacing it with a new decision, the only one with legal effects.[74] The second appeal could be useful to address the Board's possible good faith errors in implementing AP findings, or clarify the AP's view; an efficient way to ensure timely compliance, enhance certainty and protect the appellant's rights.

Notice the relevance of a seemingly minute matter for the AP's Kompetenz-Kompetenz, i.e. the power to rule on its own competence. The AP did so by underlining the differences with ABoR, where there is no second review, *because the ECB's Supervisory Board is not bound to follow ABoR's opinion*. If the AP did not allow the "second appeal", the SRB would be bound to follow the AP's view, but the SRB, not the AP, would have the last word on how to do so. To avoid the second appeal turning into a full *ex novo* review or giving rise to an endless cycle of appeals, the AP clarified that such appeal can only concern matters where the SRB's view had been found to be incorrect.[75]

Going into the decisions' substance, a summary of the rounds of appeals is as follows: (i) the overall question was how much access had been granted by the SRB to the documents supporting the Banco Popular resolution decision to the shareholders or subordinated bondholders who had suffered the loss of money as a result; (ii) the AP's first and clear answer was "not nearly enough"; (iii) the same answer was also repeated, yet in more targeted and nuanced terms, in successive rounds of appeals which resulted in additional disclosures by the SRB. We discuss the general background, the matters of principle, and some select matters of detail.

More specifically, the AP had to examine the SRB refusal to disclose key resolution documents (e.g. the Resolution Decision, Valuation Report, or Resolution Plan) in light of the right that "any citizen" has to disclosure, and elaborate on some general criteria to balance the right of access and the public interest. Key to the AP decisions were the arguments that: (i) conferral of powers to EU agencies is conditional upon respect of fundamental rights, and effective judicial review; and (ii) administrative safeguards, including access to documents or the duty to state reasons, are instrumental to effective judicial review. On these grounds, the Panel held that the SRB's refusal to grant access

74. Cases 2, 3 & 18/18 and 19/18.
75. Case 2/18, decision of 23 Feb. 2018.

to the Valuation Report *in its entirety* erred in law, since the report was a critical part of the Resolution Decision and formed a legal unity with it, and thus had to be disclosed at least partially. Then, the SRB was only partly justified in refusing access to other documents. The Resolution Decision itself, some parts of the Resolution Plan and other relevant documents could be disclosed in a redacted, non-confidential form, without endangering any public interest, including financial stability, also in light of the fact that disclosure would take place months after the Resolution Decision was adopted.[76]

Successive rounds of appeals over roughly similar cases let the AP further develop a stable framework of analysis to balance the competing interests at stake in the following structured manner: (a) the right of access is a transparency tool of democratic control of European institutions, bodies and agencies available to all EU citizens irrespective of their interests in subsequent legal actions;[77] (b) the purpose of the Access to documents Regulation "is to give the fullest possible effect to the right of public access to documents and to lay down the general principles and limits on such access" (recital 4) and "in principle, all documents of the institutions should be accessible to the public" (recital 11). This Regulation implements Article 15 TFEU which establishes that citizens have the right to access documents held by all Union institutions, bodies and agencies, and is also a fundamental right under Article 42 of the Charter. However, certain public and private interests are also protected by way of exception and the Union institutions, bodies and agencies should be entitled to protect their internal consultations and deliberations where necessary to safeguard their ability to carry out their tasks (cf. Recital 11); (c) exceptions must be applied and interpreted narrowly;[78] (d) Union institutions, bodies and agencies can rely in relation to certain categories of administrative documents on a general presumption that their disclosure would undermine the purpose of the protection of an interest protected by the Access Regulation.[79] To add more complexity, a balance between similar principles was also being drawn in parallel by

76. On documents exchanged with the ECB or the European Commission, the AP agreed with the Board that they were protected as part of the deliberation process, under Art. 4(3) of the Access Regulation.

77. Case C-60/15, *Saint-Gobain Glass Deutschland*, EU:C:2017:540, at paras. 60 and 61 and in particular Case T-376/13, *Versorgungswerk der Zahnärztekammer Schleswig-Holstein* v. *European Central Bank*, EU:T:2015:361, at para 20.

78. Case C-280/11, *Council* v. *Access Info Europe*, EU:C:2013:671, para 30.

79. Case C-404/10, *Commission* v. *Editions Odile Jacob,* EU:C:2012:393; C-514/07 P, *Sweden and Others* v. *API and Commission,* EU:C:2010:541; Case C-365/12 P, *Commission* v. *EnBW*, EU:C:2014:112; Joined Cases C-514 & 605/11 P, *LPN and Finland* v. *Commission,* EU:C:2013:738; Case C-562/14 P, *Sweden* v. *Commissio*n, EU:C:2017:356.

the ECJ in the successive cases of *Espirito Santo I,*[80] *BaFin* v. *Ewald Baumeister,*[81] *UBS Europe,*[82] *Enzo Buccioni* (where the ECJ departed from Advocate General Bot's Opinion),[83] *Espirito Santo II*[84] and *Di Masi and Varoufakis* v. *ECB*.[85]

A constant challenge was the asymmetry between narrowness of the AP's remit and the broad scope and relevance of the matters at stake, e.g. the AP cannot review the legality of the resolution scheme, or the application of resolution tools, in light of their impact on fundamental rights, but these were key to gauging the relevance of the disclosures sought. Thus, the AP had to construe the matter noting that, even if it could not decide on the legality of the measures, it assumed that the resolution framework enabled the respect of property rights since: (i) resolution action is adopted only when a bank is failing or likely to fail; (ii) resolution is implemented at the point of non-viability; and (iii) Article 20 SRMR establishes compensation to shareholders or bondholders under the "no creditor worse off" principle i.e. so as not to obtain in resolution a treatment which less favourable than in insolvency. Thus, document disclosure had to permit the proper scrutiny of such safeguards, by democratically elected bodies and, crucially, courts. This had direct implications for the right to an effective judicial protection under Article 47 of the Charter. As the rounds of appeals went on, the AP found that successive SRB disclosures in response to AP decisions offered the information needed to initiate legal proceedings, and to enable a review of the Banco Popular resolution actions. Thus, the *public* dimension of judicial accountability was respected, without unduly undermining the protection of the countervailing interests acknowledged by the Access to documents Regulation. Should any further disclosures be *individually* needed by an EU Court, the Court could order them in the specific proceedings, or ask the SRB

80. Case T-251/15, *Espirito Santo Financial* v. *European Central Bank*, EU:T:2018:234. The case concerned an application pursuant to Art. 263 TFEU for the annulment of an ECB decision refusing in part to disclose certain documents concerning Banco Espírito Santo SA; the GC found that the exception to disclosure could not be validly invoked, in light of the information already disclosed by Banco de Portugal.

