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ADMINISTRATIVE PRE-LITIGATION REVIEW MECHANISM IN THE SINGLE RESOLUTION MECHANISM (SRM): THE SRM APPEAL PANEL

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> There are three possible future paths for [administrative] reviewing bodies. One is that they take a step back and become simple internal control bodies, holding a merely advisory role. Another is that they develop into administrative judges, thus introducing a dualist judicial system into the European Union. Finally, they may become an additional court of first instance, alongside the General Court, thus following the example of the British monist system.[2]

A. INTRODUCTION

4.01 In this chapter we briefly discuss the recent practice of the Single Resolution Board's Appeal Panel (AP). Our approach is practical, i.e., based on the AP's practice and adopted decisions, since one or another of us has participated in the adoption of all those decisions. 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

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2 Sabino Cassese, 'A European Administrative Justice' (2018) 81 Quaderni di Ricerca Giuridica, Banca d'Italia 9, 16.

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, such as the Board of Appeal of the European Supervisory Authorities and the AP itself. The AP's design is no different from 'older' bodies; if anything, it has a more pronounced adjudicatory role, since it is not in functional continuity with the agencies' decision-makers, which increases its independent status of quasi-court. The only apparent reason to be excluded from the list of procedures that justify limited CJEU review is the fact that the AP is 'too young', and needs more experience. Thus, it is key to discuss such experience. The experience of the AP, although short in years, is significant in substance, enough to observe the aspects that work and the challenges ahead.

Our analysis proceeds as follows. In Section B we analyse the features of the AP, and briefly explain differences with the Single Supervisory Mechanism ('SSM') Administrative Board of Review ('ABoR'). Section C discusses the cases decided by the AP. Section D points to some weaknesses in the current design of the AP. Section E concludes. **4.02**

B. FEATURES OF INSTITUTIONAL DESIGN OF THE APEAL PANEL

The AP of the SRB is established by Article 85 of the SRM Regulation[7] with five members and two alternates. It 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 **4.03**

and unlike the Board of Appeal of the European Supervisory Authorities

3 Regulation (EU) 2017/1001 of the European Parliament and of the Council on the European Union trademark [2017] OJ L/154, Arts 66–73.

4 Council Regulation (EC) 2100/94 on Community plant variety rights [1994] OJ L/227, Arts 67–74.

5 Regulation (EC) No 1907/2006 of the European Parliament and of the Council concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency [2006] OJ L/396, Arts 89–94.

6 Regulation (EU) 2018/1139 of the European Parliament and of the Council on common rules in the field of civil aviation and establishing a European Union Aviation Safety Agency [2018] OJ L/212, Arts 105–114.

7 Regulation (EU) No 806/2014 of the European Parliament and of the Council establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund (SRM Regulation) [2014] OJ L/225.

shortlisting by the European Commission, nor statements before the European Parliament.[8] Members 'shall not be bound by any instructions' and must 'act independently and in the public interest'.[9]

4.04 The first composition of the AP reflected geographical diversity within the Union, with members of seven different nationalities, two women in the group, and a significant variety of experiences (three law professors; an experienced international lawyer; two former senior officials at central banks, one former ABoR member; and the former chair of the German stability mechanism for banks' restructuring). Partial replacement took place over the years, with two alternates of different nationalities becoming members and two new alternates being appointed. There was also a change in the position of Chair and Vice-Chair.

4.05 Appointment rules are relevant in combining lawyers and non-legal experts. This enhances the collective understanding of the issues, but also raises questions. A first, practical, issue concerns drafting (especially drafting legal documents). While this might pose an insurmountable problem for monocratic courts (if, say, each judge, lawyer or not were to be solely responsible of a specific opinion with no support or infrastructure), collegial work and secretarial support help handle the difficulty, which means that expertise in substance can trump mastery of 'legalese'. This raises a second issue. A mixed expertise only works if another element, the AP Secretariat's support, is duly acknowledged. The Secretariat is functionally independent from other SRB functions, albeit it lacks budgetary autonomy. The AP Secretariat has done a lot to suitably assist the members, and its resources have been strengthened, but the contrast with Union or US courts' resources is still striking, especially given the impact of this support on the quality of adjudicatory outcomes.

