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Building bridges: central banking law in an interconnected world

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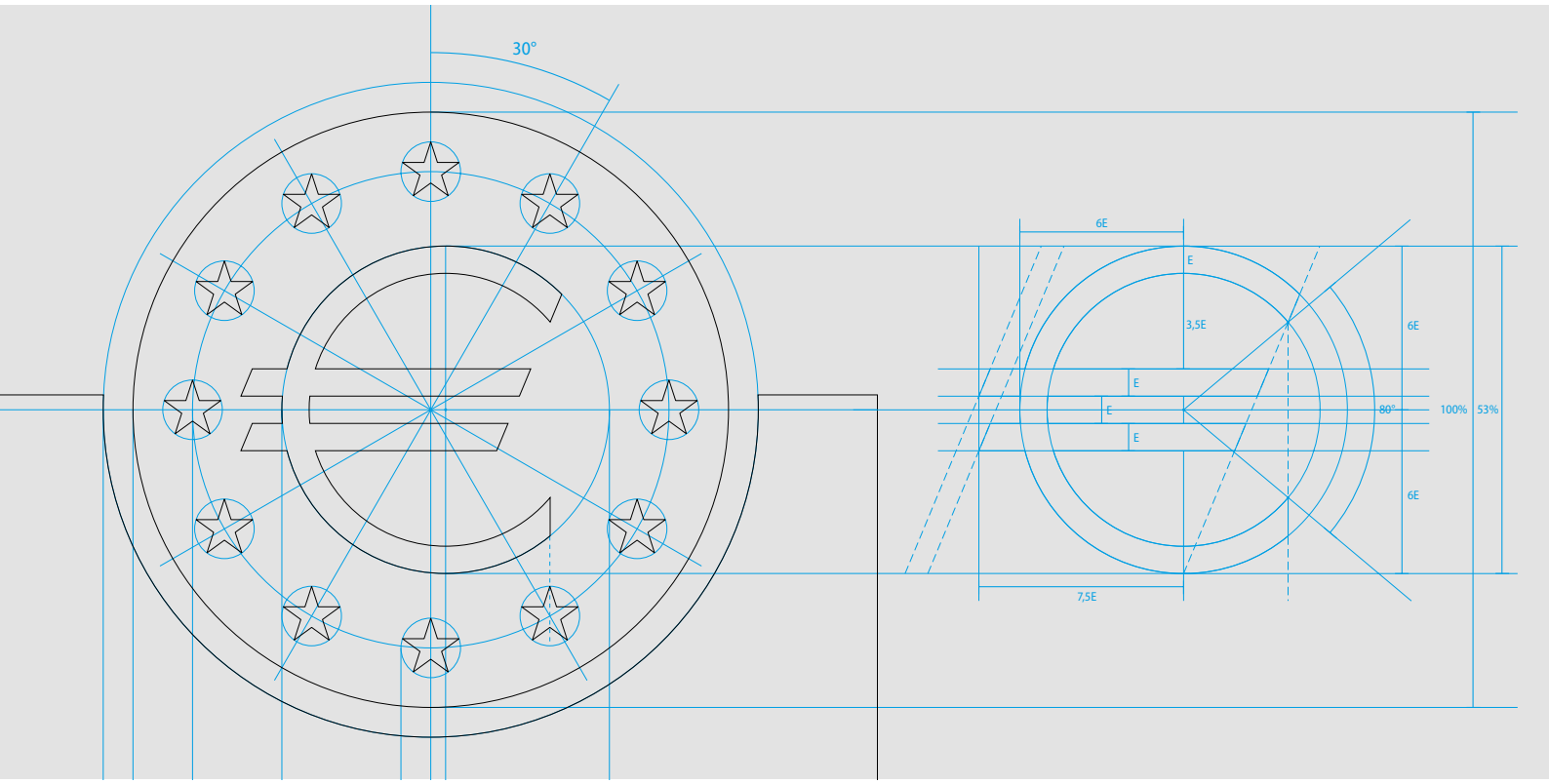

Contents

Appeal bodies of EU financial regulatory agencies: are we where we should be?

Marco Lamandini and David Ramos Muñoz[1]

Are appeal bodies for the European financial regulatory agencies doing a good job? This question has a theoretical as well as a practical dimension. Theoretically speaking, we should agree first on what an "ideal" appeal body should do, at the risk of being bogged down in a conceptual discussion. Yet, if we renounce a full-blown theory, it is easier to agree on some basic aspects: an appeal body should add value to what courts already do. Regardless of other aspects, for the decisions of such appeal bodies: quick is better than slow, clear better than obfuscated; for the system: an independent body is better than one beholden to the authority whose acts it is supposed to review, and decisions that are generally respected by appellants and courts are better than if they are constantly challenged and/or overruled. In this contribution we briefly discuss some of the recent practice of the European Supervisory Authorities' (ESAs) Joint Board of Appeal (BoA) and the Single Resolution Board's (SRB) Appeal Panel (AP) adopting a pragmatic approach and offer reflections on a possible way forward.

This topic is relevant for the Banking Union and the Capital Markets Union, since appeal bodies are an institutional tool of choice to scrutinise agencies' action in financial supervision, and such agencies constitute the stage of a drastic redistribution of competences from Member States towards the European Union. Whilst the largest euro area banks are subject to the direct supervision of the European Central Bank (ECB), their resolution is governed by the Single Resolution Board (SRB); in turn, the Union financial supervisory authorities (European Supervisory Authorities, or ESAs) in banking (EBA), securities markets (ESMA) and insurance and occupational pensions (EIOPA), which now have a reformed

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governance to better represent Union interests[2], directly decide on matters such as rating agencies, trade repositories, benchmark providers and central counterparties (CCPs). These authorities' decisions are reviewed by the BoA for the ESAs and the AP for the SRB. The Administrative Board of Review (ABoR) for the ECB is however distinctively different.