81. Case C-15/16, *BaFin* v. *Ewald Baumeister*, EU:C:2018:464. In this case Mr Ewald Baumeister, an investor who suffered financial losses due to a Ponzi scheme organized by Phoenix, submitted to BaFin (the German financial supervisor) a request for access to certain documents concerning a financial entity supervised under MiFID. Since the Bundesanstalt refused to grant him access to those documents, Mr Baumeister brought proceedings before the German courts which then led to the preliminary reference.

82. Case C-358/16, *UBS Europe and Alain Hondequin and Others* v. *DV and Others*, EU:C:2018:715.

83. Case C-594/16, *Enzo Buccioni*, EU:C:2018:717.

84. Case T-730/16, *Espirito Santo Financial Group* v. *European Central Bank*, EU:T:2019:161.

85. Case T-798/17, *Fabio De Masi and Yanis Varoufakis* v. *ECB,* EU:T:2019:154.

the necessary questions. In this way, the AP surgically distinguished an individual's rights in court proceedings (over which the AP was not competent) and the relevance of those rights for the public interest.

We leave to the end the distinction between access to documents and requests of information, as in several cases the AP had to state that: (i) under access to documents rules an institution, agency or body is not obliged to create a document that does not exist;[86] and (ii) it can rely on a rebuttable presumption that, indeed, the document does not exist.[87] Yet, this issue shows how matters of minute detail and core matters of principle can be closely interwoven, and how the design of quasi-judicial review demands an important dose of ingenuity to tailor solutions to a situation, as shown by case 21/18 of 19 June 2019. The Banco Popular resolution decision was based on a *provisional* valuation by an independent expert. The Board considered that despite the literal reading of Article 20 SRMR, which requires that an *ex post* valuation is performed as soon as possible,[88] such an *ex post* definitive valuation was not necessary if the resolution tool (sale of business) provided a price-setting market mechanism, which replaced the provisional valuation. Any harm to shareholders due to valuation inaccuracies could be addressed through the specific valuation to determine "no creditor worse off" treatment (Valuation 3).[89]

In Case T-599/18, the appellant challenged before the GC the Board's decision not to perform an *ex post* definitive valuation.[90] In parallel, it requested the Board to grant access to the independent expert's economic assessments for a definitive *ex post* valuation of Banco Popular and the European Commission documents authorizing the Board's decision or refusing authorization. The Board refused access to these documents. Its decision was appealed before the AP.

In prior decisions, the AP had stated that documents received from or exchanged with EU institutions could be kept confidential to protect internal deliberations unless an overriding public interest was present,[91] but no

86. In Cases 14 and 15/18, for instance, the AP noted that, although the definition of "document" under Regulation 1049/2001 must not be interpreted restrictively, due to the wide encompassing wording of Art. 3(a) of Regulation 1049/2001, once a European institution, body or agency asserts that a document does not exist, according to settled case law it is not obliged to create a document which does not exist. Case C-491/15 P, *Typke* v. *Commission*, EU:C:2017:5, para 31.

87. Case T-468/16, *Verein Deutsche Sprache* v. *Commission*, EU:T:2018:207.

88. Art. 20(10)-(11) SRMR.

89. Art. 20(16) SRMR.

90. Case T-599/18, *Aeris Invest Sàrl* v. *Single Resolution Board*, EU:T:2019:740. In its Order, the GC rejected the appeal as inadmissible.

91. In the AP decisions of 28 Nov. 2017 and 19 June 2018, it was stated that access to the documents received or exchanged with the ECB or the European Commission for internal use

appellant had succeeded in justifying an "overriding public interest" in disclosure. Yet, the context of the request for access in this appeal was an action before the General Court, where the appellant challenged the SRB decision *not* to have the *ex post* valuation as a violation of Article 20(11) SRMR, and argued that if there was a margin of discretion not to order the definitive valuation, the European Commission had to endorse the SRB decision pursuant to *Meroni* case law,[92] or there would be a violation of constitutional limits to delegation of powers.

Note that the AP could not decide on compliance with *Meroni*, but this was key to framing the relevance of the request of access. Thus, the AP clarified that: (i) in its view *Meroni* case law should be understood in light of the more recent judgment in *UK* v. *European Parliament and Council (Short-selling)*;[93] (ii) the power to apply rules to complex factual situations does not necessarily amount to a policymaking discretionary power, which is what was considered illegitimate in *Meroni;*[94] but (iii) no SRMR provision expressly deals with a decision *not to* perform an *ex post* valuation, or the European Commission endorsement role, if any.

Thus, the relevance of the existence of a Commission endorsement appeared to justify an overriding public interest in disclosure, but exposing *all* communications to public light would disproportionately impair internal decision-making. Thus, the AP found a way to clarify the point, without ordering disclosure. It asked specific questions to the Board and confidentially examined internal communications. Then it noted that the Board had clarified with its answers: (i) that the Commission had not issued any authorization or endorsement of the Board's decision not to perform the *ex post* valuation; (ii) that the appointed expert performed no definitive *ex post* valuation, in draft or final form (and thus the Board was not keeping an existing report secret); and (iii) that the Board's answers were not contradicted by the internal documents reviewed by the AP. This clarification satisfied the public interest in transparency, but at the same time resulted in the

as part of the file and deliberations could be legitimately refused by the Board under Art. 4(3) of Regulation 1049/2001 and 4(3) of the Public Access Decision *if no overriding public interest in disclosure was shown, as had happened to be the case in those cases*.

92. Case C-21/61, *Meroni* v. *High Authority*, EU:C:1962:12. For the constitutional implications of *Meroni* and Case 98/80, *Romano* (EU:C:1981:104) in the EMU context, see Lenaerts, "EMU and the EU's constitutional framework", 39 EL Rev., 753.

93. Case C-270/12, *UK* v. *European Parliament and Council*, EU:C:2014:18, paras. 44 to 50.

94. Thus, Union agencies like the SRB, when endowed with rules-based powers of direct intervention, by necessity must assess how facts and circumstances relate to (and fall within) the relevant rules to the effect of the adoption of individual decisions. Were it not the case, such agencies would not be able to contribute meaningfully to the achievement of their role within the Union. Such individual decisions are then entirely subject to judicial review.

inadmissibility of the appeal to disclose the specific documents: once it was clarified that there were no documents with a Commission authorization (or refusal) or an expert (definitive *ex post*) valuation, the request for document disclosure changed into a request for information, and, as outlined above, an institution, body or agency stating that a document does not exist can rely on a presumption that there is no document, and is not obliged to create a non-existing document.