4.06 The AP was first appointed at the end of 2015; its first action was to adopt its Rules of Procedure, and it started operating on 1 January 2016. The Rules underscore the Secretariat's functional separation and segregation of duties from all other SRB activities (Art. 4) to the effect that 'no information passes from the Secretariat to the Single Resolution Board ("Board") or any affiliated authority other than the Appeal Panel'. They further specify that the language of the appeal proceedings is the language of the contested decision; if the

8 On the AP, compare Y Herinckx, 'Judicial Protection in the Single Resolution Mechanism' in Robby Houben and Werner Vandenbruwaene (eds), *The Single Resolution Mechanism*, vol 2 (Intersentia 2017) 77–118 (subsequent citations of this work refer to paragraph and not page numbers); Tomé Feteira and Luís Silva Morais, 'Judicial review and the banking resolution regime. The evolving landscape and future prospects' (2018) 84 Quaderni di Ricerca Giuridica, Banca d'Italia 53, 53–70.

9 Art. 85(2) and (5) of the SRM Regulation.

contested decision is issued in more than one of the languages of the Union and the English language is among such languages,[10] the language of the appeal shall be English, unless the parties agree on a different language instead (Art. 5(2)). Once the appeal is notified to the Board, the Board can submit a response within two weeks of service of the notice of appeal, unless the Board asks for an extension of another two weeks. This occurred in practice, but the Board always justified the request for such an extension (and the AP granted it). The appellant is usually granted the opportunity to submit a reply and, where deemed necessary, also the Board has been authorized to submit a rejoinder prior to the hearing.

4.07 Appeals can be (and sometimes have been) joined 'where two or more appeal notices have been filed in respect of the same matter or involve the same or similar issues' (Art. 13). More specifically, the AP consolidated appeals in several cases where the same appellant had challenged different SRB decisions. Alternatively, the AP did not consolidate some appeals but nonetheless held joint hearings, when different appellants challenging different decisions raised the same or similar issues. Article 14 of the Rules provides that 'where a party has, without reasonable excuse, failed to comply with a direction of the [AP] or a provision of these Rules, the [AP] may, where that party is the appellant, dismiss the appeal wholly or in part'. To do so, however, the AP must 'give the parties notice so that they have an opportunity to make representations against the making of such an order'. This power has been used by the AP where the appeal was not sufficiently clear in its grounds[11] or where the party had failed, during the proceedings, to abide by a procedural order.[12] Parties can produce documents with the appeal and the response and can also request that the other party produce further documents (Art. 16). In case of disagreement on the production of further documents, the AP can give directions but further documents are admitted only if the AP considers them necessary for the just determination of the appeal.[13] With the AP's permission, a party may also adduce expert evidence in the form of a written statement (Art. 17) and of oral evidence (Art. 19) at the hearing (where the expert, like witnesses, if any, can be examined and cross-examined under the control of the Chair).

10 The AP clarified that a courtesy translation into English does not qualify English as one of the languages in which the contested decision was issued: compare decision of 19 June 2019 in *Appellant v the Single Resolution Board* [2019] AP Case 19/18.

11 *Appellant v the Single Resolution Board* [2019] AP Case 22/18.

12 Ibid.

13 *Appellant v the Single Resolution Board* [2019] AP Cases 09, 11, 13, 16/18 and Case 02/19.