Our approach is practical, i.e. based on the appeal bodies' adopted decisions, and from the inside, since we have participated in the adoption of most of those decisions. We exclude the ABoR from our analysis since, unlike the BoA and the AP, it cannot be characterised as a quasi-court. What drives this approach is not theoretical scepticism but, rather, the need of practice and experience in this field. Recent reforms to the Statute of the Court of Justice have limited the review by the Court of Justice of the European Union (CJEU) in cases decided by appeal bodies in fields such as trademarks[3], plant varieties[4], chemicals[5], or aviation[6], where such bodies have been established for a longer time. Thus, Union lawmakers seem to trust quasi-judicial bodies enough to limit review by the highest court in cases decided by such bodies and reviewed by the General Court, which is tantamount to treating them like courts, or quasi-courts of first instance. Yet, the reform does not encompass appeal bodies in the field of financial services. Since they are no different from "older" bodies as a matter of design (but for a lack of, or at least much less pronounced, functional continuity with the agencies' decision-makers, which however increases their independent adjudicatory nature and their quasi-court role), the only apparent reason is that appeal bodies in the field of financial services are still too "young", and more experience is needed with them. Thus, it is key to discuss such experience. The experience of these appeal bodies, although short in terms of time, is relevant enough in terms of substance to observe the aspects that work, the challenges, and the areas where there is room for improvement.

Our analysis proceeds as follows. In Section 1 we analyse the features of the BoA and the AP, and briefly explain why we exclude the ABoR from our analysis. Section

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2 Amended proposal for a Regulation amending Regulations (EU) No 1093/2010 (EBA Regulation), (EU) No 1094/2010 (EIOPA Regulation) and (EU) No 1095/2010 (ESMA Regulation), COM(2018) 646 final. See recital 21 of the proposed regulation and the paragraph 'Governance' in section 1.5.1. of the Legislative Financial Statement. For the final political agreement between the Council and the Parliament, see the press release: 'Capital Markets Union: European Parliament backs key measures to boost jobs and growth', Brussels, 18 April 2019, https://europa.eu/rapid/press-release_IP-19-2130_en.htm?locale=en

3 Articles 66 to 73 of Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (OJ L 154, 16.6.2017, p. 1).

4 Articles 67 to 74 of Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights (OJ L 227, 1.9.1994, p. 1).

5 Articles 89 to 94 of Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC (OJ L 396, 30.12.2006, p. 1).

6 Articles 105 to 114 of Regulation (EU) 2018/1139 of the European Parliament and of the Council of 4 July 2018 on common rules in the field of civil aviation and establishing a European Union Aviation Safety Agency, and amending Regulations (EC) No 2111/2005, (EC) No 1008/2008, (EU) No 996/2010, (EU) No 376/2014 and Directives 2014/30/EU and 2014/53/EU of the European Parliament and of the Council, and repealing Regulations (EC) No 552/2004 and (EC) No 216/2008 of the European Parliament and of the Council and Council Regulation (EEC) No 3922/91 (OJ L 212, 22.8.2018, p. 1).

2 discusses some of the cases decided by the BoA and the AP. Section 3 points to some institutional weaknesses in the current design of both appeal bodies. Section 4 concludes by offering a possible way forward.

1 Features of financial regulation appeal bodies

The BoA is a body for the administrative review of appeals relating to the three ESAs' decisions, combining elements of internal administrative self-control and judicial review. 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[7]. The BoA is a joint body of the three ESAs, and each of the authorities (ESMA, EBA and EIOPA) appoints two members and two alternates. Each ESA's Management Board chooses from a short list proposed by the European Commission following a public tender and after consultation with the respective Board of Supervisors. The appointment procedure was recently amended as part of the 2019 ESAs reform. Now, candidates must have relevant knowledge of Union law and, before being appointed by the Management Board of the ESA, may be invited by the European Parliament to "make a statement before it and answer any questions put by its Members"[8].

The other two appeal bodies are part of the euro area banking union and were both inspired by the BoA experience. The AP of the SRB, established by Article 85 of the Single Resolution Mechanism Regulation (SRM Regulation)[9] with five members and two alternates, comprises individuals of high repute and a proven record of relevant knowledge and professional experience, including resolution experience, appointed for a five-year term by the SRB following a public call for expressions of interest published in the Official Journal, with no shortlisting by the European Commission, nor statements before the European Parliament. [10] At the same time, members "shall

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7 Article 58 of Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC (OJ L 331, 15.12.2010, p. 12); Article 58 of Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC (OJ L 331, 15.12.2010, p. 48); and Article 58 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84), hereinafter collectively referred to as the "ESAs Regulations".

8 New, amended Article 58(3) of the ESAs Regulations.

9 Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 (OJ L 225, 30.7.2014, p. 1).

10 On the AP, compare Herinckx, Y. (2017), "Judicial Protection in the Single Resolution Mechanism", in Houben, R. and Vandenbruwaene, W. (eds.), *The Single Resolution Mechanism*, Intersentia, pp. 77-118 (subsequent citations of this work refer to paragraph and not page numbers); Silva Morais, L. and Tomé Feteira, L. (2018), "Judicial review and the banking resolution regime. The evolving landscape and future prospects", in *Judicial Review in the Banking Union and in the EU Financial Architecture*, Quaderni di Ricerca Giuridica, Banca d'Italia, No 84, pp. 53-70.

not be bound by any instructions" and must "act independently and in the public interest"[11].