5. Quasi-judicial protection in the Banking Union and in the Capital Markets Union: (A few) weaknesses by design?

The foregoing shows that quasi-judicial review, albeit still episodical, has been repeatedly used to deliver a timely legality review, which was accepted by the parties in all cases but one for the BoA and two for the AP.[95] This invites a pause to reflect on the lessons learned, and potential improvements regarding the system's weaknesses. We focus on compartmentalization (5.1.), organization (5.2.), and scope and focus of review (5.3.).

5.1. *Quasi-judicial review compartmentalization: fragmentation and lack of coordination with courts*

A key feature of EU administrative review in finance is its compartmentalization, which is caused by the insulation of review bodies between themselves (fragmentation) and from the European Courts (no coordination). The former is evident: three different *fora* for the ESFS, SSM and SRM respectively do not yet result in any "complete system" nor have any structural coordination. These review bodies horizontally participate in a voluntary, loose and informal network comprising all boards of appeals of European agencies, but there is no institutional liaison between them. Useful meetings to exchange views took place once a year in the past between the AP and the ABoR, and once also with the Chair of the BoA. But these are informal, and there are no clear channels to help build up a common culture of review.

The main reason for this is that review bodies are construed partly as organs of their respective European agencies, which are, in turn, built upon a "silo culture". This prevents synergies with other review bodies, because each depends on its agency's idiosyncrasy. In addition, the ABoR's decisions are not public and thus cannot be shared or discussed in detail even with other

95. Pending Case T-16/18, *Activos e Inversiones Monterosso* v. *SRB* and Case T-62/18, *Aeris Invest* v. *SRB*.

administrative review bodies (which remain external to the SSM). The BoA meets regularly, in its plenary composition of 12 members roughly once a year. Additional meetings take place among the members sitting on a case only when a hearing is held, or deliberations must be taken, due to budget constraints and the ESAs' choice to organize it as a body with an episodical and on-demand role; this despite its permanent nature and the five-year tenured position of its members.

While such *ad-hocracy* can ensure a *sui generis* status of servants of the Union without being part of the agency's staff,[96] non-publication of decisions (ABoR) breeds opacity,[97] and the episodical configuration of the role (BoA) is a mistake. It hinders the development of cohesion and collective memory, making it difficult for the body to prepare for future cases, let alone foster an institutional network with the other bodies. Cohesion and collective learning were easier, at least so far, for the AP and the ABoR, due to the more recurring caseload. However, this was circumscribed within each review body and always within strict budgetary constraints. This is even more regrettable because experience shows that horizontal coordination would facilitate a common approach to issues which are similarly relevant for all bodies (as was the case, e.g., in the question of *locus standi* for shareholders and bondholders of a resolved or liquidated credit institution, now finally addressed by the ECJ in *Trasta*[98]) and would enhance the consistency of review practices across the board.

The compartmentalization problem becomes even less defensible in light of the recent creation of the Inter-Agency Appeal Proceedings Network (IAAPN), as a sub-network of the Inter-Agency Network[99] "to promote cooperation and coordination on common appeal proceedings issues … to share knowledge and identify best practices with the view to improving

96. Yet, this creates other problems. Their members are not EU staff and are rather *sui generis* Union officials or servants under Protocol No. 7 (Art. 15) and its implementing Regulation 549/69. Since both texts predate the very notion of review bodies they should be construed in an evolutionary matter e.g. to extend the scope of immunity from legal proceedings in respect of acts performed in their official capacity. For a more restrictive, literal reading of Regulation 549/69, compare however Herinckx, op. cit. *supra* note 14, para 8.

97. This can have harmful consequences such as a reluctance to use the mechanism by supervised entities, and may explain the currently cautious approach by the industry, and the perceptible decline in the number of applications in recent years. See Smits, op. cit. *supra* note 19, p. 35; Report from the Commission to the European Parliament and the Council on the Single Supervisory Mechanism established pursuant to Regulation (EU) 1024/2013 (SWD(2017)336 final), Brussels, 11 Oct. 2017, COM(2017)591 final, p. 5.

98. Joined Cases C-663, 665 & 669/17 P, *ECB* v. *Trasta Komercbanka AS, Ivan Fursin and Others*, EU:C:2019:923.

99. See EU agencies Work Programme of the Network of EU Agencies 2019–2020, p. 16.

dispute resolution for the benefit of stakeholders".[100] This sub-network is currently formed by the appeal bodies for agencies on IP (EUIPO), chemicals (ECHA), energy cooperation (ACER), aviation safety (EASA), and bank resolution (SRB), while the Joint BoA is an observer (same status as the appeal body of the European Patent Office (EPO)), and ABoR is not present in any capacity. These are agencies and appeal bodies with very different mandates. Some are encompassed by the recent reform of the appeal proceedings before EU courts, some are not (see below); some belong to the EU, some do not. Thus, it would be a bit paradoxical if consistency and convergence were promoted between bodies whose only feature in common is the fact of being "administrative appeal" bodies, and not between those that could also benefit from sharing experiences on the substantive application of financial law.

The second angle to the problem is the compartmentalization *vis-à-vis* EU Courts, which offers at least two points for consideration: the relationship between administrative and judicial appeals; and the dialogue with courts by way of preliminary references. On the first point, the remits of the BoA and AP are specific,[101] which does not dispel all interpretative doubts on matters of competence[102] nor does it clarify the reason why certain matters were excluded.[103] In principle, the administrative appeal must be exhausted, when it is available, before filing the case before the GC. This seems to be the case for the BoA[104] and AP (not for the ABoR) in line with boards of appeal in other

100. See e.g. EUIPO Work Programme of the Office 2019 MBBC/18/S06/4/AN/EN(O), p. 27.

101. The BoA may hear appeals filed by any natural or legal person, including competent authorities, against a decision of ESMA, EBA or EIOPA "referred to in Article 17, 18 and 19 and any other decision taken in accordance with the Union acts referred to in Article 1(2)" (Art. 60(1) ESAs Regulations). In turn, the AP may hear appeals only against a decision of the Board referred to in Art. 10(10), Art. 11, Art. 12(1), Arts. 38 to 41, Art. 65(3), Art. 71 and Art. 90(3) of the SRMR.

102. E.g., the AP is competent to review the SRB decisions on impediments to resolution, but it is unclear whether this competence is restricted to appeals on the measures adopted by the SRB, or whether it also extends to the preliminary identification of the impediments, which operates as a basis to those measures.

103. A good example would be, again for the AP, the decisions to access the file by the party affected by the proceedings under Art. 90(4) SRMR or the decisions on *ex ante* contributions to the SRF.