4.08 As to the hearing, several aspects deserve specific analysis. First, the AP hearing is 'held in private, unless exceptional circumstances require otherwise' (Art. 18(5)). This is justified by the highly sensitive nature of resolution. The hearing is recorded, and the Secretariat takes minutes. As a matter of principle (to effectively ensure the private nature of the hearing and prevent unauthorized dissemination of its contents), parties can examine the minutes but not the recording, which is made for the convenience of the AP. Second, the parties are entitled to make oral representations before the AP, and a hearing is held, although both parties can decline their right to be heard. Even if both parties do so, the AP may nevertheless require oral representations if it considers it necessary for the just determination of the appeal (Art. 18(1)). The AP gives directions on the order and form of oral representations, setting a timetable. As a matter of practice, the parties are first invited to make their representations (the appellant first). Then, they answer questions posed by the AP and finally make a brief final reply, if they wish to do so. Only exceptionally did the AP authorize the submission of post-hearing briefs or notes. Unless there are special circumstances not to do so, usually at the end of the hearing the Chair informs the parties that the evidence is then complete and therefore that the appeal is considered lodged as of the date of the hearing for the purposes of Article 85(4) SRM Regulation (Art. 20). The AP decision must therefore be adopted and notified to the parties within 30 days. Deliberations take place in private and no dissenting opinions, if any, are attached to the decision, which is published in anonymised form and in such a format that the confidentiality of sensitive information is preserved (Art. 24). This has not prevented, so far, the publication of the adopted decision only with minor redactions.

4.09 The AP's remit is quite narrow and comprises only the matters mentioned in Article 85(3) of the SRM Regulation: administrative contributions, determinations of the Minimum Requirement for own funds and Eligible Liabilities (MREL), impediments to resolvability, and access to documents. Other SRB decisions (notably, the adoption of a resolution scheme) fall outside its remit. Within this remit, though, the AP's role is less administrative and more quasi-judicial: the AP may confirm the contested SRB decision or remit the case, in which case the SRB is bound by the AP decision, and obliged to adopt an amended decision.[14]

14 Art. 85(8) of the SRM Regulation.

This makes it different from the SSM ABoR,[15] 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.[16] In light of this of the Governing Council's decision-making power, the ABoR does not take a 'decision' but 'express[es] an opinion'.[17] If the ABoR 'remits the case', the new draft decision 'shall take into account the opinion of the [ABoR]' and will then be submitted to the Governing Council, which adopts the final decision. However, and crucially, the new European Central Bank (ECB) decision can abrogate the initial decision, replace it with an amended decision, *or* replace it with a decision of identical content. Neither the Supervisory Board's new draft decision, nor the new Governing Council decision (adopted via the non-objection procedure) is subject to further ABoR review. Thus, despite its importance to enhance the quality of ECB supervisory decision-making, 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 that the ECB had complied with its duty to state reasons as a result of the arguments discussed by the ABoR in its opinion, ~~i.e., the courts found the ABoR to be a fully internal ECB feature~~.[18] **4.10**

C. THE PRACTICE OF THE APPEAL PANEL: THE CASES DECIDED SO FAR

The AP has received roughly 120 appeals in less than five 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 (i) decisions on contributions to the administrative costs of **4.11**

15 Compare Concetta Brescia Morra, 'The Administrative and Judicial Review of Decisions of the ECB in the Supervisory Field', 81 Quaderni di Ricerca Giuridica, Banca d'Italia, 109, 109–32; Tomé Feteira and Silva Morais (n 8) 61.

16 The fifth paragraph of Art. 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'. See also Koupepidou, Chapter 3, para. 3.48.

17 Art. 24(7) of the SSM Regulation.

18 Case T-122/15, *Landeskreditbank Baden-Württemberg v ECB* [2017] ECLI:EU:T:2017:337, paras 121–132 and Case C-450/17 P, *Landeskreditbank Baden-Württemberg v ECB* [2019] ECLI:EU:C:2019:372, paras 87–102.

the SRB, (ii) a decision on MREL determination and (iii) decisions on access to documents in the context of the Banco Popular resolution.

4.12 While the administrative contributions cases involved many minute details, the underpinning issue was always the identification of the scope of application and rationale of the contribution obligation under the SRM Regulation. The first AP decision adopted in November 2016[19] 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. This was contested by one bank ~~in a Member State~~, which had been subject to resolution and ceased to be a bank in July 2015. The AP partially ruled in favour of 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[20] incompatible with the SRM Regulation. The AP held that, while only the CJEU,[21] and not an appeal body,[22] can 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, *ceteris paribus* the AP should prefer the interpretation that preserves the lawfulness of the delegated provision.