The AP resembles the ESAs' BoA, as it may confirm the contested SRB decision or remit the case, and the SRB is then bound by the AP decision, with an obligation to adopt an amended decision[12]. Although its role is closer to the quasi-judicial, the AP's remit is quite narrow, and comprises only the matters mentioned in Article 85(3) of the SRM Regulation: determinations of the minimum requirement for own funds and eligible liabilities (MREL), impediments to resolvability, and access to documents, but not all SRB decisions (notably, the adoption of a resolution scheme does not fall within its remit).

The ABoR[13] was established by Article 24 of the Single Supervisory Mechanism Regulation (SSM Regulation)[14] and is composed of five members and two alternates, who perform "an internal administrative review" of the procedural and substantive conformity with the SSM Regulation of ECB supervisory decisions[15]. Most of its rules on composition, independence and procedure mirror the rules of the ESAs' BoA.

Yet, there are also crucial differences[16], which can be better understood against the background of the fifth paragraph of Article 263 of the Treaty on the Functioning of the European Union (TFEU) which allows the establishment of pre-judicial control mechanisms (recourse to which would amount to an additional admissibility condition for an action for annulment before the General Court) only for Union agencies, bodies or offices – but not for Union institutions[17]. Also in view of this, and to respect the decision-making power of the Governing Council, the ABoR does not take a "decision" but "express[es] an opinion"[18]. If the ABoR "remits the case", the new draft decision "shall take into account the opinion of the [ABoR]" and is then submitted to the Governing Council, which adopts the final decision. Yet, the new ECB decision can abrogate the initial decision, replace it with an amended decision, and also replace it with a decision of identical content. Moreover, neither the Supervisory Board's new draft decision, nor the new Governing Council decision (adopted via the

11 Article 85(2) and (5) of the SRM Regulation.

12 Article 85(8) of the SRM Regulation.

13 Brescia Morra, C., Smits, R. and Magliari, A. (2017), "The Administrative Board of Review of the European Central Bank: Experience after two years", *European Business Organization Law Review*, Vol. 18, No 3, pp. 567-589; Smits, R. (2018), "Interplay of administrative review and judicial protection in European prudential supervision: Some issues and concerns", in *Judicial Review in the Banking Union and in the EU Financial Architecture*, Quaderni di Ricerca Giuridica, Banca d'Italia, No 84, pp. 29-52.

14 Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ L 287, 29.10.2013, p. 63).

15 Article 24(1) of the SSM Regulation.

16 Compare Brescia Morra, C. (2016), "The Administrative and Judicial Review of Decisions of the ECB in the Supervisory Field", in *Scritti sull'Unione Bancaria*, Quaderni di Ricerca Giuridica, Banca d'Italia, No 81, pp. 109-132; Silva Morais and Tomé Feteira (2018), op. cit., p. 61.

17 The fifth paragraph of Article 263 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".

18 Article 24(7) of the SSM Regulation.

non-objection procedure) is subject to further ABoR review. Thus, despite the importance of the ABoR role, the ABoR is closer to a fully internal mechanism than a quasi-judicial body. This impression was confirmed by the General Court and the CJEU in the *Landeskreditbank* case, where the courts considered the arguments presented by the ABoR concerning the justification of the ECB's decision, to be part of the ECB's compliance with the duty to state reasons, i.e. the courts found the ABoR to be a fully internal ECB feature[19]. For these reasons, the ABoR's experience will not be part of this study.

2 The practice of appeal bodies in the field of financial services

2.1 Joint Board of Appeal of the European Supervisory Authorities

The experience of the BoA is still limited in terms of workload, with 11 decisions[20] grouped into two main categories: decisions on breaches of Union law, where the main issue turned out to be the admissibility of the relevant appeals, and decisions concerning credit ratings.

As to the BoA cases on breaches of Union law, the typical case has been one where a (private) party complained of the supervisory conduct by an NCA, the competent ESA decided not to pursue any action, the BoA reviewed the ESA decision, and finally the General Court reviewed the BoA decision. In *SV Capital v EBA*[21], the BoA had to assess an EBA decision not to initiate of its own initiative proceedings for a breach of Union law, after being requested to do so by an applicant. The EBA had decided that Union law requirements on "suitability" apply only to persons who effectively direct the business of the credit institution. However the BoA interpreted the "suitability" criteria to encompass "key function holders", such as heads of EEA branches, and held that, even if a suitability assessment by (national) competent authorities is somewhat discretionary, the suitability of key function holders does not lie exclusively within the ambit of national law. The case was remitted to the EBA to rule on the merits. The EBA rejected the complaint, finding insufficient grounds for initiating an investigation under Article 17 of the EBA Regulation, and a second

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19 Case T-122/15, *Landeskreditbank Baden-Württemberg* v *ECB*, EU:T:2017:337 and Case C-450/17 P, *Landeskreditbank Baden-Württemberg* v *ECB*, EU:C:2019:372.

20 Decisions of 24 June 2013 and of 14 July 2014, *SV Capital* v *EBA I and II*; Decision of 10 January 2014, *Global Private Rating Company* v *ESMA*; Decision of 10 November 2014, *IPE* v *ESMA*; Decision of 3 August 2015, *Onix Asigurari* v *EIOPA*; Decision of 7 January 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 September 2018, *B.* v *ESMA*; and Decision of 27 February 2019, *Svenska Handelsbanken, Skandinaviska Enskilda Banken, Swedbank, Nordea Bank* v *ESMA*. Access to the full content of all decisions is available on the EBA, ESMA and EIOPA websites, e.g. www.esma.europa.eu/about-esma/governance/board-appeal.

