

***Reflections on the design and implementation  
of the European Banking Union***

*The experience and case law of the Board of Appeal of the  
European Supervisory Authorities*

***Università degli Studi di Bologna  
Annual conference of the European Association of Law and Economics***

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## Outline

- The purpose of this presentation is to highlight some of the issues which have proved to be relevant in practice to the work of the Board of Appeal of the European Supervisory Authorities.
- In particular, the presentation seeks to show that a positive contribution can be made by such a body, though the jurisdictional base of this particular body is narrow, and the case load is likely to be limited.



## Why are regulatory appeals relatively infrequent?

- The vast majority of financial regulatory/supervisory decisions do not give rise to justiciable complaints in most systems.
- Those decisions that *do* give rise to justiciable complaints are not in practice generally challenged because of the continuing relationship between the supervisors and the financial institution concerned.
- To give an example, the work of the Upper Tribunal of the English courts (and its predecessor the Financial Services and Markets Tribunal) in the field of financial regulation is relatively light, consisting mainly of disciplinary appeals by brokers etc.



## But how to provide redress?

- However, some regulatory decisions are going to be challenged, and it is possible that in the future this will become an increasing trend.
- The question then is how best to provide an effective review (for present purposes at the EU level), that is, a review that is sensitive to the needs of the regulatory system, but which at the same time gives the aggrieved party confidence that an independent appraisal will be made of the decision in question, and if necessary a remedy given.



## Why the courts are not always the best option

- The courts obviously play a central role in the process of redress, and only the courts are authoritative arbiters of the law – in the EU, that means the CJEU.
- However, experience shows that – at least at the initial stage – the courts are not always the ideal forum, either for the party bringing the challenge, or for the regulator.
- Part of the reason for this is the sheer complexity of current regulatory law. Specialist tribunals and specialist courts are found in many fields, and can be of value in this as in other fields.



## An example

An example comes from the United States, in the well-known decision of the District Court in *Metlife Inc v Financial Stability Oversight Council* (March 2016).

The criticisms that are made of the decision (rightly or wrongly) are that the court did not fully appreciate the significance of the concepts of financial stability and systemic risk post-2008, and inadvertently undermined central planks of the regulatory system (the decision is under appeal).



## A dedicated review/appeal body

- A dedicated review/appeal body can play a useful function in this respect alongside the courts.
- The intensity of the review need not be the same across the board – it depends on the particular type of decision.
- The work of the Max Planck Institute is very timely in assessing this function, and is welcome.



## Potential benefits

■ In principle, the review/appeal body's most important feature is that its members have expertise in two distinct ways:

(1) first, expertise in what is a highly specialised field of law,

(1) and second, equally if not more important, practical expertise in the subject matter of appeals.

So in the case of the ESAs Board of Appeal, we have lawyers with expertise in the field, economists, people with market experience, and distinguished former supervisors, all of whom bring their personal experience to the case in hand. This is an invaluable combination.



## Other potential benefits

Other potential benefits include:

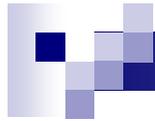
- (1) relative speed,*
- (2) relative procedural informality,*
- (3) lower cost*
- (4) identification of the key issues.*

As to (4), this can mean that if there is a further appeal to the court, the issues have been clarified, making the task of deciding the case simpler. This is a significant consideration when courts generally are experiencing heavy workloads.



## The European Supervisory Authorities

- The work of the European Supervisory Authorities extends of course to all Member States of the EU, whether or not members of banking union.
- Their work is essential among other things in producing common rules for the provision of financial services in Europe.
- However in terms of decisions which are potentially the subject of appeals, the direct regulatory powers of the ESAs are limited. Apart from interventions when NSAs are not fulfilling their duties, and certain emergency powers, it is at present only ESMA which has front line supervisory duties, namely those over credit rating agencies, and trade repositories.



## The Joint Board of Appeal

- The Joint Board of Appeal of the ESAs is established in the founding regulations of the ESAs, as part of their governance structure. It is therefore an integral part of the ESAs, but it is mandated by the regulations to act independently.
- This independence is essential for the credibility of the body.
- The administrative support for the BoA is provided by the Joint Committee of the ESAs. These arrangements have so far worked well.



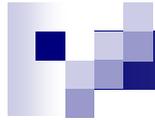
## The Board of Appeal's jurisdiction

- The jurisdiction of the BoA is set out in the founding regulations of the ESAs. It is not always easy to understand which decisions are, and which decisions are not, the subject of an appeal.
- Also, the relationship between the jurisdiction of the BoA and that of the court is not entirely clear. For example, should the right of appeal be exhausted before recourse to the court? These are matters which will be clarified over time.
- The Board of Appeal has itself communicated to the European Commission for its consideration various steps which would be helpful to its future workings.



## Practical issues

- Because of the comparatively limited role of the ESAs, appeals to the BoA are not frequent. There have to date been six decisions.
- Under the regulations, the BoA must sit in panels of six, two members for each ESA. Such a large panel works well because of the limited caseload, but would not be efficient if the workload increased substantially.
- The regulations require the decisions to be made public, and accordingly they are posted on the website of each of the ESAs.



## Limitations on the jurisdiction of the BoA

- In *SV Capital OU v EBA* (9 September 2015) the General Court held that the BoA has no competence to rule on cases where an ESA refuses to exercise its “own initiative” powers to institute an investigation, except where the appeal is brought by one of the bodies listed in the regulation. (An appeal is believed to have been brought by the appellant.)



## The nature of an appeal

- The following general question arises. When deciding an appeal, is the BoA limited to a review of the legality of the decision in question, or can it review the “merits” of the decision?
- This is not a straightforward question. However if an appeal is seen as a “box-ticking” exercise, it may be seen as of limited value to an aggrieved complainant, and other routes of redress will be sought.
- An alternative approach is that a proper margin of appreciation should be afforded to the decision making body, but the appeal body must accept responsibility to review the substance of the decision where appropriate.
- In this regard, it does not follow that the appeal procedure should apply the limited scope of judicial review in a court. The term “appeal” appears to envisage some wider remit.



## Issues to date

■ The experience to date of the BoA is sufficient to identify some of the issues that are likely to arise as regards such bodies.

■ These issues include:

- *Possible allegations of conflict of interest on the part of members, and how to deal with them.*
- *The procedure to be adopted including at the hearing (the regulations require the BoA to adopt its own Rules of Procedure, which has been done).*
- *The language of the appeal (the BoA has indicated that it is appropriate in these cases for the appeal to be brought in the language of the decision).*
- *The time allowed for the deciding of the appeal (it cannot be so curtailed that it is impossible to deal with the appeal fairly).*
- *The form of the decision.*



## To summarise

- To summarise, the Board of Appeal is at an early stage of its development, but like other similar bodies it has the potential to contribute positively to the resolution of regulatory disputes within the field of its competence.



## Endnote

- At this time, and in the great university city of Bologna, it is appropriate to finish by reflecting on the contribution made by Italy to the development of financial law.
- To take an example from the English case of *Goodwin v Robarts* decided in 1875, which held that Russian sovereign debt issued in the form of “scrip” was negotiable to the same extent as the underlying bonds, the court drew on the development of negotiable instruments in 12<sup>th</sup> century Florence, and 13<sup>th</sup> century Venice, to ascertain the content of the *lex mercatoria* in this regard.
- The court went on to cite from the (then contemporary) German and French jurisprudence.
- This approach sees European law not fragmented but as a unity, each respecting the other, where contributions from each go to make up the whole. It is still the right approach.