



THE EXPERIENCE AND THE CASE LAW OF THE ADMINISTRATIVE BOARD OF REVIEW OF THE SSM

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Bologna, 7 September 2015

* The opinions expressed in this presentation are solely those of the author and do not represent the official policy or position of the ABoR

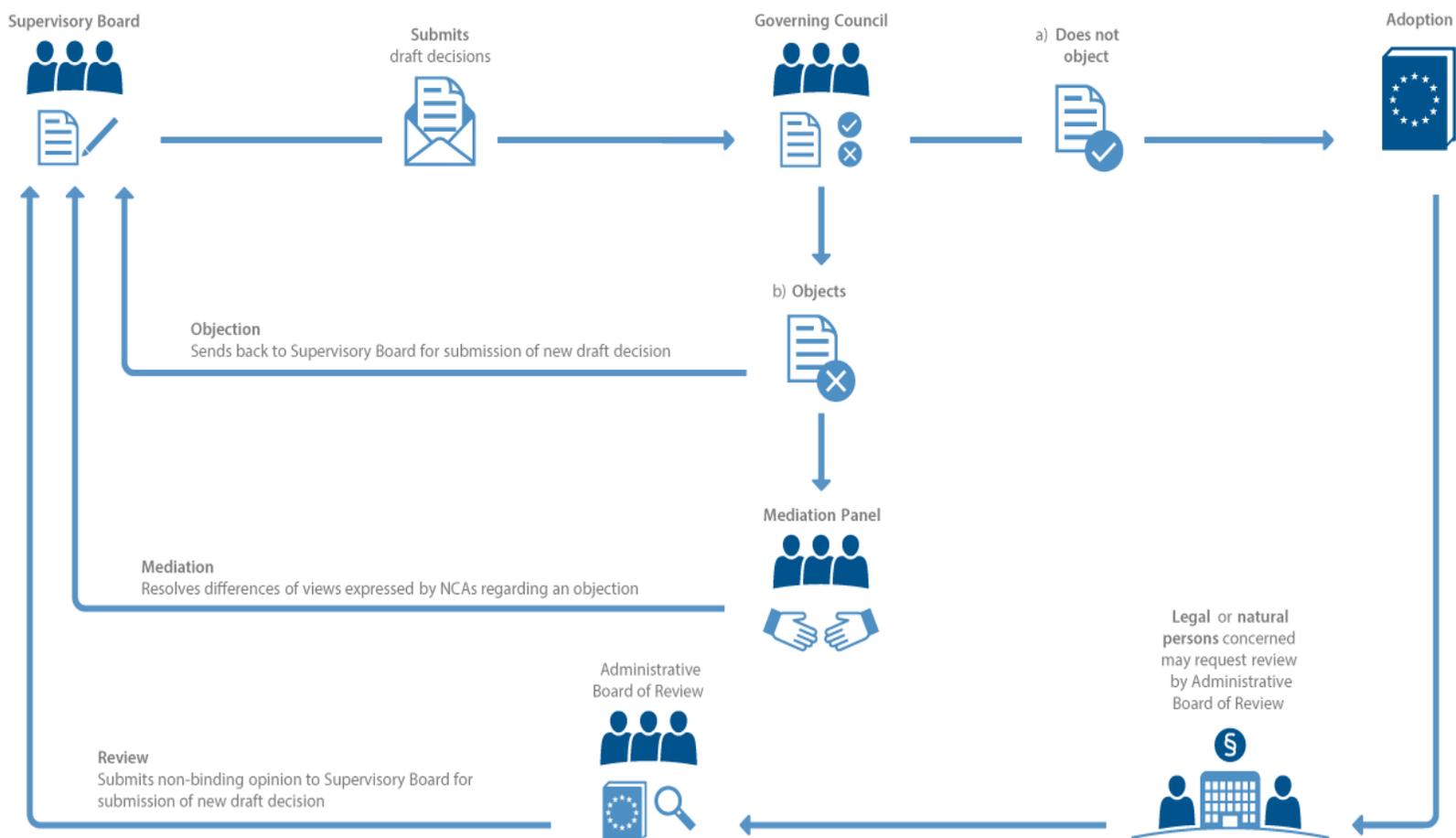
OUTLINE

- 1. The operating scheme and the core characteristics of the administrative review**
- 2. The role of the Administrative Board of Review**
- 3. The case law**

1. The scheme

- Any natural or legal person may request a review of a decision taken by the ECB in the exercise of the powers conferred on it by the SSM Regulation which is addressed to that person, or is of a direct and individual concern to that person.
- the ABoR shall express an opinion within two months from the receipt of the request and remit the case for preparation of a new draft decision to the Supervisory Board.
- The Supervisory Board shall take into account the opinion of the ABoR and shall promptly submit a new draft decision to the Governing Council. The new draft decision shall **abrogate the initial decision**, replace it with a decision of identical content, or replace it with an amended decision.
- The review is without prejudice to the right to bring proceedings before the Court of Justice of European Union (CJEU) in accordance with the Treaties