On the Global Rating decision, see Gargantini, M. (2014), "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)", *Rivista di diritto societario*, p. 416.

21 BoA 2013-008.

appeal was lodged before the BoA. The BoA dismissed the appeal, finding the EBA's interpretation reasonable. The BoA nonetheless found that the EBA act was reviewable.

The case was taken before the General Court (Case T-660/14, *SV Capital OÜ* v *EBA*), and the court took a restrictive view of the BoA's jurisdiction. In its judgment[22] the General 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, meaning that the BoA's view was not correct and hence the BoA decision had to be annulled on grounds of lack of competence.

Quite naturally, in subsequent cases the BoA diligently applied the General Court's approach. In *Kluge* v *EBA*[23], the BoA followed *SV Capital* and found that it lacked competence to decide on an appeal against EBA's decision not to open an investigation into alleged breaches of Directive 2006/48/EC of the European Parliament and of the Council[24] by Finantsinspektsioon (the Estonian Financial Supervisory Authority), in its supervision of AS Eesti Krediidipank, a credit institution. The same rationale was applied in *B* v *ESMA*[25], an appeal against a decision of ESMA's Chair not to open a formal investigation against the Cyprus Securities and Exchange Commission pursuant to Article 17 of the ESMA Regulation for alleged infringements of MiFID[26] and EU rules on capital adequacy. Perhaps the more notable case was *Onix Asigurari* v *EIOPA*[27], where the BoA found that the appellants had brought no appeal against the relevant decision. Rather, the "communication" appealed by the appellants was only "confirmatory" of the earlier decision, which had not been appealed. Thus, Article 17 of the EIOPA Regulation did not apply, and, for this reason, the BoA had no competence.

The BoA cases involving competences directly exercised by ESMA over credit rating agencies offer a more promising context in terms of substance. Here, the BoA has clear competence because ESMA has direct supervisory responsibility. We briefly discuss four cases. The first is *Global Standard Rating* v *ESMA*[28]. In 2012, the UK Financial Services Authority informed ESMA 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)[29], ESMA's Board of Supervisors refused the application, and an appeal was brought before the BoA against the refusal. The BoA

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22 Case T-660/14, *SV Capital OÜ* v *EBA*, EU:T:2015:608. The appeal against this judgment was dismissed by the CJEU, Case C-577/15 P, *SV Capital OÜ* v *EBA*, EU:C:2016:947.

23 BoA/2016/001.

24 Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (OJ L 177, 30.6.2006, p. 1).

25 BoA D/2018/02.

26 Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC (OJ L 145, 30.4.2004, p. 1).

27 BoA 2015/001.

28 BoA 2013-14.

29 Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies (OJ L 302, 17.11.2009, p. 1).

held that the burden was on the applicant to make sure that the application for registration provided ESMA with all the necessary information and that ESMA was not obliged to raise questions, nor to remedy any deficiencies in the application. In the view of the BoA, there was no breach of registration rules by ESMA: its finding of non-compliance by the appellant was based on a number of grounds, raising significant matters, and ESMA's refusal decision was fully reasoned as required by Articles 16(3) and 18(1) of the CRAR. The appeal was thus dismissed. Similar steps were taken in *FinancialCraft Analytics* v *ESMA*[30], another refusal to register a credit rating agency. ESMA had concluded that an insufficient level of detail, inconsistencies and weaknesses in the application resulted in a failure to comply with the CRAR[31]. Dismissing the appeal, the BoA held that in respect of technical matters about credit rating, such as rating methodologies, ESMA acts as a specialist regulator, and thus is entitled to a margin of appreciation, provided that the decision itself sets out ESMA's reasons in a detailed manner, as required by Articles 16(3) and 18(1) of the CRAR.

Another example is the *Nordic banks* case, concerning appeals by Svenska Handelsbanken AB, Skandinaviska Enskilda Banken AB, Swedbank AB, and Nordea Bank Abp[32]. The problem was unusual because it involved not an individual institution, but the Nordic debt market, with the key issue being what may be considered a "rating", as opposed to investment research[33]. ESMA's Board of Supervisors found a negligent infringement of the CRAR to the extent that the four banks included "shadow ratings" in their credit research reports. As a result the Board of Supervisors published public notices and imposed fines of EUR 495 000 on each bank. The banks appealed. The main issue of the case concerned the ambiguity of Article 3(2) of the CRAR, which excludes recommendations and "investment research" from consideration as "credit ratings". In all cases, the "shadow ratings" were prepared by the banks' credit analysts and based in whole or in part on the methodology of "official" rating agencies. The documents included an alphanumerical rating in the text, which, in ESMA's view, put them outside the investment research exclusion under the CRAR, and within the definition of "rating", even if the reports themselves could be characterised as MiFID investment research.

The BoA found no evidence of unlawfulness in the decisions having regard to the principles of legal certainty and due process and upheld ESMA's assessment that the activities of the appellants fell within the CRAR provisions. Thus, the banks had to be CRAR registered to undertake the activity, and without such registration would infringe the provisions of the CRAR. In reaching its conclusion, the BoA engaged not only in a literal interpretation of the relevant provisions, but also looked at their

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30 BoA/2017/01.