104. There is an apparent ambiguity in the wording of the ESAs regulations. Art. 61(1) stipulates that "proceedings may be brought before the Court of Justice in accordance with Article 263 TFEU contesting a decision taken by the Board of Appeal or, in cases where there is no right of appeal before the Board of Appeal, by the Authority", implying that the institution of a proceeding before the GC under Art. 256(1) TFEU and 51 of the Statute of the Court should follow the decision of the Board, unless "there is no right of appeal before the Board of Appeal". Yet Art. 61(2) and (3) do not expressly subject the recourse to the EU courts to the preemptive exhaustion of the appeal remedy under Art. 61(1), nor does the Regulation further specify when

EU agencies. It is also desirable for reasons of procedural economy to filter the proceedings which should be instituted before the EU Courts in line with a principle already stated by the ECJ in *Peter Puskar.*[105] Yet, since remits are narrow and their logic is unclear, this can raise doubts as to whether an appellant chose the right remedy at the right time. Furthermore, given that the BoA and AP are part of the authorities' governance, it is doubtful if their decisions can be challenged before the GC by those authorities. If not, the only (quite convoluted) way to challenge a mistaken decision would be by the European Commission, upon informal request of the relevant agency. The result would be an appeal system that is disjointed, and unbalanced for the agencies.

Compartmentalization from the courts also raises the issue of whether administrative review bodies could, or should, be allowed to make preliminary references to the ECJ, including on the illegality of EU law provisions that are central for their decisions. The answer seems that they cannot, for different reasons: the ABoR, due to its nature as an advisory body that gives "opinions", which unambiguously excludes it from the concept of "a court or tribunal".[106] Things are different for the BoA and AP, which could meet the *Vaassen* criteria which any adjudicating body must fulfil to be considered a "court or tribunal"[107] and thus request preliminary rulings.[108]

The ECJ has sometimes admitted preliminary references from administrative tribunals outside the "formal" judicial system, e.g. in *Umweltanwalt voor Kärten.*[109] Applying the same criteria from that case, the BoA and AP are: (a) established by law; (b) permanent; (c) have compulsory jurisdiction (within the limits of their respective remits); (d) apply rules of law; and (e) act as independent bodies. Even if one could argue whether a public hearing or public pronouncement are also essential *vis-à-vis* Article 47 Charter,[110] (debatable, since the ECJ did not expressly refer to them) these

no appeal before the BoA is available. Yet the view on the applicability of the principle of pre-emptive exhaustion of the administrative remedy in this context seems to be settled: Scholten and Luchtman (Eds.), *Law enforcement by EU authorities: Implications for political and judicial accountability* (Edward Elgar, 2017), p. 76; Herinckx, op. cit. *supra* note 14, para 30 ("leapfrog appeals to the CJEU are not permitted"); for a more nuanced reading, Blair and Cheng, op. cit. *supra* note 7, p. 24.

105. Case C-73/16, *Puskar* v. *Finance*, EU:C:2017:725, para 67.

106. Case C-318/85, *Greis Unterweger*, EU:C:1986:106.

107. Case C-61/65, *Vaassen (neé Göbbels)*, EU:C:1966:39.

108. Case C-54/96, *Dorsch Consult*, EU:C:1997:413, at para 23; Case C-517/09, *RTL Belgium*, EU:C:2010:82.

109. Case C-205/08, *Umweltanwalt von Kärnten*, EU:C:2009:767, at paras. 34–39; see also Case C-195/06, *Österreichischer Rundfunk (ORF)*, EU:C:2007:613, at paras. 10–13, 22–22; Opinion of A.G. Ruiz Jarabo, EU:C:2007:303, paras. 24–41.

110. Herinckx, op. cit. *supra* note 14, para 20.

additional requirements are only missing in the AP, where hearings are not public and decisions are extracted, but not the BoA, where hearing and decisions are public.

Furthermore, the ECJ's reasons not to regard boards of appeals of other European agencies as a "court or tribunal", e.g. the EUIPO boards of appeal, is that they enjoy "the same powers as the examiner" and there is thus "continuity of their functions with the agency", in the sense that "an action before the Board of Appeal forms part of the administrative registration procedure, following an interlocutory revision by the first department to carry out an examination, pursuant to Article 60 of Regulation No 40/94".[111] This reasoning is not applicable to the BoA and AP[112]which are not "in functional continuity". They do not second-guess the agency's determination, but ensure the legality of its actions, as courts typically do.

Yet, even if they could be considered "courts or tribunals", the BoA and AP are part of the European agencies' structure and established by European regulations. This European status means they are not courts or tribunals "of a Member State". The ECJ considered that the Complaints Boards of the European Schools, established by European Convention satisfied all Article 267 TFEU requirements, but for the requirement that it should be a "court or tribunal of a Member State": therefore, it could not make a preliminary reference.[113] The Court has also clarified that if a respondent cannot ask its court to make a preliminary reference, that does not affect its right to effective judicial protection.[114] While this may be acceptable in commercial arbitration where parties opt for arbitration and appoint tribunals,[115] or investment arbitration which, though Treaty-based, is only mandatory for the State,[116] it is unfortunate for appeal bodies which are *impartial and independent vis-à-vis both parties and offer a first instance, in-depth (EU) legality review*.

Access to the preliminary reference procedure could be key for the consistency and stability of decisions. As explained above, the constant challenge for appeal bodies lies in reconciling the fact that they cannot decide

111. Case T-63/01, *Procter & Gamble* v. *OHIM (soap bar shape)*, EU:T:2002:317, paras. 21–22. See also Case T-298/10, *Gross* v. *OHIM*, EU:T:2012:113, para 105; as to the CPVO, Case T-133/08, *Schräder* v. *CPVO*, EU:T:2008:511, para 137; Case C-546/12, EU:C:2015:332, at para 73.

112. Herinckx, op. cit. *supra* note 14, para 20.

113. Case C-196/09, *Paul Miles and Others*, EU:C:2011:388, at paras. 37–39.

114. Joined Cases C-464 & 465/13, *Europäische Schule München* v. *Silvana Oberto, Barbara O'Leary*, EU:C:2015:163, at para 75.

115. For an exception, Case C-109/88, *Danfoss*, EU:C:1989:383, paras. 7–9, where the arbitrator responsible for collective agreements disputes was mandated by national law and did not depend on the parties' agreement.

116. For additional references see Lenaerts, Maselis and Gutman (ed. Nowak), *EU Procedural Law* (OUP, 2014), p. 58 et seq.

on certain (broad) issues, and also that they need to acknowledge the broader issue if their decision is to be meaningful. This problem is similar, though more intractable. Only the Court of Justice has the power to find European secondary law provisions invalid. Thus, without the possibility of a preliminary reference, the BoA and AP may end up being bound to "blindly"' apply secondary law even when there are serious doubts that it may infringe primary EU law.[117] If the function of quasi-judicial bodies is to provide a credible first line of assessment of complex financial disputes (to also filter the courts' caseload), they should have recourse to all the tools needed for that function.