The ECB decision-making process



1. The core characteristics of the administrative review of the ECB decisions in the banking supervisory field:

A body composed of:

- **“independent” members:**
 - shall act independently and in the public interest
 - shall not be bound by any instructions
 - they shall make a public declaration of commitments and a public declaration of interests indicating any direct or indirect interest which might be considered prejudicial to their independence or the absence of any such interest;
 - should not be current staff of the ECB, as well as current staff of competent authorities or other national or Union institutions, bodies, offices and agencies who are involved in the carrying out of the tasks conferred on the ECB by the SSM Regulation
- with **relevant knowledge and professional experience in the fields of banking or other financial services**

1. The operating procedure adopted by the ABoR is “quasi-judicial”

Procedural aspect of the review:

The Board:

- rules on the admissibility of the request before examining whether it is legally founded (rules about the standing are the same as those provided by TFEU for having standing before the CJEU)
- assessment is limited to the examination of the grounds relied upon by the applicant as set forth in the notice of review (on the contrary the Supervisory Board may also take other elements into account in its proposal for a new draft decision)
- may propose to the Governing Council to suspend the contested decision if:
 - the request for review is admissible and not obviously unfounded;
 - it considers that the immediate application of the contested decision may cause irreparable damage.

1. The operating procedure adopted by the ABoR is “quasi-judicial”

Procedural aspect of the review:

The Board:

- may call for an oral hearing where it considers this necessary for the fair evaluation of the review:
 - both the applicant and the ECB shall be requested to make oral representations at such hearing;
 - but the hearing shall not be open to third parties
- shall decide on the basis of a majority of at least three of its five members

1. The operating procedure adopted by the ABoR is “quasi-judicial”

Evidence

The applicant:

- may request the ABoR’s permission to adduce, in the form of a written statement, witness or expert evidence;
- may request the ABoR’s permission to call a witness or expert who has given a written statement to give oral evidence at the hearing;
- shall have the right to cross-examine witnesses or experts called on by the ECB where this is necessary for the just determination of the review

The ECB:

- may request the Administrative Board’s permission to call a witness or expert to give oral evidence at the hearing;
- permission shall only be given if the ABoR considers it necessary for the just determination of the review;

Witnesses or experts shall be examined by the Administrative Board.

1. The operating procedure adopted by the ABoR

The confidentiality of the proceedings: a typical feature of the administrative review:

- The proceedings of the ABoR **shall be confidential unless the Governing Council authorizes** the President to make the outcome of the particular proceedings public (Article 22(2) of the ECB/2014/16).
- Given that **the proceedings before the ABoR are part of the decision making process of the ECB**, the confidentiality of the process before the ABoR and of its opinion is justified by the confidentiality that applies to all acts of the ECB as a supervisory authority (Article 27 of the SSM Regulation on professional secrecy).
- **The duty of confidentiality also protects the interest of the applicant in not having “non-public” information on its financial situation or on its relationship with the supervisory authority disclosed.**

1. ABoR “express an opinion”

Is this **solution the result of the decision not to amend the Treaty** which provides the Governing Council as the only decision-making body of the ECB?

- the SSM has a complex decision-making structure: the Governing Council can only object to the decision of the Supervisory Board but cannot replace its decision. Therefore, if the ABoR opinion were to be binding on the Supervisory Board, de facto, it would have been binding on the Governing Council as well.
- The “independence” of the ECB in the EU legal system makes it difficult to conceive that a body composed of “independent experts” may bind the decision-making power of the Governing Council. Undoubtedly, not a body established by a European regulation.

1. Is it just an opinion?

- **I don't believe so:**
 - The opinion **must propose whether the initial decision should be abrogated, replaced with a decision of identical content or replaced with an amended decision.** In the latter case, the **opinion should contain proposal for the necessary amendments** (article 16(2) ECB72014/16)
 - the Supervisory Board **“shall take into account the opinion”** of the ABoR (Article 24(7) Reg. No. 1024/2013)
 - the Supervisory **shall in any case promptly submit a new draft** decision to the Governing Council and the **new draft decision abrogate the initial decision**; it may replace the original decision with a decision of identical content or replace it with an amended decision (the **Supervisory Board may accept in full or in part the opinion** of the ABoR) (Article 24(7) Reg. No. 1024/2013)
 - the ABoR's opinion **“shall be notified to the parties”** (Article 24(9) Reg. No. 1024/2013) and accordingly if the parties affected by the ECB decision appeal it before the CJEU **the arguments of the ABoR will be disclosed in court and the CJEU could consider the arguments of the ABoR.**

1. Scope of the review

The Administrative Board of Review carries out an internal administrative review pertaining to “...**the procedural and substantive conformity with this Regulation...**” of the decision taken by the ECB in the prudential supervisory field.