31 The weaknesses 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.

32 BoA/2019/01, 02, 03 and 04.

33 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 November 2018.

legislative history and purpose. The latter was somewhat enlightening, which led the BoA to hold, in paragraph 262 of the single document dealing with the four separate appeals, that the effect of the banks' interpretation, were the BoA to accept it, would be that market participants could circumvent the CRAR restrictions "simply by including credit ratings in documents containing recommendations or investment research or even opinions about the value of a financial instrument". The BoA concluded, however, that due to the ambiguous wording of Article 3(2) of the CRAR and the unusual circumstances of the practice on Nordic debt markets, which had been carried out for many years without any perception of an infringement of the CRAR, the infringements were not committed negligently. 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*[34], 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 proposed amendments to Commission Implementing Regulation (EU) 2016/1799 on the mapping of the credit assessments of external credit assessment institutions in accordance with Article 136(1) and (3) of Regulation (EU) No 575/2013[35]. They included a proposal to amend the correspondence ("mapping" in the terminology of the Capital Requirements Regulation (CRR)[36]) 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 European 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 European Commission's final decision.

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34 BoA/2019/05.

35 Commission Implementing Regulation (EU) 2016/1799 of 7 October 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 Articles 136(1) and 136(3) of Regulation (EU) No 575/2013 of the European Parliament and of the Council (OJ L 275, 12.10.2016, p. 3).

36 Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ L 176, 27.6.2013, p. 1).

2.2 Cases decided by the Appeal Panel of the Single Resolution Board

The AP has received 115 appeals in less than four years: a majority were beyond the AP's remit (e.g. appeals against ex ante contributions to the Single Resolution Fund (SRF) or appeals against a resolution decision) and clearly inadmissible and received shortly reasoned inadmissibility orders. The roughly 30 decisions where an appeal on the merits was not clearly inadmissible consisted of decisions on contributions to the administrative costs of the SRB, a decision on MREL determination and decisions on access to documents in the context of the Banco Popular resolution.

(a) While the administrative contributions cases involved many minute details, the underpinning issue was always the identification of the exact scope of application of the contribution obligation under the SRM Regulation. The first decision adopted in November 2016[37] concerned an SRB letter requesting payment of 2015-2016 provisional administrative contributions sent to all banks included in a list of credit institutions published by the ECB on its website on 4 September 2014, which was contested by one bank, which had been subject to resolution measures (in Germany) and ceased to be a bank in July 2015. The AP partially sided with the appellant and remitted the case to the SRB. If an entity originally included in the ECB list of credit institutions had ceased to be a licensed bank during the relevant period, it could not 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 requiring entities which are not credit institutions to make contributions to the SRB could make Commission Delegated Regulation (EU) No 1310/2014[38] incompatible with the SRM Regulation (and the latter's clear scope of application). The AP held that, while only the CJEU[39], and not an appeal body[40], has the power to declare a regulation invalid, when two alternative interpretations of a provision of Union law are possible, but one interpretation would make the provision unlawful because it would entail that the provision contradicts the delegating act, the AP should prefer the interpretation that preserves the lawfulness of the delegated provision.

Similarly, in Case 4/2018, the AP held that, even following an ECB declaration that the bank was failing or likely to fail and the appellant entity was subject to liquidation under national law, the bank was required to pay administrative contributions until the date when its banking licence was finally withdrawn. The appellant had argued that it had ceased to be subject to the SRM Regulation

[37] Decision of 23 November 2016, in Case 1/16.

[38] Commission Delegated Regulation (EU) No 1310/2014 of 8 October 2014 on the provisional system of instalments on contributions to cover the administrative expenditures of the Single Resolution Board during the provisional period (OJ L 354, 11.12.2014, p. 1).

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

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

and should not pay administrative contributions to the SRB from the date when the SRB had decided that resolution was not in the public interest. The AP found, on the contrary, that the appellant was still a credit institution when the SRB determined the 2018 contributions, which followed strict pre-defined criteria, in a list intended to be exhaustive and non-discretionary. The facts alleged by the entity fell outside these criteria and were not relevant for the decision whether to exempt the entity from the payment of administrative contributions.

(b) On the determination of MREL, the AP gave a decision on 16 October 2018[41]. MREL rules ensure that a bank has sufficient instruments that may be written-down or converted (bailed-in) in order to ensure an orderly resolution. Thus, from the instruments which can be potentially subject to bail-in, the MREL rules identify a narrower sub-set whose characteristics make such bail-in easier[42]. In this case the SRB made an MREL determination that was below 8% of total liabilities including own funds (TLOF). Since resolution rules provide that the SRF resources can be tapped only after capital/liabilities reaching 8% TLOF are bailed-in[43], the appellant alleged that, where an MREL target was set below that level, the authorities might have to implement the resolution strategy without relying on SRF resources. The AP held that the SRB's decision was justified. The MREL requirement was calibrated to ensure that the MREL target set for the relevant credit institution was proportionate, also taking account of the fact that the bail-in of instruments equivalent to 8% TLOF can be achieved using not only MREL instruments but also liabilities that do not qualify as MREL but are not excluded from bail-in[44], e.g. those with a maturity of less than one year.

(c) The largest AP caseload has focused on access to documents under Regulation (EC) No 1049/2001 of the European Parliament and of the Council on access to documents[45] (Public Access Regulation) connected to the Banco Popular resolution. In summary: (i) the overall question was whether the SRB had granted Banco Popular's shareholders and subordinated bondholders adequate access to the documents supporting the SRB's resolution decision; (ii) the AP's first answer was "not nearly enough"; and (iii) the answer became more refined

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41 Decision of 16 October 2018, in Case 8/18.

42 Article 45(4) of Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ L 173, 12.6.2014, p. 190) (BRRD) provides that these are instruments that are issued and fully paid up, not owed to, funded, guaranteed, or funded by the institution, with a maturity of more than one year, and not comprising deposits or derivatives.