It is interesting to note that following a recent Court reform,[118] "an appeal brought against a decision of the General Court, which, in turn, follows the decision of an independent board of appeal of EUIPO, CPVA, ECHA and EUASA shall not proceed unless the Court of Justice first decides that it should be allowed to do so". Thus, this limits the review by the higher court, and this is only justified if the lower, quasi-judicial review, is sufficiently reliable and part of the administration of justice system. And yet, the reform does not furnish review bodies with the possibility to make preliminary references. It is unclear why administrative review bodies, subject to the review of the General Court, can be trusted with the decision, but not with the possibility of a (limited) dialogue with the ECJ. Furthermore, the BoA and AP are not included among the appeal bodies affected by the reform, despite the fact that they are *not* in functional continuity with their agencies and are therefore more independent from the administration. The possible reason is that, recent as they are, they must still prove their worth with a longer track record; an *ex post* criterion of effectiveness. Yet, the preponderant factors in the Court's assessment in *Vaassen* concerned *ex ante* institutional design features, and on these the BoA and AP offer the same guarantees (and even more) as any other European agency's Board of Appeal.

5.2. *Organization: appointment and independence, expertise and support*

If financial appeal bodies still have to prove their worth to be formally included in the administration of justice system, they can do so under organizational conditions guaranteeing their independence and support. Yet, this is an area where there is room for improvement in the institutional design.

117. Compare Case C-196/09, *Paul Miles,* para 28, where the Complaints Board of the European School expressed a similar concern.

118. Regulation 2019/629 of 17 April 2019 amending Protocol No 3 of the Statute of the Court of Justice. O.J. 2019, L 111/1. For an insightful discussion on the proposal, see Alberti, "The draft amendments to CJEU's Statute and the future challenges of administrative adjudication in the EU", *Federalismi.it,* No. 3/2019, 6 Feb. 2019, 1–32.

Take independence for a start: appointment rules are relevant to verify whether the BoA and AP can qualify as "courts" (under *Vaassen* criteria), and although in our view they can, their appointment rules (albeit less "political" than the appointment of the judges of the ECJ) rely perhaps excessively on the agencies' governing bodies. A comparative look shows that there are many different modes to set up and appoint courts, which stretch the contours of what is styled as judicial (the "identity" of a court). The EU appointment system itself offers a variety of solutions, some of them subject to criticism which has not spared ECJ appointments.[119] Yet, criticism must bear in mind that there seems to be no clear-cut, "optimal" selection procedure for members of a court: mechanisms to insulate the appointment process from political influence may vary between systems, but no system is "waterproof". However, the flexibility to design appointment arrangements has, as a clear limit coessential to the judicature's nature, the need that these preserve full independence and impartiality. This red line is embedded in the "rule of law" (one of Art. 2 TEU's fundamental values)[120] and is a characterizing factor for a "court" according to the ECJ in *Vaassen.*[121] An adjudicating authority is considered a "court" by the ECJ only if "it acts as a third party" also *vis-à-vis* the authority which adopted the contested decision.[122] The ECJ already elaborated on the requirements for independence and impartiality in *Graham J. Wilson* v. *Ordre des avocats du barreau de Luxembourg,*[123] and more recently in *Associacao Sindical dos Juizes Portugueses* v. *Tribunal de Contas*[124] and, rightly adopting a strong stance, in *Commission* v. *Poland.*[125]

Thus, for the purposes of our discourse, the question is whether current BoA and AP arrangements meet these standards, and the answer is only partially reassuring. Both the ESAs' regulations and the SRMR require BoA and AP members to be independent, and practice also shows that they act fully

119. Weiler, "Epilogue: Judging the judges – Apology and critique", in Adams, De Waele, Meeusen and Straetmans (Eds.), *Judging Europe's Judges* (Hart Publishing, 2015), p. 251.

120. Such values are, in turn, protected through the sanctions listed in Art. 7 TEU: for a discussion of the applicability of Art. 7 in the context of PiS Party's reform bills in Poland threatening judicial independence, see Hoffmann, "[PiS]sing off the courts: The PiS Party's effect on judicial independence in Poland", 51 *Vanderbilt Journal of Transnational Law* (2018), 1153–1190.

121. Case C-61/65, *Vaassen (neé Göbbels)*; Case C-54/96, *Dorsch Consult*, EU:C:1966: 391997:413; Case C-517/09, *RTL Belgium*.

122. Lenaerts, Maselis, Gutman op. cit. *supra* note 116, p. 54, fn. 36; Case C-516/99, *Schmid*, EU:C:2002:313, paras. 34–44.

123. Case C-506/04, *Graham J. Wilson* v. *Ordre des avocats du barreau du Luxembourg,* EU:C:2006:587; see also Case C-199/11, *Europese Gemeenshap* v. *Otis,* EU:C:2012:684, para 64.

124. Case C-64/16, *Associacao Sindical dos Juizes Portugueses* v. *Tribunal de Contas,* EU:C:2018:117.

125. Case C-192/18, *Commission* v. *Poland,* EU:C:2019:924.

independently and without any pressure from the authorities. Yet, their appointment is delegated to the authority's governing body; and their five-year term (perhaps not long enough in light of the actual learning curve) can be extended for one term. Extension, however, again depends on the authority's governing body. This misplaces incentives and might limit the propensity to challenge the governing body's decisions (this potential risk did not materialize in the only available example, i.e. the extension for BoA members). Remuneration is based on hourly fees and is thus episodical (absent continuous workload) with the risks that membership becomes "honorary" or that members "create their own work". These and other organizational weaknesses[126] may be design faultlines in the long run. Though not jeopardizing independence, they may jeopardize the appearance of it.

A second set of considerations concerns expertise. The thrust of the problem is whether financial disputes' adjudication requires a composition by legal experts only, or also non-legal financial experts (e.g. former central bankers or high-level supervisors). The rules embraced the latter solution for the BoA and AP, which require members with relevant knowledge and professional experience, including supervisory experience to a sufficiently high level in the field of finance. Yet, the 2019 ESAs reform has added the requirement that all members have "knowledge of Union law".

