

The role of judicial review in the EU's financial architecture and the development of alternative remedies: the experience of the Board of Appeal of the European Supervisory Authorities

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The main subject matter of these remarks

- How the European Supervisory Authorities (ESAs) fit into the EU's financial architecture
- The reasons for providing for a review of their actions
- The provision of an alternative remedy by way of an appeal to a specialist review body
- Jurisdiction, and the relationship with the court's jurisdiction (CJEU)
- Independence and due process
- The main aspects of the BoA's experience as a reviewing body
- What developments may be expected in the future

The changes in the EU's financial architecture following the global financial crisis of 2007-8

- Until the GFC, although the content of financial regulation throughout the EU was largely a matter of EU law, implementation was largely a matter for national regulatory authorities
- The EU overhauled its system of financial regulation in the wake of the financial crisis, following the recommendations in the de Larosière report on Financial Supervision in the EU published in 2009, creating the European Supervisory Authorities (ESAs) and the European Systemic Risk Board (ESRB)
- Although the ESAs direct powers are relatively limited, their establishment was seen as the foundation of an EU system of financial regulation/supervision
- This has been enhanced by the Commission's September 2017 proposals to strengthen the ESAs to pave the way for a full Capital Markets Union

The European Supervisory Authorities

- The ESAs were established in 2011 and are –
 - the European Banking Authority (EBA) presently based in London
 - the European Insurance and Occupational Pensions Authority (EIOPA) based in Frankfurt
 - the European Securities and Markets Authority (ESMA) based in Paris
- The ESAs' mandate is to contribute to developing the Single Rulebook, solve cross-border problems, and promote supervisory convergence
- ESMA also has direct regulatory responsibilities for credit rating agencies and trade repositories (such as DTCC Derivatives Repository Ltd)
- These were previously outside the scope of formal financial regulation, and there had not previously been a significant part of the financial sector supervised at the European level in this way

Changes to the EU's financial architecture that followed the sovereign debt crisis

- Banking Union has brought an important shift towards front-line regulation at the EU level
- It is currently based on two pillars: the Single Supervisory Mechanism (SSM) and the Single Resolution Mechanism (SRM)
- The SSM became fully operational in November 2014, the SRM on 1 January 2016
- In its supervisory role, the ECB's core task is to perform supervision of those banks which are under its direct responsibility
- Responsibility for the orderly resolution of failing banks is shared between the Single Resolution Board (SRB) at European level and national resolution authorities

These changes to the EU's financial architecture have implications for judicial (and non-judicial) review of regulatory action

- Regulatory action includes a vast range of matters within the regulators' particular expertise (such as capital requirements) or day-to-day supervision
- Some kinds of regulatory action, however, such as the withdrawal of authorisation (which may effectively close a business), the imposition of financial and other penalties, and issues as to access to documents, call for rights of review on the part of parties adversely affected by the decision
- The question 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 against the regulator
- It should however be noted that experience shows that regulated entities often prefer to reach a settlement with regulators, rather than pursue appeals, and that in some jurisdictions challenges by major institutions are rare
- Moody's did not appeal the €1.24m fine imposed in June 2017, though it had the right to so

Examples of rights of review from decisions of securities regulators

- In domestic systems, these are typically provided by way of an appeal to a specialist tribunal, or to the domestic courts, or both (there is no uniformity in this respect)
- *Germany* – individual investigatory measures by *BaFin* or other regulators may be challenged before the competent administrative court, though it seems this does not happen in practice. Administrative fines must be challenged by filing a formal objection upon which the case will be referred to the public prosecutor and, ultimately, to a criminal court
- *USA* – the imposition of fines is a matter for the courts, but administrative proceedings can be initiated by the *SEC* heard by an independent “administrative law judge”: a recommendation for a civil money penalty may be appealed to the SEC, and further appealed to the court. The system has been thrown into doubt by the recent decision of the 10th U.S. Circuit Court of Appeals in *Bandimere v. SEC* that its in-house administrative judges are not constitutionally appointed (the SEC is seeking to appeal to the US Supreme Court)

Rights of review from decisions of the ESAs

- When the ESAs were established, provision was made in the founding regulations for a right of appeal against certain decisions of the ESAs to the Joint Board of Appeal
- In its proposal for the regulations, the Commission explained that the appeal system would ensure that any natural or legal person, including national supervisory authorities, could appeal to a Board of Appeal against a decision by one of the ESAs to ensure the coherent application of Community rules, action in emergency situations, and the settlement of disagreements
- Why should there be a right of appeal? One reason is that some of the ESAs' decisions could have a direct effect on the rights of businesses and consumers. Another is that an independent appeal process is part of the accountability of the supervisory authorities. Finally, it is an aspect of good governance.
- The model followed is similar to that already adopted for some other EU agencies with widely differing roles, the body being a specialist tribunal, whose members are appointed on the basis of their expertise in the field of finance and financial supervision

Jurisdiction and competency

- The right of appeal against decisions of the ESAs is stated in Art 60.1 of the founding Regulations: doubts as to which decisions are the subject of an appeal will need to be resolved in the jurisprudence of the CJEU over time
- In *SV Capital OÜ v EBA* C-577/15, [2016] EUECJ C-577/15, in dismissing an appeal from the General Court, it was confirmed that the BoA has no competence to consider an appeal by a private party against the refusal by the EBA to institute an “own motion” investigation
- In principle, the BoA will decide an issue as to jurisdiction as a preliminary issue (Art 60.4)
- In any case, because the direct regulatory powers of the ESAs are presently limited, the jurisdiction of the BoA is quite narrow: there have been 7 decisions handed down between 2013 and 2017