43 Article 44(4) and (5) of the BRRD.

44 The liabilities that are eligible for bail-in are specified in Article 44 of the BRRD (the bail-in sequence is set out in Article 48 of the BRRD). The liabilities eligible to fulfil MREL are identified in Article 45(4) of the BRRD. On the organising role of the principle of proportionality in EU banking regulation, compare Zilioli, C. (forthcoming), "Proportionality as the Organizing Principle of European Banking Regulation", in Baums, T., Remsperger, H., Sachs, M. and Wieland, V. (eds.) *Zentralbanken, Währungsunion und stabiles Finanzsystem* (in honour of Helmut Siekmann), Duncker & Humblot, (accessible at SSRN).

45 Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31.5.2001, p. 43).

and nuanced as successive rounds of appeals resulted in additional SRB disclosures.

The AP had to examine the SRB's refusal to disclose key resolution documents (e.g. the resolution decision, the valuation report, and the resolution plan) in light of the right to access documents that "any citizen" has under the Public Access Regulation. Key to the AP decisions were the arguments that: (i) the conferral of powers on Union agencies is conditional upon respecting fundamental rights and judicial review; and (ii) administrative safeguards, including access to documents, are instrumental to both. On these grounds, the AP held that the SRB erred in law when refusing to grant access to the valuation report in its entirety. The report was a critical part of the resolution decision, and thus had to be disclosed, at least in part. In turn, the SRB was only partly entitled to refuse access to other documents: the resolution decision, some parts of the resolution plan and other relevant documents could be disclosed in a redacted, non-confidential form, without endangering financial stability, especially since disclosure would take place months after the resolution decision had been taken[46].

In successive rounds of appeals the AP developed a stable framework of analysis to balance the competing interests at stake and adhered to the following principles:

(i) The right of access is a transparency tool of democratic control available to all Union citizens irrespective of their interests in subsequent legal actions[47].

(ii) The principle is that all documents of the institutions should be accessible to the public, since the Public Access Regulation implements Article 15 TFEU, and a fundamental right under Article 42 of the Charter of Fundamental Rights of the European Union, although certain public and private interests are also protected by way of exceptions and the agencies must be able to protect internal deliberations to safeguard their ability to carry out their tasks.

(iii) Exceptions to public access to documents must be applied and interpreted narrowly[48].

(iv) For certain categories of documents the Union institutions, bodies and agencies can rely on a general presumption that their disclosure

[46] The AP agreed with the SRB that documents exchanged with the ECB or the European Commission were protected, as part of the deliberation process, under Article 4(3) of the Public Access Regulation.

[47] Case C-60/15, *Saint-Gobain Glass Deutschland*, EU:C:2017:540, paras. 60-61; and Case T-376/13 *Versorgungswerk der Zahnärztekammer Schleswig-Holstein* v *ECB*, EU:T:2015:361, para. 20.

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

would undermine one of the interests protected by the Public Access Regulation[49].

A balance between similar principles was being drawn in parallel by the CJEU in the successive cases of *Espirito Santo I*[50], *Baumeister*[51], *UBS Europe*[52], *Enzo Buccioni*[53], *Espirito Santo II*[54] and *Di Masi and Varoufakis* v *ECB*[55], which were closely followed by the AP. Another challenge was the difficulty to reconcile the AP's inability to review the legality of the resolution scheme (a matter which is outside its narrow remit) with the fact that the alleged collision of the resolution scheme adopted in the Banco Popular case with fundamental rights was what gave relevance to the access requests. Thus, the AP assumed that the resolution framework respected property rights because resolution decisions were taken only at the point of non-viability and respecting the "no creditor worse off" principle[56] and that document disclosure had to permit the proper scrutiny of whether these two conditions were respected where a resolution decision was adopted.

3 Weaknesses and challenges

The experience accrued so far by the BoA and the AP shows that quasi-judicial review has been delivered on a timely basis, and generally accepted by the appellants in all cases but for one before the BoA and two before the AP[57]. Yet, the system exhibits some design weaknesses, which can be summarised as (a) "compartmentalisation", (b) organisational flaws, and (c) insufficient clarity as to the scope and focus of review.

(a) "Compartmentalisation" is visible and by design. There are three different fora of the European System of Financial Supervision, the Single Supervisory Mechanism and the Single Resolution Mechanism and no complete system. The main reason is that review bodies are construed as organs of their respective Union agencies or institutions (yet not as part of their staff in order to ensure independence). This entails also a lack of clarity over the status of appeal body members, and a dependence on the idiosyncrasy of each agency or institution. For example, the ABoR's decisions are not public and thus cannot be shared nor

[49] Case C-404/10 P, *Commission* v *Éditions Odile Jacob*, EU:C:2012:393; Case 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-514/11 P and C-605/11 P, *LPN and Finland* v *Commission*, EU:C:2013:738; and Case C-562/14 P, *Sweden* v *Commission*, EU:C:2017:356.

[50] Case T-251/15, *Espirito Santo Financial* v *ECB*, EU:T:2018:234.

[51] Case C-15/16, *Baumeister*, EU:C:2018:464.

[52] Case C-358/16, *UBS Europe and Alain Hondequin and Others*, EU:C:2018:715.

[53] Case C-594/16, *Enzo Buccioni*, EU:C:2018:717.

[54] Case T-730/16, *Espirito Santo Financial Group* v *ECB*, EU:T:2019:161.

[55] Case T-798/17, *De Masi and Varoufakis* v *ECB*, EU:T:2019:154.

[56] In accordance with Article 20 of the SRM Regulation, creditors cannot obtain in resolution a treatment less favourable than under a hypothetical insolvency.