Integrating legal knowledge and (financial) expert knowledge is a normative (design) question and a difficult one, but not new. It has been the rule for many British administrative (e.g. tax) tribunals, which relied "upon the specialist expertise of their members, and [were] therefore constituted by non-judicial members, who [were] experts in the relevant field".[127] The same holds true for Boards of Appeal members of other European agencies and for members of the Unified Patent Court, to name but a few examples. The GC acknowledged the special role of Board of Appeal members with specific expertise in *Schräder* v. *CPVO* (*Lemon Symphony* case).[128]

Yet, specific competence raises at least three issues. First, whether a judge with no legal background runs counter to our idea of a "court", since the law of finance is "law" after all. An absolute requirement of legal background, however, would be beyond necessity and deprive the court of interdisciplinary expertise to have more precise knowledge of cases. This raises a second, more practical, question: how members with no legal background can properly fulfil their duties, if e.g. they cannot draft in legal terms. While this might pose

126. See also for empirical data based upon the results of a questionnaire, Dimitropoulos and Feinäugle, "Organizational aspects of the Boards of Appeal of the agencies of the European Union", MPI Luxembourg, 2015 (on file with the authors).

127. Cassese, op. cit. *supra* note 7, p. 14.

128. Case T-133/08, *Schräder,* para 155.

an insurmountable problem for a monocratic court, collegial work and secretarial support should be enough to handle the difficulty. What matters for judges is more their acumen and full understanding of an issue's substance, and less their mastery in the arcane art of legal writing. Third, which constituencies should provide the best recruiting pools. Experience, so far, emphasizes the importance of a mixed background, and the fundamental contribution of former central bankers and/or high-level supervisory officials in the BoA, ABoR and AP.

A third aspect concerns organizational support, including research assistance, without which quasi-courts cannot work properly. Here, European financial practice is still clearly in the making. The BoA and AP have Secretariats which are functionally independent from the functions of other agencies, but lack budgetary autonomy. While this may be due to these agencies' youth, it is unfortunate. It is fair to acknowledge that the AP Secretariat has been progressively strengthened in resources and it now offers permanent and good support. However, the difference with the resources traditionally granted both to US federal judges or EU Court members is striking, especially given the practical relevance of this support in the quality of adjudicatory outcomes.

A final set of considerations concerns the *procedural* angle. Due process and the right to be heard are common principles, but understood differently between courts and quasi-courts. Only formal courts are subject to the more exacting requirements of fair trial (under Art. 47 of the Charter), whilst internal review bodies, being formally "administrative", are in principle bound solely by the principle of good administration (Art. 41 of the Charter).[129] This results in different procedural rules, time limits, rules on the taking of evidence and oral hearings, but also in relation to case management (which is to a large extent convergent for the BoA and the AP). Nonetheless, the Rules of Procedure of both the BoA and the AP were carefully crafted to ensure full compliance with the right to be heard and fair trial.

5.3. *The nature of the scrutiny: Standard of review, and procedural rights*

A recurring question is the standard, or standards, of review by financial quasi-courts on appeals against supervisory decisions,[130] especially in

129. Consider, however, Case C-119/15, *Biuro Podrozy Partner* v. *Prezes Urzedu Ochrony Konkurencji I Konsumentow*, EU:C:2016:987, requiring the respect of effective judicial protection on the part of the Polish specialized court (Regional Court Warsaw, Competition and Consumer Protection Court) that exercises adjudicatory power with the "specific task of monitoring standard conditions of business and therefore of maintaining uniformity of the case law on consumer protection".

130. Witte, op. cit. *supra* note 7, 1–37.

comparison to the standards employed by the GC or ECJ. The BoA seems to have acknowledged, in an *obiter dictum* fashion,[131] that an appeal could consider the merits beyond the legality review applied by the ECJ, given the circumstances. Some authors have gone further and argued that the Board is vested with unlimited, full review jurisdiction, which could allow the Board to reconsider all aspects of the decision's merit.[132] Others argue that since an appeal is a very different procedure from judicial review under Article 263 TFEU, this means that market participants can challenge ESMA's failures to act more than is possible for other forms of EU (in)action.[133] Another view claims that, although the AP's review must remain a legality review, the AP cannot "substitute its own appraisal to that of the SRB", and the standard is that of an "error of assessment": an error need not be "manifest" in the same manner as it is before the ECJ, because due to its mixed composition the AP can investigate the SRB's economic assessment more thoroughly.[134]

While academic opinions are not uniform, to us the reality seems that in complex cases the precise intensity of review is still elusive.[135] In principle, no court or quasi-court is prepared to second-guess the appropriateness of a supervisor's complex economic assessment, and all of them are keen to check whether errors of fact or errors of law are present; however, it remains unclear where precisely the legality control ends.[136] Without explicit statutory language on this issue, only the ECJ can offer the necessary input, and, without it, appeal bodies are between the Scylla and Charybdis of full and marginal review.[137] Thus, absent clear judicial guidance, appeal bodies will likely limit

131. Board of Appeal, 10 Nov. 2014, *IPE* v. *ESMA*.

132. Gargantini, op. cit. *supra* note 27, p. 416.

133. Murphy, "The effective enforcement of economic governance in the European Union: Brave new world or a false dawn?" in Drake and Smith (Eds.), *New Directions in the Effective Enforcement of EU Law and Policy* (Edward Elgar, 2016), p. 316, citing *IPE* v. *ESMA*, decision of 10 Nov. 2014.

134. Herinckx, op. cit. *supra* note 14, para 26.

135. Cf. for a broader review Wymeersch, "The European Financial Supervisory Authorities or ESAs" in Wymeersch, Hopt and Ferrarini (Eds.), *Financial Regulation and Supervision. A Post-Crisis Analysis (*OUP, 2012), p. 294; Chirulli and De Lucia, op. cit. *supra* note 7, 832; for a review limited to questions of law see Witte, op. cit. *supra* note 7, 245; for an intermediate position (as *supra* in the text) Lamandini, (2015), op. cit. *supra* note 7.

136. For a tiered approach, Lehmann, "Varying standards of judicial scrutiny over central bank actions", *ECB Legal Conference* 2018; Mendes, "Discretion, care and public interests in the EU Administration: Probing the limits of law", 53 CML Rev. (2016), 419–452; for a parallel with the Italian experience, Preto and Carotti, "Il sindacato giurisdizionale sulle autorità indipendenti: il caso dell'AGCOM", (2016) *Rivista trimestrale di diritto pubblico*, 124–154.

137. Kalintiri, "What's in a name? The marginal standard of review of 'complex economic assessments' in EU competition enforcement", 53 CML Rev. (2016), 1283–1316; Fritzsche, "Discretion, scope of judicial review and institutional balance in European Law", 47 CML Rev. (2010), 361–403.

themselves to a more detailed and granular fact analysis, but will balk at the prospect of explicitly claiming an approach to review that is different in name from that of EU courts, and will mostly mirror their stance on that of EU courts.

