

The ESAs' Board of Appeal as a Blueprint for the Quasi-Judicial Review of European Financial Supervision

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1. INTRODUCTION

The ESAs Board of Appeal established by the Regulations No. 1093, 1094 and 1095/2010 of 24 November 2010 is a joint body of the three Authorities that displays quasi-judicial functions ensuring internal enforcement of the rule of law within the Authorities and a final administrative review process for appeals relating to the ESAs decisions. It also works as a de facto filter for the European Court of Justice (ECJ), which retains however full competence over the legitimacy of the acts adopted by the Authorities under Article 263 Treaty on the Functioning of the European Union (TFEU). It seems to deserve, therefore, some scholarly attention,¹ also because the ESAs' Board of Appeal model – to some extent inspired, but with quite distinctive features, by similar bodies existing in several international organization and, in Europe, within some agencies, most notably the OHIM and EPO² – worked as the blueprint of similar quasi judicial bodies eventually established, albeit with authority-specific variations, within both the ECB under the single supervisory mechanism (Board of Review) and of the Single Resolution Mechanism.

2. COMPOSITION AND APPOINTMENT MECHANISM

The Board of Appeal is composed of six members and six alternates who must be 'individuals of high repute with a proven record of relevant knowledge and professional experience (...) in the fields of banking, insurance, occupational pensions, securities markets or other financial services, excluding current staff of the competent authorities or other national or Union institutions

involved in the activities of the Authority' (Article 58 of the founding Regulations). Currently, the Chairman is a High Court Judge, two Members are former Chairmen of national Authorities for the supervision of financial markets (one of them has also served as Chairman of CESR); three are academics in the field of law and finance; three are former high officials at national supervisory authorities; the remaining either serve in associations of market participants or are in the private practice as economists or lawyers. Since the Board is a joint body of the three Authorities – and as such it has proven, according to the Commission Report 2014 on the operation of the ESAs, to be a 'useful mechanism to ensure consistent views and cross-sectorial cooperation' – this is reflected in the appointing mechanism: two Members and two alternates of the Board are appointed by each of the three ESAs and in particular by its Management Board choosing from a short list proposed by the Commission following a public tender and after consultation of the Board of Supervisors (Article 58, paragraph 3). This appointing mechanism is clearly aimed at balancing the needs for a certain degree of merit discretion granted, at the different stages of the selection process, both to the Commission (when short-listing the candidates originated by the market following the public tender) and the relevant Authority and the needed transparency of the entire process. In particular, considered the role still played by national representatives in the Management Board and in the Board of Supervisors of the ESAs and, in turn, the crucial importance of independence – not only from particular private interests but also from national interests – of the Members and Alternates of the Board, it seems to be quite appropriate that, at least at this stage of evolution of the European

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¹ For a first and insightful exam, compare W.Blair, *Board of Appeal of the European Supervisory Authorities*, University of Oslo, *Research Paper Series*, no. 2012-30 and the presentations (not yet published) of W.Blair, M.Lamandini, H.Hofmann, F.Fracchia, T.Gross, J.G.Alcorta, N.J.Forewood and P.Senkovic at the International seminar held at the Max Planck Institute in Luxembourg, 25 Sep. 2013, *Judicial and Quasi-Judicial Accountability of European Agencies: The Case of the Board of Appeal of the European Supervisory Authorities*.

² For an interesting review of the ECJ case law on the different boards of appeal foreseen by European legislation, N.J.Forwood, presentation, Max Planck Institute, Luxembourg, 25 Sep. 2013, *Judicial and Quasi-Judicial Accountability of European Agencies: The Case of the Board of Appeal of the European Supervisory Authorities*.