[57] Pending cases: Case T-16/18, *Activos e Inversiones Monterosso* v *SRB*; and Case T-62/18, *Aeris Invest* v *SRB*.

discussed in detail with other bodies, which breeds opacity[58]. Also, in the absence of a pending case, the BoA meetings are episodic due to budgetary constraints. Participation by appeal bodies in the European agencies' network and other ad hoc liaisons is voluntary, loose and informal, and no substitute for institutional coordination.

Appeal bodies are also compartmentalised from Union courts, which raises many issues. One is whether the administrative appeal must be exhausted before filing a case before Union courts. Although this seems to be the case for the BoA[59] and the AP (but not for the ABoR), since the BoA and the AP remits are narrowly designed, appellants could hesitate as to whether they chose the right remedy at the right time. In turn, it is doubtful whether the authorities can challenge appeal bodies' decisions before the General Court. Another problem is that these appeal bodies apparently cannot make references to the CJEU for a preliminary ruling. Although it is arguable that they would meet the *Vaassen* criteria for being a "court or tribunal" entitled to make a reference for a preliminary ruling (the BoA and the AP would meet the criteria but the ABoR would not[60]), they are not courts or tribunals "of a Member State"[61]. This is particularly significant because, as a result, they cannot make references for a ruling on the legality of Union law provisions central to their decisions, and are bound to "blindly" apply secondary law even in the face of potentially serious doubts as to their legality under primary Union law[62]. In all fairness, this is not new, and also the recent Court reform[63], although it seems to treat boards of appeals of some Union agencies as part of the judicial review system, does not give them the possibility to make references for a preliminary ruling. This is, however, particularly unfortunate for the BoA and the AP, which, unlike those other boards of appeal, adjudicate matters without being in functional continuity with the respective agencies.

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58 See Smits (2018), op. cit., p. 35.

59 Van Rijsbergen, M. and Foster, J. (2017), "'Rating' ESMA's accountability: 'AAA' status", in Scholten, M. and Luchtman, M. (eds.), *Law enforcement by EU authorities: Implications for political and judicial accountability*, Edward Elgar Publishing, Cheltenham, p. 76; Herinckx (2017), op. cit., para. 30; and Blair, W. and Cheng, G. (2018), "The role of judicial review in the EU's financial architecture and the development of alternative remedies" in *Judicial Review in the Banking Union and in the EU Financial Architecture*, Quaderni di Ricerca Giuridica, Banca d'Italia, No 84, pp. 17-28, at p. 24.

60 Case 61/65, *Vaassen (neé Göbbels)*, EU:C:1966:39; Case C-54/96, *Dorsch Consult*, EU:C:1997:413, para. 23; and Case C-517/09, *RTL Belgium*, EU:C:2010:82. See in particular Case C-205/08, *Umweltanwalt von Kärnten*, EU:C:2009:767, paras. 34-39. See also Case C-195/06, *Österreichischer Rundfunk (ORF)*, EU:C:2007:613, paras. 10-13 and 22 and the Opinion of Advocate General Ruiz-Jarabo Colomer in the same case, EU:C:2007:303, points 24-41. The EUIPO Board of Appeal is not considered a "court or tribunal", see Case T-63/01, *Procter & Gamble* v *OHIM (soap bar shape)*, EU:T:2002:317, paras. 21-22. However, unlike the EUIPO Board of Appeal, the BoA and the AP are not "in functional continuity" with the agency, which was the decisive criterion according to the Court.

61 This was the decisive criterion for denying such status to the Complaints Boards of the European Schools. See Case C-196/09, *Miles and Others*, EU:C:2011:388, paras. 37 to 39.

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

63 Regulation (EU, Euratom) 2019/629 of the European Parliament and of the Council of 17 April 2019 amending Protocol No 3 on the Statute of the Court of Justice of the European Union (OJ L 111, 25.4.2019, p. 1). See Alberti, J. (2019), "The draft amendments to CJEU's Statute and the future challenges of administrative adjudication in the EU", *Federalismi.it,* No 3, 6 February 2019, pp. 1-32.

(b) Some features of the administrative organisation of the BoA and the AP show clear causes for concern. First, appointment rules are relevant in determining whether the BoA and the AP qualify as "courts" under the *Vaassen* criteria. In our view, this is possible, but room for improvement remains. The ESAs Regulations and the SRM Regulation require the BoA and the AP members to be independent. Yet, there are shortcomings: (i) the appointment of the members of the BoA and AP is delegated to the authorities' governing body, which also decides on the (once only) extension of their five-year term. This may misplace incentives and might reduce the propensity of some members to challenge the agencies' decisions; (ii) remuneration is based on hourly fees and is thus episodic (absent a continuous workload) with the risk that membership becomes "honorary". In the long run, these and other weaknesses[64] may not jeopardise independence, but may undermine the appearance of such independence.

A second matter regarding membership concerns the best combination of expertise to be available in appeal bodies. Combining lawyers and non-legal experts offers clear advantages, but also raises questions. First, does the presence of a member of a quasi-court with no legal background run against the concept itself of a "court"? However, an absolute requirement of legal background would be beyond necessity and deprive appeal bodies of interdisciplinary expertise and a more precise knowledge of cases. A second, more practical, question is how members of appeal bodies can properly fulfil their duties if they cannot draft in legal terms. While this might pose an insurmountable problem for monocratic courts, collegial work and secretarial support should be enough to handle the difficulty. What matters for members is their understanding of an issue's substance and less their mastery in the arcane art of legal writing.