- These expressions **allow a broad interpretation of the powers of the ABoR?** This body carries out a review different from a mere assessment on the legality of the ECB powers?
 - The substantive conformity means that the ABoR review **is not limited to “infringement of an essential procedural requirements”** but it should **respect the margin of discretion left to the ECB to decide on the opportunity to take those decisions**” (recital 64 Reg. No 1024/2013).

1. Scope of the review

- To define the scope of the ABoR revision it's useful to point out the CJEU “limited standard of review”:
- Where the Union Courts review the legality of a complicated “**economic assessment**” made by the Commission or another institution and the institution concerned has a “**broad discretion**”, **the review will be confined to whether the procedural requirements were complied with, whether**
 - the statement of reason is sufficient
 - the facts are correctly reproduced
 - there wasn't a manifestly wrong assessment
 - there wasn't a misuse of powers.

1. Scope of the review

- Should ABoR's mandate exclude an evaluation of the conformity of the ECB decision with Union law in general (for instance on the basis of unequal treatment, non-discrimination, a lack of motivation, proportionality)? (Wymeersch 2014). I don't think so because:
 - Most of these principles are expressly referred to in SSM Regulation (equal treatment, and non-discrimination and the duty to state the reasons; recital 30; Articles 30(1); 22(2))
 - This theory would undermine the main purpose for which this body of internal review was established: to prevent the ECB carries out acts voidable in court (recital 64 provides that the ECB should establish the ABoR "for reasons of procedural economy")

2. THE ROLE OF THE ABoR

The scope of the ABoR's review:

- its review is not limited to procedural matters, but it can **consider the substantive conformity to the law** of the ECB decisions.
- its review **is confined to ascertaining that the facts have been accurately stated, that there has been no manifest error of assessment and no error in law**
- The proceedings before the ABoR have an added-value: the specific knowledge and the experience of the ABoR's members allow them to **assess thoroughly and expertly whether the decision complies with the prudential rules**
- The ABoR offers a **“well qualified” assessment of the prudential aspects of the case underlying supervisory decisions.**

2. THE ROLE OF THE ABOR

The ABoR:

- **is an organ of the ECB?** even if its decisions are not binding on the ECB (the comparison the Board of Appeal of *Office for Harmonization in the Internal Market* (OHIM); the latter body, according to CJEU “...forms an integral part of the Office”; CFI, Case T-110/01 *Vedial v OHIM* [2002] E.C.R. II-5275, paras 16-25)
- **Yes because:**
 - According Article 24(1) “The ECB shall establish an Administrative Board of Review”
 - it is part, albeit only following a request by third party, of the decision-making process of the ECB

2. THE ROLE OF THE ABoR

- The ABoR is an **administrative body** and **cannot be regarded as being a court or tribunal** even if the **operating procedure** adopted by the body is “**quasi-judicial**” (like the OHIM - CFI, Case T-63/01 *Procter & Gamble v OHIM* [2002] E.C.R. II-5255, para. 20)
- Whereas the ABoR does not issue a binding opinion to the ECB, one cannot apply to the ABoR the points made by some authors commenting on the role of the Board of Appeal of ESA:
 - “has an **adjudicative function**” (W. Blair, 2013)
 - displays “**quasi-judicial functions**” (M. Lamandini 2014)

2. THE ROLE OF THE ABOR

Which is the aim of this body?

- **reduce the cost of an appeal** for people affected by an administrative decision of the ECB (the appeal before the CJEU is costly and forcing the bank to disclose confidential information);
- ensure that parties who are affected by an ECB decision **are protected by the law in a manner which is suited to the special characteristics of the banking supervision**
- the idea behind the establishment of an ABoR is the creation of a system of review of administrative decisions **entrusted to persons with specific expertise in the field.**
- **protect the interest of the public administration to operate in full compliance with the law and not to implement acts voidable in court.**

3. The case law

Since its establishment in September 2014 and by 1 September 2016:

- **17 requests for review**
- **14 opinions:**
 - 6 proposing to maintain the initial decision (2 inadmissible)
 - 7 proposing to amend it
- **3 requests withdrawn**
- Different language regime: 4 EN, 2 DE, 3 FR, 2 IT, 2 ES
- 11 hearings of applicants
- 4 cases brought before the Court of Justice

3. The case law: main issues raised

- **When is a bank significant?**
 - e.g. business model, scope of consolidation of a banking group
- **What is a banking group?**
 - e.g. Article 10 CRR, status of joint ventures in banking groups
- **Corporate governance of the credit institution**
 - e.g. the principle of separation between supervisory and management functions
- **Interrelation between the ECB and NCAs powers**
 - e.g. the powers of the ECB as consolidating supervisor;
 - e.g. the withdrawal of the licence of a less significant institution

3. The case law: ABoR's area of focus

- duty to motivate;
- the respect of the proportionality principle;
- the responsibility of the ECB in complex decision-making proceedings;
- lack of harmonisation in the implementation of EU law at national level.