supervisory architecture, the Commission be charged with the role of first filter of the candidatures, so as to better ensure that those getting the chance to be appointed are characterized by a genuine (and sufficient) European vision and background. Due to its quasi-judicial role the Board must also have 'sufficient legal expertise to provide expert legal advice on the legality' of the Authorities' exercise of their powers. Currently, seven Members are lawyers or have legal background, with the Chairman being a High Court judge. There are no formal provisions on nationality and gender diversity of the Members in the founding regulations; nonetheless, such diversity is informally ensured, to a certain degree, in the appointing process. The current Board is composed indeed by Members representing ten different nationalities, with three women in the group, and displays a significant variety in track records of its Members,³ thereby ensuring full coverage of the different financial sectors supervised. The term of the office for Members and Alternates is set at five years and may be extended only once (Article 58, paragraph 4), and rightly so to prevent the risk of entrenchment in the office. It is unclear, however, whether an Alternate, after having served as such for two terms, shall be still eligible to serve as (full) Member for a maximum of additional two terms. In turn, currently the founding regulations do not expressly provide whether a new Member, appointed to replace a Member ceased from office before its natural expiry, shall remain in office for a five years term (as the plain wording of Article 58, paragraph 4, seems to suggest) or expires together with the other Members. In perspective, though, a staggered board system would probably appear better suited to ensure continuity of operation and a smoother process of internal transfer of knowledge between different boards. According to Article 58, paragraph 2, second period 'the Board of Appeal shall designate its President'. The Rules of Procedure adopted by the Board in compliance with Article 60, paragraph 6, of the founding regulations further detail that: (i) the designation shall be made by secret ballot; (ii) the Board shall designate also a Vice-President; (iii) both designations shall be made by simple majority; (iv) the President's term shall be two and half years.

3. INDEPENDENCE AND IMPARTIALITY

According to Article 59, the Members of the Board must be independent in making their decisions. For this purpose they 'shall not be bound by any instructions', either from their sovereigns or any other Member State or from the Commission, the Management Board, the Board of Supervisors or any other official at the ESAs and from market participants. Consistently, the Members of the Board shall undertake to act independently and in the public interest and shall make, at the taking up of the office

and annually thereafter, a declaration of commitment and absence of 'any direct or indirect interest which might be considered prejudicial to independence' (Article 59, paragraph 6). In particular, in order to ensure the necessary distance of the Board from those ultimately taking the decisions which may eventually come under its scrutiny, and in this way making it possible for the Board to offer a genuine 'fresh look' at the issues resolved by the Authority and appealed in front of it, Article 59 requires that the Members of the Board 'shall not perform any other duties in relation to the Authority, its Management Board or its Board of Supervisors'. Obviously, a similar duty of abstention from the appeal proceeding applies, under Article 59, paragraph 2, where the Member has a personal interest or has previously been involved as representative of one of the parties to the proceedings. No personal interest can be inferred, though, by the nationality of the Member, as it has been rightly clarified by paragraph 4, second period. By contrast, the notion of personal interest should be construed in a way so as to encompass, for instance, also the indirect personal interest deriving from the involvement in the matter of law firms, consultancy firms and alike having lasting professional relationships with the Member of the Board. Each of the parties, upon receipt by the Secretariat of the composition of the Board, may object to the participation of such Member to the Board.⁴ Such objection, according to the Rules of Procedure, is to be made to the President through the Secretariat 'as soon as possible thereafter and in any case within ten days from the date when the party making the challenge knew, or with reasonable diligence could have known, about the facts and circumstances on which the challenge is based'. Where the Member withdraws or the objection of one of the parties to his or her participation to the deliberation of the case is held by the other Members of the Board, Article 59, paragraph 5, second period provides that 'for the purpose of taking that decision, the member concerned shall be replaced on the Board of Appeal by his alternate. Where the alternate is in a similar situation, the Chairperson shall designate a replacement from among the available alternates'. The Rules of Procedure further detail that 'if no Alternates are available, the size of the Board of Appeal shall be reduced' and the parties shall be notified by the Secretariat about the restricted composition of the Board.

