

# **Roundtable: Quasi-Judicial and Judicial Review in Banking and Capital Markets Law**

**Comments by**

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# Review bodies in European financial law

Agencification of EU administration > proliferation of appeal bodies

Financial sector: three appeal bodies:

- ESAs Joint BoA

- ECB ABoR

- SRB AP

Soon to be joined by one more: AMLA ABoR (modelled on the ECB ABoR)

Lack of uniformity

- Organizational and procedural variations

- Different role, imprecisely defined mandate

- Bindingness of decisions: ABoRs v BoA/AP

# Uncertainty and complexity

Legal certainty and predictability:

presuppose normative clarity and structural simplicity

Overcomplexity can be a source of non-transparency and uncertainty

In the case of European financial appeal bodies:

Instead of streamlined review mechanisms, inconsistent and confusing substantive and procedural framework

Ambiguous and rudimentary legislative frameworks

Uncertain nature and role (scope *ratione materiae*, nature/standard of review)

Need for substantive and procedural consistency

between GC and ECJ;

amongst the appeal bodies

Potential inconsistency between the European and national levels

(eg, in relation to admissibility/standing and standard of review, liability of public authorities, challenges to administrative sanctions)

# Admissibility and standing

Restrictive test for persons other than the addressees: direct and individual interest

Case 25/62, *Plaumann*, ECLI:EU:C:1963:17

Shareholders' standing

C-663/17 P, *Trasta Komercbanka*, ECLI:EU:C:2019:923

v.

T-502/19 P, *Corneli v ECB*, 12 October 2022, ECLI:EU:T:2022:627

Formalism: legal effects (however negligible) give standing, but mere economic harm does not! Does this guarantee effective judicial protection?

Formalism: only the final act counts, unless it is fully predetermined

*Quaere*: Does Art 32B BRRD justify a different result?

Different rules on standing in EU and national administrative law

Different opportunities for challenging identical measures when addressed by national authorities to LSIs?

# Mandate *ratione materiae*

ECB ABoR: power to ‘review of decisions taken by ECB in the exercise of the powers conferred on it by this Regulation’; SSMR, Art 24(1)

ESAs BoA: ‘Any natural or legal person, including competent authorities, may appeal against a decision of the Authority referred to in Articles 17, 18 and 19 and any other decision taken by the Authority in accordance with the Union acts referred to in Article 1(2)’; ESAs Regulations, Art 60(1)

Cf. Art 60a on ESAs exceeding their competence (Commission responsibility); and Art 61(3) on failure to act (proceedings under TFEU, Art 265 before the GC)

SRB AP: power in pursuance of SRMR, Art 85(3) to review decisions on:

- addressing or removing impediments to resolvability;
- applying simplified obligations in relation to resolution plans;
- determining MREL;
- imposing fines;
- raising contributions to administrative expenditures of SRB;
- raising extraordinary ex-post contributions for SRF; or
- granting/denying access to documents under access to documents framework

# Nature/standard of review

ECB/AMLA ABoRs: special cases, unlike ESAs BoA/SRB AP

ECB ABoR output: merely opinions, not binding decisions

Clearly part of the ECB administrative mechanism / functional continuity

Constitutional justification: respect for Treaty-defined decision-making role of Governing Council – but what justification for deference to the SB?

Nature of review: SSMR, rec. (64): ‘procedural and substantive conformity ... while respecting the margin of discretion left to the ECB to decide on the opportunity to take those decisions’

ESAs BoA and SRB AP: legality/marginal or full review? Is there a *tertium quid*?

Cf. SRB AP, Case 7/2022, 10 May 2023 v.

ESA BoA 24-01, *DCCC v ESMA*, 29 January 2024

Towards a clarification of the European system of remedies?

Limits to scope of GC’s judicial review:

C-389/21 P, *ECB v Crédit lyonnais*, 4 May 2023, ECLI:EU:C:2023:368

Nature of appeal bodies / need to go beyond mere legality review:

C-46/21 P, *ACER v Aquind Ltd*, 9 Mar 2023, ECLI:EU:C:2023:182

Thank you for your attention

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