Jurisdiction as between the BoA and the CJEU

- By Art 61 of the founding Regulations, proceedings may be brought before the CJEU contesting a decision of the BoA in accordance with Article 263 TFE, or where there is no right of appeal to the BoA
- Appeals go the General Court in the first instance
- Where both the BoA and the CJEU have jurisdiction, it is not entirely clear whether a party must appeal to the BoA first – support for the view that it must is expressed in some of the commentary (e.g. *Law Enforcement by EU Authorities: Implications for Political and Judicial Accountability*, ed Miroslava Scholten, Michiel Luchtma, 2017, p.76)
- The BoA is well suited to find the facts, and narrow the issues, thereby saving time and expense, and its expertise should be recognised in the decision making process, even if the matter does ultimately goes to the Court

The ESAs Board of Appeal is required to be independent

- Appeal rights are only of value if the appeal body is independent in its decision making
- Although the Board of Appeal is part of the ESAs, its duty of independence and impartiality is expressly enshrined in Art 59 of the founding Regulations
- There are provisions precluding members from taking part in an appeal in case of conflicts of interest, and we have to make annual public declarations in this regard – parties are notified of the composition of the Board at the outset of the appeal process, and are entitled to challenge members on conflict grounds
- Further, there is a right of appeal from the Board of Appeal to the Court of Justice of the European Union, and this is a further guarantee of our duty of independence

The procedure of the Board of Appeal upholds due process

- Observing due process is an essential feature of the work of the BoA and established in the process set out in the founding Regulations and in the Rules of Procedure
- All the usual principles apply – a practical issue is transparency, establishing at the outset that there can be no unilateral communications with the BoA
- Due process also requires that parties have a proper opportunity to state their case, and sufficient time in which to do so, which has significance in interpreting and applying the time limit in Art 60.2
- For an analysis of the underlying legal issues in the SSM context, see Quaderni di Ricerca Giuridica della Consulenza Legale, *Depicting the limits to the SSM's supervisory powers: The Role of Constitutional Mandates and of Fundamental Rights' Protection*, Marco Lamandini, David Ramos Muñoz, Javier Solana Álvarez

The procedure of the Board of Appeal in practice

- The Rules of Procedure adopted pursuant to the founding Regulations provide for the conduct of the appeal from the exchange of written materials between the parties through to the giving of the Board's decision
- Procedural directions are in practice vital to enable the process to run efficiently, and as provided for in the RoP, can be given by the President on behalf of the Board, or by the full Board
- Directions can be responsive to requests from the parties, or given on the initiative of the Board
- The parties express their views, and having considered them, the President issues directions – the whole process is generally conducted by email
- This is done through the Secretariat – there is no direct contact between the Board and the parties
- The Secretariat is provided through the Joint Committee of the ESAs, and rotates annually – a permanent secretariat is not required given the limited case load of the BoA – a firewall protects information

From notice of appeal to hearing

- Although an appeal does not have a suspensive effect, the BoA may suspend the application of the decision if it considers that circumstances so require (this power has not so far been invoked)
- In determining an appeal, the BoA is constituted by 6 members or alternate members, 2 from each ESA, one of whom is usually rapporteur
- Under the founding Regulations, parties are entitled to make oral representations, though in practice they have often been content to present their cases in writing
- Hearings are held at the premises of the ESA that is providing the Secretariat (unless the appeal involves that ESA), and a transcript is taken by professional transcribers
- If required, translation facilities will be provided, though this has not proved necessary to date

Language

- Parties generally bring the appeal in the language of the ESAs' decision (which to date has been the English language)
- In *FinancialCraft Analytics Sp. z o.o. v ESMA*, BoA 2017 01, 3 July 2017, the language of ESMA's decision was English, but the Notice of Appeal was submitted in the Polish language (as was the appellants' right)
- The language issue was the subject of discussions through the Secretariat between the BoA and the parties
- Directions were given by which translations of documents in the Polish language which had been submitted in respect of the original application were to be used for the appeal, the Notice of Appeal being sent to the Translation Centre for the Bodies of the EU for translation into the English language
- In the event, translation took up time, but language was not itself an issue

From deliberation to decision

- Once the President considers that the evidence is complete, the parties are notified and the BoA considers its decision on the Appeal – deliberations are in private
- The decision is sent by the Secretariat to the parties who have 7 days in which to provide suggested corrections of clerical mistakes (there is no right to reopen the arguments)
- The Rules of Procedure also provide that the parties may request that particular information is treated confidentially
- Art 60.7 of the founding Regulations provides that the decisions taken by the Board of Appeal shall be reasoned and shall be made public by the Authority – this is done by posting them on the ESAs websites

Current developments

- The European Commission published reform proposals in September 2017 to pave the way for further financial integration and a full Capital Markets Union in the EU
- These proposals will improve the mandates, governance and funding of the ESAs
- ESMA will have direct supervisory power in respect of certain benchmarks, prospectuses, and investment funds, and a greater role in coordinating market abuse investigations
- The ESAs will have a role in promoting sustainable finance and Fintech
- This marks a significant further step towards the integration of financial regulation/supervision at the EU level

Conclusion

- The ECB Administrative Board of Review, the Single Resolution Board Appeal Panel and the ESAs Board of Appeal have distinct mandates, but share the aim of providing an independent review of regulatory action in the field of EU financial supervision
- Alongside the national and EU courts, these bodies can play an important role in developing practice and jurisprudence
- The bodies have the advantage of expertise in a highly specialised field
- Their potential is to provide a means of dispute resolution which combines relative speed and procedural informality at a lower cost than court proceedings
- If the matter does proceed further, the key issues will have been identified, and the court process thereby facilitated

This is who we are: the visit of the members of the ESAs Board of Appeal to the Court of Justice of the European Union (CJEU)