A mixed expertise only works if a third element is duly acknowledged, which is the support provided to appeal bodies. In relation to this element, there is still room for improvement. The BoA and the AP have secretariats which are functionally independent from other functions of the relevant agencies but without budgetary autonomy. While this may be due to the relevant agencies' youth, it is unfortunate. It is fair to acknowledge that the secretariats to the BoA and the AP have done a lot to suitably assist the members and the resources of the AP secretariat have been strengthened to offer permanent and excellent support, but the contrast with the resources of Union or US courts is striking, especially given the impact of this support on the quality of adjudicatory outcomes.

(c) On the clarity of the review, as was emphasised earlier, the competences granted to the BoA and the AP are specific[65], but this does not dispel all

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64 For data based upon the results of a questionnaire, see Dimitropoulos, G. and Feinäugle, C. (2015), *Organizational Aspects of the Boards of Appeal of the Agencies of the European Union*, MPI Luxembourg (on file with the authors).

65 The BoA may hear appeals against a decision of ESMA, EBA or EIOPA "referred to in Articles 17, 18 and 19 and any other decision taken in accordance with the Union acts referred to in Article 1(2)" (Article 60(1) of the ESAs Regulations). The AP may hear appeals only against a decision of the SRB referred to in Articles 10(10), 11, 12(1), 38 to 41, 65(3), 71 and 90(3) of the SRM Regulation.

interpretative doubts on matters of competence[66] nor does it clarify why certain matters were excluded from the remits of the BoA and the AP[67]. One must add to this the recurring question about the standard, or standards, of review by quasi-courts over supervisory decisions[68], especially in comparison to the standards of the General Court and the CJEU. The BoA seems to have acknowledged, in an obiter dictum fashion[69], that it may push its review of the merits beyond the CJEU-like legality review, given the circumstances. Some authors have gone further and argued that the BoA is vested with unlimited, full review jurisdiction that could lead it to re-assess all aspects of the decision's merits[70]. Others argue that, since an appeal is a very different procedure to judicial review under Article 263 TFEU, market participants can challenge ESMA's failures to act more than is possible in relation to other forms of (in)action by Union institutions and bodies[71]. Another view argues that the AP's review must remain a legality review and the AP cannot merely substitute its own appraisal for that of the SRB. In this regard, the standard of review is that of an "error of assessment", but an error need not be "manifest" as determined in the case-law of the CJEU, because due to its mixed composition the AP can investigate more thoroughly the SRB's economic assessments[72].

While academic opinions are not uniform, in our assessment, no court or quasi-court is willing to second-guess the opportuneness of a supervisor's complex economic assessments, 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. Without explicit statutory language on this issue, only the CJEU can offer the necessary clarity, and, without it, appeal bodies may conduct a review which sits somewhere between full and marginal, but are not likely to expressly state a specific standard of review of their own.

4 A way forward

The analysis shows that appeal bodies in the field of financial services seemingly offer a quick remedy, with the benefits of procedural flexibility and technical expertise. Our discussion also exposes some weaknesses, however, which, if reformed, would enhance the BoA's and the AP's supporting role to Union courts. If

66 E.g. the AP can review SRB decisions on impediments to resolution, but it is unclear whether this also extends to the preliminary identification of the impediments, which operates as the basis for those measures.

67 E.g. decisions on access to the file by the party affected by the proceedings under Article 90(4) of the SRM Regulation or the decisions on ex ante contributions to the SRF are not reviewable before the AP.

68 Witte, A. (2015), "Standing and judicial review in the new EU financial markets architecture", *Oxford Journal of Financial Regulation*, pp. 1-37.

69 Board of Appeal, 10 November 2014, *Investor Protection Europe* v *ESMA*.

70 Gargantini (2014), op. cit., p. 416.

71 Murphy, R. (2016), "The effective enforcement of economic governance in the European Union: brave new world or a false dawn?", in Drake, S. and Smith, M. (eds.), *New Directions in the Effective Enforcement of EU Law and Policy*, Edward Elgar, Cheltenham, Northampton MA, pp. 285-319, at p. 316, citing *Investor Protection Europe* v *ESMA*, decision of 10 November 2014.

72 Herinckx (2017), op. cit., para. 26.

the reforms are designed as an ambitious overhaul to transform the BoA and the AP (or the ABoR) into specialised courts attached to the CJEU, under Article 257 TFEU, such reforms will likely not be successful in the short to medium term.

A more promising avenue may be the consolidation of the BoA and the AP into a single independent Board of Appeal.

This reform would take these quasi-judicial review bodies out of the internal governance of their four agencies, dispelling any remaining institutional uncertainties about their nature, and bringing organisational and efficiency gains. To our minds, a (de facto) administrative tribunal is currently preferable to specialised courts attached to the CJEU under Article 257 TFEU because it can also be composed of non-legal experts, and its rules of procedure, whilst fully respecting the right to be heard and all procedural fundamental rights, can be designed to deliver a prompt review. A comprehensive reform could also extend the legality review conducted by such review bodies beyond the current CJEU standard – in order to include all errors (and not simply manifest errors). 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"[73].

Appointment rules should reflect these changes, e.g. by strengthening the role of the European Commission which could select and appoint the members (possibly from a list proposed by the relevant agencies, following a public call for expressions of interest), after a statement before the European Parliament. This would enhance formal independence, which could be accompanied by full status as European Union officials, better-designed remuneration, immunity, budget autonomy and adequate secretarial and law clerk support.

[73] Alberti. J. (2017), "New developments in the EU system of judicial protection: the creation of the Unified Patent Court and its future relations with the CJEU", *Maastricht Journal of European and Comparative Law*, Vol. 24, pp. 6-24, at p. 21 (with reference to the Unified Patent Court).