4.13 Similarly, in *Case 04/2018*,[23] 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

19 *Appellant v the Single Resolution Board* [2016] AP Case 01/16.

20 Commission Delegated Regulation (EU) No 1310/2014 on the provisional system of instalments on contributions to cover the administrative expenditures of the Single Resolution Board during the provisional period [2014] OJ L354/1.

21 Case C-362/14 *Maximillian Schrems v Data Protection Commissioner* [2015] EU:C:2015:650, para. 61; Joined Cases C-188/10 and C-189/10, *Aziz Melki (*C-188/10*) and Selim Abdeli (C-189/10)* [2010] EU:C:2010:2016, para. 54; Case 101/78 *Granaria v Hoofdproduktschap voor Akkerbouwprodukten* [1979] EU:C:1979:38, paras 4–5; Case 63/87 *Commission of the European Communities v Hellenic Republic* [1988] EU:C:1988:285, para 10; and Case C-475/01 *Commission of the European Communities v Hellenic Republic* [2004] EU:C:2004:585, para. 18.

22 Case F-128/12 *CR v European Parliament* [2014] EU:F:2014:38, paras 35–36, 40; Case T-218/06, *Neurim Pharmaceuticals (1991) Ltd v OHIM* [2008] EU:T:2008:379, para. 52; and Case T-120/99, *Christina Kik v OHIM* [2001] EU:T:2001:189, para. 55.

23 *Appellant v the Single Resolution Board* [2018] AP Case 04/18, paras 13–15.

withdrawn. The appellant had argued that it had ceased to be subject to the SRM Regulation 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 could not be considered for a decision to exempt the entity from the payment of administrative contributions.

4.14 On the determination of MREL, the AP rendered a decision on 16 October 2018.[24] 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 initial list of instruments which can be potentially subject to bail-in,[25] MREL rules identify a narrower sub-set whose characteristics make such bail-in easier.[26] Bearing this in mind, the SRB and NRAs must determine MREL levels for each institution or set of institutions. In this case the SRB made an MREL determination below 8 per cent of Total Liabilities including Own Funds (TLOF). Yet, since resolution rules provide that the Single Resolution Fund (SRF) resources can be tapped only after capital/liabilities reaching 8 per cent TLOF are bailed-in,[27] the appellant alleged that MREL should be set above the 8 per cent threshold to ensure that the authorities could implement the resolution strategy without relying on SRF resources. Nonetheless, the AP held that the SRB's decision was justified: the MREL requirement was calibrated to ensure that the target set for the relevant credit institution was proportionate. This meant that the 8 per cent TLOF threshold ~~can~~ be achieved through the bail-in of instruments that are not MREL-eligible but are not excluded from bail-in,[28] e.g, those with a less than one-year maturity.

24 *Appellant v the Single Resolution Board* [2018] AP Case 08/18, para. 37.

25 In principle, only the liabilities listed under Art. 27(3) SRM Regulation are excluded.

26 Art. 45(4) of Directive 2014/59/EU of the European Parliament and of the Council 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 (BRRD) [2014] OJ L/173 provides that these are instruments that are issued and fully paid up, not owed to, funded, guaranteed, or funded by the institution, with more than one-year maturity, and not comprising deposits or derivatives.

27 Art. 44(4) and (5) of the BRRD.

28 The liabilities that are eligible for bail-in are specified in Art. 44 of the BRRD (the bail-in sequence is set out in Art. 48 of the BRRD). The liabilities eligible to fulfil MREL are identified in Art. 45(4) of the BRRD. On the organizing role of the principle of proportionality in EU banking regulation, compare Chiara Zilioli (forthcoming), 'Proportionality as the Organizing Principle of European Banking Regulation' in Theodor Baums and others (eds), *Zentralbanken, Währungsunion und stabiles Finanzsystem* (in honour of Helmut Siekmann), (Duncker & Humblot 2019).

