

# **Interplay of administrative review and judicial protection in European prudential supervision**

*Some issues and concerns*

Presentation at the Conference

*Judicial review in the banking Union and in the EU financial architecture,*  
jointly organized by the Bank of Italy and the European Banking Institute,  
Rome, 21 November 2017

# Disclosure and disclaimer

- ❑ *Professor, Law of the Economic and Monetary Union, University of Amsterdam*
  - ❑ *Alternate Member, Administrative Board of Review (ABoR), European Central Bank*
  - ❑ *Assessor, Competition College, Belgian Competition Authority (BCA)*
  - ❑ *Consultant, EMU law and banking regulation, RS Law & Society Consulting B.V.*
- 
- No disclosure of confidential information (ABoR, BCA)
  - Presentation title a misnomer: just banking union; just SSM
  - All views my own

# Overview of the paper

1. Introduction: scope of the presentation
2. Administrative review: contours, briefly
3. Administrative review: issues, mainly
4. Transparency: comparatively
5. Subsequent cases at the European Courts.
6. *L-Bank, Trasta* and more...
7. Concluding remarks

# Papers

- **Competences and alignment in an emerging future**  
*After L-Bank: how the Eurosystem and the Single Supervisory Mechanism may develop,*  
Paper for the Conference **The New ECB in Comparative Perspectives**, European University Institute, 19-20 September 2017 – soon on the ADEMU website: <http://ademu-project.eu>.
- **Reflections on Euro Area banking supervision: context, transparency, review and culture**  
*A contribution to the conversation on the SSM after three years,*  
Paper for the Conference **The European Banking Union and its relationship with the law: reflections three years on**, London (UK), 23 October 2017
- **Interplay of administrative review and judicial protection in European prudential supervision**  
*Some issues and concerns*  
Paper presented at the Conference *Judicial review in the banking Union and in the EU financial architecture*, jointly organized by the Bank of Italy and the European Banking Institute, Rome, 21 November 2017



21 November 2017

© René Smits 2017

**Pantheon, always awe inspiring**

# Numbers may not tell the whole story

**To be explained later**

# Contours of administrative review

- Low cost, fast, independent review of...
- procedural and substantive conformity with SSM Regulation (including Charter, principles)
- ABoR is bound to the grounds relied upon by the applicant in its notice of review
- ABoR reviews *ex tunc*, but is neither deaf nor blind – Supervisory Board “may take other elements into account in its proposal for a new draft decision” – **two** decisions of the ECB

# Phases, oral hearing, role Alternates

- Three phases:
  - (a) preparatory phase (including admissibility assessment)
  - (b) examination phase, which may entail an oral hearing and the collection of the relevant evidence
  - (c) deliberative phase (adopted opinion to SB)
- Alternate members do not take part in oral hearing and subsequent deliberations and voting.
- Due process before first ECB decision: (1<sup>st</sup>) hearing

# Review rate

- Going against the supervisor in formal proceedings is a step not easily chosen: the supervisor will continue to oversee the business of the challenger, and may react by intensifying its supervision.
- 8 out of 4,870 supervisory decisions ( $1,835 + 3,035$ ) = 0,16%, or **one in every 609 decisions**, gets subject to ABoR review. That was for 2016; this year, the number of review requests dropped by 50% as the ABoR had only 4 cases (the number of supervisory decisions as yet unknown, no review rate for 2017 can be calculated).

# Administrative review: issues

- ‘Significance’ of a supervised entity;
- Corporate governance;
- Outcome of the Supervisory Review & Evaluation Process (SREP) under which ECB may impose higher capital and liquidity requirements, and other supervisory measures, than statutorily prescribed in view of the riskiness of a bank’s business;
- Fit and proper (FAP) assessment of members of the management body;
- Withdrawals of the authorisation;
- Sanctions;
- Relationship with NCAs;
- Supervisory fees.
- **Reliance on national law – two elements highlighted in joint article on ABoR (Concetta, Andrea, René): FAP and BHC supervision; see:**  
Brescia Morra, C., Smits, R. & Magliari, A. *Eur Bus Org Law Rev* (2017) 18:567; <https://doi.org/10.1007/s40804-017-0081-3>.

# Transparency – ECB options

- No publication, even in abridged form, of ABoR Opinions
- ABoR is part of the (second) decision-making process within the ECB, so sensitive to go public
- ECB Governing Council may authorise ECB President to make the outcome of ABoR proceedings public **(22(2) ABOR)**
- ECB may amend ABoR Establishment Decision as long as it remains within the confines of Article 24 SSM Regulation
- ECB may decide to provide quarterly statistics on number of review requests and ABoR Opinions adopted; their nature, i.e. proposing abrogating the ECB's decision, its confirmation or its replacement with an amended decision; subject matter of the contested issue (e.g., significance, SREP, FAP, corporate governance, sanctions).