4. PROCEDURAL MATTERS RELATED TO THE STRUCTURE AND FUNCTIONING OF THE BOARD OF APPEAL: (A) BOARD'S MAJORITY FOR INTERNAL DELIBERATIONS

The Board takes its decision within a restricted group of six members only to avoid that a plethoric composition of the bench could lead to 'group thinking' and 'herd effects' biases (mostly to be expected within large groups according to behavioural literature). According to Article 59, paragraph 6, the decisions of

³ Compare W.Blair, *Board of Appeal of the European Supervisory Authorities*, p. 4.

⁴ To date, this procedure was applied once, in the *Global Private Rating Company v. ESMA* appeal 2014, and the Board rejected the objection.

the Board of Appeal shall be adopted on the basis of a majority of at least four of its six members. Such majority shall however include at least one of the two members appointed by the Authority whose decision is appealed. The Rules of Procedure adopted by the Board of Appeal clarify, under Article 21, that 'in that regard abstentions are not permitted' and that 'the deliberations of the Board of Appeal shall be private'.

5. PROCEDURAL MATTERS RELATED TO THE STRUCTURE AND FUNCTIONING OF THE BOARD OF APPEAL: (B) PRESIDENT'S ROLE IN GUIDING THE PROCESS

Up to the deliberation stage, the internal process is governed by the President, who not only presides at hearings and deliberations, but also, in more general terms, 'may give directions on behalf of the Board of Appeal by way of case management for the efficient conduct of the appeal at any stage' (Article 11 of the Rules of Procedure). For such purposes the President: (i) may consult with the other Members and may receive observations as to what directions are appropriate by the parties; (ii) may decide, 'if it is appropriate', to direct a pre-hearing conference (taking place in person, by phone, video link or otherwise).

6. PROCEDURAL MATTERS RELATED TO THE STRUCTURE AND FUNCTIONING OF THE BOARD OF APPEAL: (C) RAPPORTEUR

As part of his or her duties, the President should, with the consent of the person concerned, designate another Member/s or Alternates as Rapporteur for the case to the Board of Appeal, unless the President decides to perform the duties himself or herself. The Rules of Procedure stipulate, under Article 12, that 'the function of the Rapporteur is internal to, and part of the deliberations of the Board of Appeal'. The President and the Rapporteur are entitled, under the Rules of Procedure, to jointly take certain preliminary decisions for the most appropriate conduct of the proceeding (e.g., on the union of appeals, on the hearing in private or oral representation where there are 'good reasons' to do so; on the adjournment of the hearing and so on), informing the other Members thereafter in due time. However, if the President and the Rapporteur disagree, such decisions will be taken by the whole Board of Appeal.

7. PROCEDURAL MATTERS RELATED TO THE STRUCTURE AND FUNCTIONING OF THE BOARD OF APPEAL: (D) SECRETARIAT

According to Article 58, paragraph 8, the ESAs shall ensure adequate operational and secretarial support for the Board of Appeal through the Joint Committee. Article 4 of the Rules of Procedure details further such general provision, stipulating that: (i) the ESA which chairs the Joint Committee when the notice of appeal is filed will provide the Secretariat for the appeal; however,

no ESA can administer an appeal directed against its own acts; if the appeal is directed against the ESA which is chairing the Joint Committee, the appeal shall be administered by the ESA which chairs the Joint Committee in the following year; (ii) the Secretariat is the contact point for the appellant, the respondent and the Board of Appeal Members; (iii) for the purposes of continuity, the Secretariat which starts administering the appeal shall administer it until completion; (iv) there shall be appropriate 'Chinese walls' in place within each of the ESAs and among themselves so as to ensure that no information passes from the Secretariat to the respondent ESA or any of the ESAs except as specified by the Rules of Procedure; (v) the Secretariat will act in accordance with the President's directions, and will maintain a register of appeals, circulate documents to the Board of Appeal member, organize Board of Appeal meeting, pre-hearings and hearings and otherwise provide assistance in relation to the appeal.