Yet, the Court's standard of review has also evolved over time to ensure effectiveness and intensity of judicial control (also on the requirement[138] of sufficiency of motivation[139]), and the ECJ criteria originally set in *Remia* in 1985 have over time become more encompassing and capable of extending the scope of the review.[140] There is a recent and growing body of GC case law on the ECB's exercise of its powers,[141] and the first "pilot" judgments in the Banco Popular saga are still to be decided.[142] Thus, without engaging in judicial second-guessing of complex technical assessments, the Court seems to be more willing to elaborate on the criteria of manifest error, duty to state reasons and excess of power, to grant itself sufficient leeway for a robust judicial control, a trend not unique to finance, as shown by parallels in other areas, such as the ECJ case *Europese Gemeenschap* v. *Otis*.[143]

Furthermore, we must not forget that in the review of sanctions, EU Courts are given unlimited jurisdiction under Article 261 TFEU, and their control goes beyond strict legality and embraces also "the appropriateness and fairness of the penalties imposed, meaning that the Court's own discretion replaces the Commission's discretion".[144] This is desirable, and supervisors like Paul Tucker have noted that a regulatory agency should not be able to impose fines that ruin a person or business to the point where they cannot operate in other parts of life or society, because:[145]

> "To do so would be to encroach on their liberty beyond what is necessary to achieve the agency's mandate (proportionality). That implies that the authority delegated to them by legislators should not include the levying of ruinous fines."

138. Case C-89/08, *Commission* v. *Ireland*, EU:C:2009:742.
139. Case C-550/09, *E and F*, EU:C:2010:382.
140. See the Opinion of A.G. Cosmas in Case C-83/98, *France* v. *Ladbroke and Commission*, EU:C:1999:577; Case C-12/03, *Tetra Laval BV* v. *Commission,* EU:C:2005:87 and the Opinion of A.G. Tizzano in the same case, EU:C:2004:318; Case T-201/04, *Microsoft*, EU:T:2007:289.
141. See Smits and Della Negra, "The Banking Union and Union Courts: Overview of cases (as at 14 June 2019)", available at <ebi-europa.eu/publications/eu-cases-or-jurisprudence>.
142. Ibid.
143. Case C-199/11, *Otis*.
144. Geiger, Khan and Kotzur, *European Union Treaties* (C.H. Beck, 2015), p. 872.
145. Tucker, *Unelected power* (Princeton University Press, 2018), p. 248.

Yet again, it is doubtful whether the BoA and AP can review the amount of the fines. They can *confirm or remit* the decision imposing the fine, but it is doubtful whether they can decide on the appropriateness of the amount.

On a more general point of policy, if according to ECtHR and ECJ case law, these are tantamount to criminal sanctions (in some circumstances at least), it could be more appropriate to delegate to the BoA and AP the role of imposing the sanctions upon the supervisor's request, without prejudice to the unlimited jurisdiction of the EU Courts to review these sanctions.

A second angle of the approach of quasi-judicial bodies to review concerns procedural fundamental rights. Case law shows that every time individual substantive rights are interfered with in the name of public interest, e.g. where financial supervisors take intrusive administrative measures affecting property rights, courts need to ensure carefully that procedural safeguards are properly respected and effective judicial protection is ensured. This was notably emphasized by the ECJ in *Gauweiler*,[146] a case on monetary policy, where discretion is broader and judicial review much more restrained. Thus, it becomes even more relevant in supervision, as the recent *Trasta* judgment[147] of 5 November 2019 clearly confirms.

6. A way forward?

Of the many policy experiments of EU institutions, appeal bodies look set to stay in areas where there is a need for specialized knowledge delivered swiftly, flexibly and impartially to balance the EU's potentially intrusive action through expert regulatory agencies with bodies that combine expert knowledge of their own with a firm anchor on fundamental rights and the rule of law. Initial experience suggests that the BoA and the AP have ensured that appellants have "their affairs handled impartially, fairly and within a reasonable time".[148]

What does this mean? Most visibly, appellants received a timely, non-expensive, expert review, which afforded proportionate protection in line with Charter Article 41; and, we venture to say, should Charter Article 47's "fair trial" requirements be applicable to administrative review, they would be met too.[149] Less visibly, quasi-courts have tried to carve out a place of their own in the increasingly complex architecture and governance of financial

146. Case C-62/14, *Peter Gauweiler* v. *Deutscher Bundestag,* EU:C:2015:400.

147. Joined Cases C-663, 665 & 669/17 P, *ECB* v. *Trasta.*

148. To use the words of the ECJ in Case C-439/11 P, *Ziegler SA* v. *Commission*, EU:C:2013:513, para 154.

149. For a similar conclusion, see also Herinckx, op. cit. *supra* note 14, para 21.

markets. This requires a delicate balancing act *vis-à-vis* the three established players in the review system. Towards the agencies, quasi-courts need to combine the independence to decide each case based on its merits (and not the downsides for the agency) with the institutional loyalty to offer precise reasons on why a decision was wrong, which help to put it right. Towards appellants, they need to be perceived as a useful device, but also send a clear message as to what they can, and cannot, review. The third relationship is with the courts. While the legislature may have established quasi-courts, only the courts' interpretation of their role can grant them a stable ground to operate. Quasi-courts thus need to persuade courts that they have a relevant role to play without interfering with the courts' role, that they can help "de-clutter" the courts' table, without becoming "institutional clutter" themselves. So far, they have tried to do so by combining expedience, prudence, and willingness to penetrate the minute, often abstruse details, to dig out the real issues which can then be re-examined by the courts. Their contribution in this relationship with courts, is that of helping to see the forest of fundamental issues through the trees of technical points, and provide a first, quick, solution for the benefit of courts and parties alike.

It is, however, too soon to decide whether this self-reflective view is accurate, and whether financial quasi-courts have got off to a promising start. Meanwhile, our discussion also exposed some potential weaknesses in the overall design, which, if reformed, would enhance the supporting role of the BoA and AP to EU Courts in the adjudication of public law disputes. Such reforms are unlikely in the short-to-medium term, if they are packaged in an ambitious overhaul to transform the BoA and AP into specialized courts attached to the Court of Justice, under Article 257 TFEU.[150] Indeed, a 2015 reform went the opposite way, doubling the number of General Court members, and abolishing the CST.[151] Disputed though it was,[152] the reform marked a rejection of the specialized court model.[153] This remains so even

150. For a proposal to use Art. 257 to establish a "Tribunal of Financial Supervisory and Resolution Affairs", see Arons, "Judicial protection of supervised credit institutions in the European banking Union" in Busch and Ferrarini (Eds.), *European Banking Union* (OUP, 2015), p. 474.