# Transparency: Court options

- divulge information on pending cases which includes the fact that these cases are post-ABoR proceedings, something that will be clear from the file
- Curia website, Official Journal notification

- Federico and I cannot do more than:

[https://ebi-europa.eu/wp-content/uploads/2017/08/Cases-against-the-ECB-and-preliminary-proceedings-concerning-prudential-supervision\\_public-sources-1-September-2017\\_def\\_.pdf](https://ebi-europa.eu/wp-content/uploads/2017/08/Cases-against-the-ECB-and-preliminary-proceedings-concerning-prudential-supervision_public-sources-1-September-2017_def_.pdf)



# Cases at the General Court - 1

- ***The French banking industry against the ECB***
- Six cases by French banks against the ECB on its apparent dismissal of an application for authorisation to exclude certain public-sector exposures from the calculation of the leverage ratio
- Regulated savings in the form of the *Livret A* and connected deposits with the *Caisse des Dépôts et Consignations* (CDC)
- French banks: ECB incorrectly assesses prudential risk associated with these and thus renders a provision of the Capital Requirements Regulation (CRR) ineffective that allows specifically for the exclusion from the calculation of a bank's exposures of certain exposures to a public entity.
- Case T-751/16: Finland given leave to intervene in support of the ECB.
- Numbers 11-16 on the list: Case T-758/16, (*Crédit Agricole v ECB*); Case T-768/16, (*BNP Paribas v ECB*); Case T-757/16 (*Société générale v ECB*); Case T-751/16 (*Confédération Nationale du Crédit Mutuel v ECB*); Case T-745/16 (*BPCE v ECB*); and Case T-733/16 (*Banque Postale v ECB*).



# Cases at the General Court - 2

- ***Crédit Agricole***
- Four cases from the *Credit Agricole* group on issues of governance;
  - ❑ Cumulative functions of the Chair and the CEO
  - ❑ Time allotted to the function of bank director
  - ❑ Four eyes principle.
- ECB is alleged to have misconstrued CRD IV and *French Code monétaire et financier* in decisions of 29 January 2016
- A hearing has been held in these cases on 23 October 2017.
- Numbers 5-8 on the list: Case T-133/16 (*Caisse régionale de crédit agricole mutuel Alpes Provence v ECB*); Case T-134/16 (*Caisse régionale de crédit agricole mutuel Nord Midi-Pyrénées v ECB*); Case T-135/16 (*Caisse régionale de crédit agricole mutuel Charente-Maritime Deux Sèvres v ECB*); Case T-136/16 (*Caisse régionale de crédit agricole mutuel Brie Picardie v ECB*).



# Cases at the General Court - 3

- *Credit Mutuel Arkéa*
- Two cases by *Credit Mutuel Arkéa* against the ECB relate to an SREP decision and concern the governance of the group.
- The publicly available information shows that this French bank challenges SREP decisions of two dates (5 October 2015 and 4 December 2015): the two-month period between these two dates may lead an informed outsider to surmise ABoR proceedings were conducted in between: a second decision normally follows a first when the ABoR has opined on the matter.
- A hearing has been held in these cases on 6 June 2017.
- Numbers 2 and 3 on the list: Cases T-712/15 and T-52/16 (*Crédit Mutuel Arkéa v ECB*).



# Cases at the General Court - 4

- *Trasta*
- Withdrawal of a license of an LSI in Latvia
- Issue of the standing of the bank and of the shareholders after liquidator withdrew authorisation for attorney to act for the bank
- General Court: liquidator, installed at the behest of supervisory authority, has power to determine whether an appeal can be lodged against the withdrawal of the license: bank effectively barred from taking action – unlikely that liquidator will challenge supervisory authority's decision to withdraw the licence, the very basis for his functioning in this capacity
- Pending and prior ABoR so reticence is called for
- Yet: access of affected parties to judicial and administrative review even of altogether sound supervisory decisions is a fundamental element of a well-functioning democratic community of law
- Numbers 9 and 10 on the list: Case T-247/16 and Case T-698/16 (*Trasta Komercbanka and others v ECB*)





# Judgment in Case T-122/15 (*L-Bank*)

- L-Bank's arguments that it should have remained under sole German supervision resoundingly rejected
- Any bank claiming "particular circumstances" that justify its qualification as less significant in spite of meeting the criteria for 'significance' in the SSM context, needs to show that national supervision is *better able* to attain the objectives of the SSM Regulation (and not solely: just as well able);
- SSM Reg. objectives repeatedly referred to as the "consistent application of high prudential standards";
- The *NCA*s perform *decentralised* tasks which form part of the exclusive ECB competences in the field of prudential supervision over all banks in the Euro Area; the allocation of competences to NCA's within the SSM concerns a *delegation* from Union to State level; prudential supervision over LSIs by NCA's is *not the exercise of a national power* – an unexpected reading that strongly underpins the ECB's SSM powers;
- ABoR's Opinion is given weight by the General Court as it considers an ECB Decision adopted in conformity with an ABoR Opinion "an extension of" the ABoR Opinion (*French text less strong*); ABoR's reasoning may be taken into account when assessing whether the subsequent ECB Decision is sufficiently motivated (adequately reasoned).

# Numbers may not tell the whole story

- Numbers of individual cases may conceal clusters of issues (the 19 cases before the General Court mainly concern four issues);
- Numbers may conceal actual outcomes: any impression that the ABoR fails to opine differently from the ECB is false as, **even when the ultimate outcome is considered in accordance with the required standard** (*procedural and substantive conformity with the SSM Regulation and the principles and rules referred therein – including the EU Charter of Fundamental Rights*), ABoR's Opinion is likely to have suggested material improvements, notably on motivation (reasoning);
- Administrative review has an impact way beyond an actual case: the ABoR may question the approach taken by the ECB which, in turn, may lead to changes in procedures and approaches. **Never underestimate the incidence of independent scrutiny.**