4.15 The largest AP caseload by far has focused on access to documents under Regulation (EC) No 1049/2001 of the European Parliament and of the Council on access to documents[29] 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 initial answer was 'not nearly enough;' and (iii) the answer has become more refined and nuanced as successive rounds of appeals have been followed by additional disclosures by the SRB.

4.16 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.[30]

4.17 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:

(a) The right of access is a transparency tool of democratic control available to all Union citizens irrespective of their interests in subsequent legal actions.[31]

(b) 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

29 Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents (Public Access Regulation) [2001] OJ L145/43.

30 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 Art. 4(3) of the Public Access Regulation.

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

Fundamental Rights of the European Union (Charter), 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.

(c) Exceptions to public access to documents must be applied and interpreted narrowly.[32]

(d) For certain categories of documents the Union institutions, bodies and agencies can rely on a general presumption that their disclosure would undermine one of the interests protected by the Public Access Regulation.[33]

4.18 A balance between similar principles was being drawn in parallel by the CJEU in the successive cases of *Espirito Santo I*,[34] *Baumeister*,[35] *UBS Europe*,[36] *Enzo Buccioni*,[37] *Espirito Santo II*,[38] and *Di Masi and Varoufakis*[39] which were attentively followed by the AP.

4.19 Among the major challenges for the AP was the difficulty to reconcile its lack of competence to review the legality of the resolution scheme, as this falls outside its narrow remit, with the fact that the relevance of the requests to access documents was largely determined by the alleged collision between the resolution scheme adopted for Banco Popular and fundamental rights. 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[40] and that document disclosure had to permit the proper scrutiny of whether these two conditions were respected where a resolution decision was adopted.

4.20 Another, recurring issue has been the distinction between access to documents and requests of information, as in several cases the AP had to state that,

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

33 Case C-404/10 P, *Lagardère SCA v Éditions Odile Jacob SAS* [2013] EU:C:2012:393; Joined Cases C-514/07, C-528/07 P and C-532/07 *Sweden v Association de la presse internationale ASBL (API) and European Commission (C-514/07 P), Association de la presse internationale ASBL (API) v European Commission (C-528/07 P) and Commission v Association de la presse internationale ASBL (API) (C-532/07 P)* [2010] EU:C:2010:541; Case C-365/12 P *Commission v EnBW Energie Baden-Württemberg AG* [2014] EU:C:2014:112; Joined Cases C-514/11 P and C-605/11 P, *Liga para a Protecção da Natureza (LPN) and Finland v Commission* [2013] EU:C:2013:738; and Case C-562/14 P *Sweden v Commission* [2017] EU:C:2017:356.

34 Case T-251/15 *Espírito Santo Financial (Portugal) v ECB* [2018], EU:T:2018:234.

35 Case C-15/16 *Bundesanstalt für Finanzdienstleistungsaufsicht v Ewald Baumeister* [2018] EU:C:2018:464.

36 Case C-358/16 *UBS Europe and Others v DV and Others* [2018] EU:C:2018:715.

37 Case C-594/16 *Enzo Buccioni v Banca d'Italia* [2018] EU:C:2018:717.

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

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

40 In accordance with Art. 20 SRM Regulation creditors cannot obtain in resolution a treatment less favourable than under a hypothetical insolvency.

(i) under access to documents rules an institution, agency or body (including the SRB) is not obliged to create a document that does not exist,[41] and (ii) it can rely on a rebuttable presumption that, indeed, the document does not exist.[42] Yet, this issue also shows how matters of minute detail and core matters of principle can be closely interwoven, and how the design of quasi-judicial review occasionally demands important dosage of ingenuity to tailor solutions to a case.