151. Although the GC favoured the establishment of a specialized (Art. 257 TFEU) intellectual property court, reformers preferred the ECJ's view, which was to expand the GC as a whole. The Court of Justice considered this reform quicker to implement and more focused on achieving consistency within EU law. For a criticism of the Court's attachment to its monopoly on the preliminary reference procedure, see Weiler, op. cit. *supra* note 119, p. 252.

152. For a discussion on the need for reform before the adoption of the 2015 redesign of the court structure, compare Karper, *Reformen des Europäischen Gerichts- und Rechtsschutzsystems* (Nomos, 2011), pp. 145–160.

153. Tridimas, "The Court of Justice of the European Union" in Schütze and Tridimas (Eds.), *Oxford Principles of European Union Law*, Vol. I, *The European Union Legal Order*

after the recent establishment in September 2019, through self-organizational decisions adopted by the General Court, of specialized chambers within the General Court. The reform implies so far only that among the ten Chambers of the General Court, four will handle staff cases and six will deal with intellectual property matters. All other actions (including those on the law of finance) are still to be allocated among all the Chambers.[154] Moreover, an enlarged General Court still needs to prove its case against its actual workload.[155]

Thus, a different and more promising avenue may involve a simultaneous reform of the ESAs Regulations and SRMR to consolidate the BoA and AP into a single Board of Appeal, a single quasi-judicial body for public law disputes dealing with the specialized review of EU financial agencies' decisions.

This reform would take the concept of a *joint* board of appeal already embedded in the ESAs' Regulations one step further, including also the SRMR, and would take quasi-judicial review out of the internal governance of the four agencies, dispelling any remaining institutional uncertainties about their nature, and resulting in organizational and efficiency gains. A (*de facto*) administrative tribunal is preferable to specialized courts attached to the ECJ under Article 257 TFEU for several reasons: (a) It can be composed also of experts in supervisory and financial matters who do not "possess the ability required for appointment to judicial office" required by Article 257 TFEU and the appointment of the members (unlike the appointment of judges to the ECJ) does not require any political consensus. (b) Its Rules of Procedure can be designed to deliver a prompt review (far shorter than GC proceedings), although current one to three month deadlines are hardly compatible with the right to be heard: either the period starts from the date the evidence is complete, as with BoA and AP Rules of Procedure or, if it runs from the appeal filing, proceedings that leave time for being heard, examining and drafting should last from four to six months, unless otherwise agreed with the parties. (c) A comprehensive reform could also extend legality review beyond the current ECJ's standard to include errors (not just manifest errors) of assessment, using the mixed composition for a "more thorough investigation whether the economic assessment made by the [authority] was not

(OUP, 2018), p. 607. The Commission supported the ECJ's view but thought that together with an increase in the number of GC judges, two specialized chambers could be established (for staff and trademark cases). Opinion 30 Sept. 2011, COM(2011)596 final, Brussels; this proposal had no follow-up. Tridimas, ibid. p. 609 and fn. 183.

154. ECJ, Press Release No 111/19, 19 Sept. 2019, accessible at <www.curia.europa.eu>.

155. See Alemanno and Pech, "Thinking justice outside the docket: A critical assessment of the reform of the EU's court system", 54 CML Rev. (2017), 129–176.

erroneous".[156] (d) It may usefully participate in the administrative process by confirming (contributing additional reasoning, as in the *Landesbanken* decision) or remitting to the agency, thus fostering prompt self-correcting action on relevant matters, where erroneous decisions entail serious consequences. (e) Moreover, following the Unified Patent Court's blueprint, the reform could also require parties to pay fees "balancing the principle of fair access to justice with the objectives of a [at least partially], self-financing court with balanced finances".[157]

Appointment rules should reflect this change. Our preference would be to build further on the recently reformed appointment system for BoA members[158] and to strengthen the role of the European Commission (which shortlists BoA candidates but has no role concerning AP candidates) which could select and appoint the members (possibly from a list proposed by the agencies, following a public call for manifestations of interest), after a statement before the European Parliament. This would enhance formal (appearance of) independence, which could be accompanied by full EU official status, better-designed remuneration, immunity, budget autonomy and adequate secretarial and law-clerical support.

Would such a body outside Article 267 TFEU be admissible to judicial dialogue with the ECJ? The case is different from that of courts common to Member States, like the Benelux Court of Justice[159] and the Unified Patent Court. Furthermore, although the ECJ has accepted that international agreements can confer on courts which are not of a Member State, the right to make preliminary references,[160] the ECJ in *Miles and Others*[161] denied this possibility to the Complaints Boards of the European Schools.

Yet, the factors that justified a restrictive stance in *Paul Miles* are absent in this context. First, unlike the norms concerned in *Paul Miles*, in this context European agencies and mechanisms interpret and apply primarily EU administrative law, and this law would constitute the subject matter of the appeals. Second, unlike the European Schools, financial appeal bodies are not bodies of "an international organization", but EU bodies which pervade the legal system of Member States in the same way the EU institutional system participates in the national legal order. Why not then use the Court's words in *Paul Miles* at paragraph 45 to "envisage a development of the system of

156. Herinckx, op. cit. *supra* note 14, p. 24.

157. Alberti, "New developments in the EU system of judicial protection: The creation of the Unified Patent Court and its future relations with the CJEU", 24 MJ (2017), 21 (with reference to the UPC).

158. This introduced a role for the European Parliament: new Art. 59(3) as amended.

159. Case C-337/95, *Parfums Christian Dior* v. *Evora*, EU:C:1997:517.

160. Lenaerts, Maselis, and Gutman op. cit. *supra* note 116, p. 62.

161. Case C-196/09, *Paul Miles and Others.*

judicial protection" by expressly granting the power to make preliminary references in this context?

Conversely (and not less importantly), with a self-standing review body outside the agencies' governance structure, those agencies should have *locus standi* to challenge its decisions before the GC.

To conclude, *usus promptos facit*, or, as the modern version goes, "practice makes perfect". Coincidentally or not, this sentence figures in the Diary and Autobiography of John Adams, who was a lawyer by training and an advocate of the rule of law by vocation. The views offered here do not come from any pretence of the superiority of inside views, but from an ascertainment of the fact that deciding on, rather than writing about, appeal bodies turns prudence into a requisite and doubt into the necessary methodology. In that context, theory is also important on the place of the rule of law in the face of increasingly specialist knowledge and to consider how these bodies fit into that picture. The way forward proposed here is inspired by all those thoughts. Only time will tell if such a way may find its place in the context of a reformed, and more legally robust, Banking Union and Capital Markets Union.