8. TIME OF THE BOARD'S DECISION

It is important that the Board of Appeal should reach its decisions as quickly as possible consistent with its duty to act with procedural fairness. According to Article 60, paragraph 2 of the Regulation, 'the Board shall decide upon the appeal within two months after the appeal has been lodged'. A period of two months from the date of filing (Article 60, paragraph 1) resulted however unlikely to be long enough. To avoid the risk of breach of due process including the right of representation of the parties and getting the (written and oral) evidence/material necessary properly to reach a decision on the appeal, the Rules of Procedure stipulate that 'when the President considers that the evidence is complete, the President shall notify the parties that the appeal has been lodged for the purposes of Article 60.2 of the ESA Regulations'.

9. COSTS OF THE PROCEEDING AND BUDGET OF THE BOARD

Under Article 25 of the Rules of Procedure, the costs of the appeal shall comprise the reasonable legal and other costs incurred by the parties for the appeal. Although the process can be seen as a quasi-arbitral process, the costs for the functioning of the Board of Appeal are not transferred to the parties, as it happens in arbitrations, following the outcome of the dispute, but they are internalized essentially by ESAs bearing the costs. This includes remuneration of the Members of the Board of Appeal.

10. THE FIRST YEARS OF EXPERIENCE: A COMMENT

The experience of the Board of Appeal so far, albeit still at its infancy, seems to confirm the rightness of the position taken, at a quite advanced stage of the drafting process of the founding Regulations, by those within the European co-legislators who

successfully advocated the introduction of a review process for the decisions taken by the Authorities. The Board has adopted so far three decisions⁵ and a fourth case is pending. This illustrates that a quasi judicial administrative review vested in a truly independent body of experts offers, with an appropriate due process detailed in the Rules of Procedure, an effective guarantee as to the legitimacy of the acts of the ESAs to the benefit, according to Article 60(1) (mirroring Article 263 TFEU), 'of all those to whom the decision is addressed or to whom the decision, albeit addressed to another person, is of direct and individual concern'. The establishment of a joint Board of Appeal seems thus to respond to both institutional and market needs, providing a ready to use and non expensive tool to timely correct supervisory failures which might otherwise prove quite detrimental. In one of the three cases decided so far the Board overruled a former decision of EBA, in this way well exposing the importance of having, within the Authorities, a second instance 'fresh look' at complex legal issues, as is so often the case when dealing with European regulatory and technical standards and their compliance with EU primary law. These cases, in turn, illustrate the useful filter that the Board can exert in respect to appeals before the Court of Justice. There is obviously some room left to improvements, also in the founding regulations, which shall be made in due course in the light of experience. A few examples could clarify this. One relevant question is whether in respect to the decisions and acts adopted by one of the three Authorities for which the appeal is available, the administrative (but quasi judicial) internal remedy of the appeal should be pre-emptively exhausted by the parties concerned as a condition for the filing of the request of judicial review before the Court of Justice of the European Union. This would be consistent with the practice of exhaustion of administrative recourses, the quasi judicial nature of the Board and probably advisable for reasons of procedural economy in order best to filter the proceedings which shall be instituted before the Court of Justice of the European Union. Consistently, it should be provided that, as long as a case is pending before the Board of Appeal, the proceedings before the Court of Justice instituted by other parties than those of the appeal before the Board of Appeal may in the Court's discretion be put on stay, This would reflect a similar approach followed under Regulation No. 1/2003 in competition matters so long as a case is pending before the Commission. In turn, when according to Article 60(3) The Board adopts a suspensive order or a decision refusing to grant such order, the parties should be entitled to an immediate proceeding before the Court of Justice of the European Union, herein included a '*demande en référé*' to the effects of Articles 278 and 279 TFEU. Another relevant point seems to be the one concerning the review of administrative fines imposed by the