4.21 This was shown in *Case 21/18*.[43] 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 SRM Regulation, which requires that an ex-post valuation is performed as soon as possible,[44] such ex-post definitive valuation was not necessary because the sale of business resolution tool 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).[45] In *Aeris* case[46] the appellant challenged before the General Court the Board's decision not to perform an ex-post definitive valuation. In parallel, it requested the Board access to the independent expert's economic assessment for a definitive ex-post valuation of Banco Popular and European Commission documents authorizing the Board's decision or refusing authorization. The Board refused access to these documents, and 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 there was an overriding public interest in disclosure,[47] which no appellant had so far succeeded in establishing. Yet the context of the request of access in this appeal was an action before the General Court where the appellant challenged

41 In *Appellant v the Single Resolution Board* [2019] AP Cases 14 and 15/18, for instance, the AP noted that, although the definition of 'document' to the effect of Regulation 1049/2001 must not be interpreted restrictively, due to the wide encompassing wording of Art. 3, letter 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. Judgment of 11 January 2017, *Typke v Commission*, C-491/15 P, EU:C:2017:5 at para. 31.

42 Case T-468/16 *Verein Deutsche Sprache v Commission* [2018] EU:T:2018:207.

43 *Appellant v the Single Resolution Board* [2019] AP Case 21/18, para 41–48.

44 Art. 20 (10)–(11) SRM Regulation.

45 Art. 20 (16) SRM Regulation.

46 Case T – 599/18 *Aeris Invest Sàrl v Single Resolution Board* [2019] ECLI:EU:T:2019:740.

47 In the AP decisions of 28 November 2017 *Appellant v the Single Resolution Board* [2017] AP Cases 34 – 43/17, and 19 June 2018, *Appellant v the Single Resolution Board* [2019] AP Cases 44 – 54/17, 56/17, and 1 and 7/18/18 it was stated that access to the documents received or exchanged with the ECB or the European Commission for internal use as part of the file and deliberations could be legitimately refused by the Board according to 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 it had happened to be in those cases.*

the SRB decision not to have the ex-post valuation as a violation of Article 20(11) SRM Regulation, 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,[48] or there would be a violation of constitutional limits to delegation of powers. One can notice that the AP could not decide on compliance with *Meroni*, but this was key to frame the relevance of the request of access. Thus, the AP clarified that (i) in its view *Meroni* case should be understood in light of the more recent judgment of 22 March 2014, *United Kingdom v European Parliament and Council*,[49] (ii) that the power to apply rules to complex factual situations does not necessarily amount to a policy-making discretionary power, which is what was considered illegitimate in *Meroni*[50] but (iii) no SRM Regulation 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 noted that the Board had clarified with its answers (i) that the European Commission had not issued any authorization or endorsement of the Board's decision not to perform the ex-post valuation; (ii) 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 the Board's answers were not contradicted by the internal documents reviewed by the AP.

4.22 This clarification satisfied the public interest in transparency, but at the same time resulted in the 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 what was originally a request for document disclosure turned into a request for information, and, as outlined above, an institution, body or agency

48 C-21/61 *Meroni v High Authority* [1962] EU:C:1962:12. For the constitutional implications of *Meroni* and *Romano* in the EMU context, see Koen Lenaerts, 'EMU and the EU's constitutional framework' [2014] *EL Rev* 753.

49 C-270/12 *United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union* [2014] EU:C:2014:18, paras 44–50.

50 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.

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.

D. WEAKNESSES AND CHALLENGES

4.23 The experience accrued so far by the AP shows that quasi-judicial review has been delivered on a timely basis, and generally accepted by the appellants in all cases but two before the AP.[51] Yet, the system exhibits some design weaknesses, which can be summarised as: (a) uncertainties in the relationship with the Union courts and (b) an excessively narrow scope of the remit.

(a) Several aspects of the AP's relation with Union courts still need to be clarified by further practice. Whilst it seems reasonably clear that the administrative appeal must be exhausted before filing a case before Union courts, it is doubtful whether the SRB can challenge the AP's decisions before the General Court or must rely on the European Commission to do so. Another problem is that the AP apparently cannot make references to the CJEU for a preliminary ruling. Although it is arguable that the AP would meet the *Vaassen* criteria for being a 'court or tribunal' entitled to make a reference for a preliminary ruling,[52] the AP is not a court or tribunal 'of a Member State'.[53] As a result, the AP could end up being precluded from making references for a ruling on the legality of Union law provisions central to its decisions, and would be bound to apply secondary law even in the face of potentially serious doubts as to their legality under primary Union law.[54]

51 Case T-16/18 *Activos e Inversiones Monterosso v SRB* [pending case] OJ C/83; Case T-62/18 *Aeris Invest v SRB* [pending case] OJ C/123.

52 Case 61/65 G. *Vaassen-Göbbels (a widow) v Management of the Beambtenfonds voor het Mijnbedrijf* [1966] EU:C:1966:39; Case C-54/96 *Dorsch Consult Ingenieurgesellschaft mbH v Bundesbaugesellschaft Berlin mbH* [1997] EU:C:1997:413, para. 23; and Case C-517/09 *RTL Belgium* [2010] EU:C:2010:82. See in particular Case C-205/08 *Umweltanwalt von Kärnten v Kärntner Landesregierung* [2009] EU:C:2009:767, paras 34–39. See also Case C-195/06 *Kommunikationsbehörde Austria (KommAustria) v ORF* [2007] EU:C:2007:613, paras 10–13, 22 and ibid., Opinion of AG Ruiz-Jarabo Colomer, points 24–41. The European Union Intellectual Property Office ('EUIPO') Board of Appeal is not considered a 'court or tribunal', see Case T-63/01 *Procter & Gamble v OHIM (soap bar shape)* [2002] 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.

53 This was the decisive criterion for denying such status to the Complaints Boards of the European Schools. See Case C-196/09 *Paul Miles and Others v Écoles européennes* [2011] EU:C:2011:388, paras 37–39.

54 Compare *Miles and Others*, ibid., 28, where the Complaints Board of the European School expressed a similar concern.

This is not new. Furthermore, the recent CJEU reform[55] that limits its own review in case there have been a previous decision by boards of appeals of some Union agencies (i.e., treating them as somehow part of the judicial review system), does not give any of these boards the possibility to make preliminary references. This is, however, particularly unfortunate for the AP, which, like other boards, adjudicates matters, but has no functional continuity with the respective agency, which places it more clearly within the CJEU's concept of 'court'.

(b) On the AP's remit, the competences granted are specific[56] and enumerated in a closed list, but this does not dispel all interpretative doubts on matters of competence[57] nor does it clarify why certain matters were excluded from the remits of the AP[58] (or other boards, for that matter). One must add to this the recurring question about the standard, or standards, of review by quasi-courts over supervisory decisions,[59] especially in comparison to the standards of the General Court and the CJEU. Some authors have argued that the AP's review must remain a legality review (and the AP cannot merely substitute its own appraisal for that of the SRB) however 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.[60] 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,

55 Regulation (EU, Euratom) 2019/629 of the European Parliament and of the Council amending Protocol No 3 on the Statute of the Court of Justice of the European Union (2019) OJ L/111. See Jacobo Alberti, 'The draft amendments to CJEU's Statute and the future challenges of administrative adjudication in the EU' [2019] 3 *Federalismi.it* 1–32.

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

57 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.

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

59 Andreas Witte, 'Standing and judicial review in the new EU financial markets architecture' [2015] 1 *J Fin Reg* 226, 226–32.

60 Herinckx (n 8) 26.

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.

E. CONCLUSION

4.24 The practice of the AP shows that this relatively new appeal body has been capable of offering a review of sensitive decisions, in a complex environment in a relatively agile manner. It has tried to combine the benefits of procedural flexibility and technical expertise. Although the picture is not black-and-white, the experience so far seems to show that quasi-judicial review strives to ensure that appellants had 'their affairs handled impartially, fairly and within a reasonably time'.[61]

4.25 Appellants got a timely, expert review. This protection appears to respect Article 41 of the Charter, but most important, in our view it would also respect 'fair trial' requirements of Article 47 of the Charter if these were applicable to administrative review.[62] Nonetheless, our previous discussion also exposed some weaknesses in the overall design, which could suggest reforms to enhance the complementary and supporting role of the AP to the CJEU in the adjudication of public law disputes in the field of bank resolution.

61 Using the words of the CJEU in case C-439/11 P *Ziegler v Commission* [2013] EU:C:2013:513, para. 154.
62 Herinckx (n 8) 21.