Authorities (for instance under Article 36 of Regulation 1060/2009 as amended). It may result appropriate, indeed, to grant to the Board of Appeal (as it is the case for the European Court of Justice) the right to review the amount of the fines and to determine the same as it deems fit having regard to all the circumstances of the case. Currently the Board can only confirm or annul the decision imposing the fine but cannot decide on the appropriateness of its amount. Finally, it should be noted that recommendations and guidelines adopted by the ESAs under Article 16, albeit de facto very influential and capable of becoming mandatory once adopted by the national authorities, and capable of assisting in the interpretation of provisions of Union law, are not in themselves expressly included either in: (i) the judicial review of the Court of Justice of the European Union and (ii) the quasi judicial review of the Board of Appeal. Lacking an express provision making them reviewable by the Board, it may be argued that they are not decisions or acts adopted by the Authority intended to produce legal effects in relation to third parties which are of direct and individual concern to them according to Article 263 TFEU and Articles 60 and 61. However, this would probably overlook the fact that, under Article 16(3) of the ESA regulations national authorities are obliged to use best efforts to implement such guidelines and recommendations and that national courts, when deciding on the legality of the decisions adopted by the national competent authorities in compliance with ESAs recommendations and guidelines, will normally pay a high degree of deference to the exercise done by the European authority. This might prompt an outcome whereby relevant supervisory decisions, especially if of general application, would go de facto exempt from any review. In order to minimize such risk and to draw a fair balance between the interests of the ESAs and of those concerned by their recommendations and guidelines, having regard to the fact that the judicial review of the Court of Justice is expressly excluded in respect to recommendations under Article 263(1) only if made by the Council, the Commission or the European Central Bank and having regard to the (wider) enabling provision of Article 263(5), it would be advisable that the Board of Appeal could hear appeals on the recommendations and guidelines of the ESAs under Article 16 of the ESA Regulations.

11. THE ESAS' BOARD OF APPEAL AS A BLUEPRINT FOR FINANCIAL SUPERVISORS?

In light of this story, quite successful so far, it seems quite appropriate that also the single supervisory mechanism and the single resolution mechanism adopted, in their brand new governance arrangements, a similar administrative review process

⁵ Decisions 24 Jun. 2013 and 14 Jul. 2014, *SV Capital v. EBA*; Decision 10 Jan. 2014, *Global Private Rating Company v. ESMA*. For an interesting comment on the latter decision, see now M. 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)*, forthcoming in *RDS*, 2014. All decisions are accessible at www.esma.europa.eu/it/page/board-appeal.

of the decisions taken by the ECB under the Regulation No. 1024/2013 and the SRM Board under Regulation no. 806/2014 respectively. Both Boards present however distinctive features in respect to the ESAs' Board of Appeal. The Administrative Board of Review established under Article 24 of Regulation 1024/2013, for instance, is composed of five members and two alternates and is called to perform 'an internal administrative review' pertaining 'to the procedural and substantive conformity with Regulation No. 1024/2013 (establishing the SSM) of ECB decisions' (Article 24(1)). Whilst most of the rules on Board composition, independence and procedural functioning of the Board mirror those of the ESAs' Board of Appeal and Article 24(11) expressly states that the right of action set out in Article 24 'is without prejudice to the right to bring proceedings before the CJEU in accordance with the Treaties', a distinctive feature of the ECB review process is that the Board of Review is not called to take a 'decision' but rather to 'express an opinion' (Article 24(7)) and then 'remit the case for the preparation of a new draft decision by the Supervisory Board'. Such new draft decision 'shall take into account the opinion of the

Administrative Board of Review' and shall be submitted to the Governing Council, who shall then adopt the final decision. The draft new decision can either abrogate the initial decision, or replace it with a decision of identical content or replace it with an amended decision. This new decision, once adopted by the Governing Council (also by silence-consent if it is not objected within ten days), is not subject to further review by the Board of Review. In turn, the Appeal Panel to be established under Article 85 of the SRM Regulation No. 806/2014 mirrors in its composition and functioning the Administrative Board of Review (five members and two alternates, appointed following, *mutatis mutandis*, the same rules set in the SSM Regulation), but it is aligned with the ESAs Board of Appeal blueprint as to the effects of the decisions adopted. Article 85(8) sets out indeed that 'The Appeal Panel may confirm the decision taken by the Board, or remit the case to the latter. The Board shall be bound by the decision of the Appeal Panel and it shall adopt an amended decision regarding the case concerned'.