

QUASI-JUDICIAL AND JUDICIAL REVIEW

David Ramos-Muñoz

Universidad Carlos III de Madrid

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Discretion and quasi-judicial standard of review. *Aquind*

- Case T-735/18 EU:T:2020:542 (GC), and C-46/21 P EU:C:2022:695 (AG) and EU:C:2023:182 (CJ) ***ACER v. Aquind***
 - Main precedent T-125/17 *BASF Grenzach v ECHA*, EU:T:2019:638 (paras. 87-89, 124)
 - → Boards of appeal cannot limit themselves to a limited review of “manifest error of assessment”.
- 1.- General tendency of EU legislature: administrative appeal on matters where agencies are given significant decision-making powers over complex technical or scientific matters, which directly affect parties [“standard v. actual review; similarities v. differences”]
- 2.- Organisation: legal + technical experts [“Hybridity”]
- 2bis.- Organisation. Permanence, staff, resources, deadlines [“conditions”]
- 3.- “Any power of the agency” or “confirm or remit” [“Powers”]
- 4.- Justice system [Mechanism under Article 58a Statute of Court of Justice]
- 5.- Judicial protection [“Limited review of a limited review”]

Aquind findings

ARGUMENT	BASF	GENERAL COURT	ADVOCATE GENERAL	COURT OF JUSTICE
Standard v actual review	Actual review	Standard	Standard	Standard
Boards' similarities v. differences	Differences (EUIPO v ECHA) paras. 94-131	Similarities, para. 51;	Similarities, paras. 41-44	Similarities, para. 56
Hybridity	Relevant, paras. 87-89.	Relevant, para. 53	Relevant, paras. 50-54	Relevant, paras. 60-63
Conditions	--	Irrelevant, paras. 65-66	Irrelevant 53-57	Irrelevant 70-71
Powers	Relevant	Relevant paras. 54-55, 59-60	Unclear, paras. 64-69	No mention
Article 58a Statute	No mention	Irrelevant, para. 68	Passing reference, paras. 42-43, fn. 28	No mention
Limited review of limited review	No mention	Relevant, para. 58	Relevant, para. 49	Relevant (passing), para. 67

Discretion and courts' standard of review

- *Livret* cases (e.g., Cases T-733/16 *Banque Postale v ECB* EU:T:2018:477; T-504/19 *Crédit Lyonnais v ECB* EU:T:2021:185; C-389/21 P *ECB Crédit Lyonnais* EU:C:2023:368)
 - Basis
 - ECB refusal to exclude from leverage ratio exposures from certain tax-exempt accounts, where funds were held by Caisse des Dépôts et Consignations (CDC)
 - Balancing leverage ratio's focus on 'total exposures' v. exclusion of low-risk exposures not representing investment choice
 - First batch (T-733/16) General Court: ECB erred in law, depriving provision of practical effect.
 - No analysis of likelihood of default of French State
 - Finality of leverage's risk: eventual distressed sale of assets, valuation corrections in scenarios of insufficient liquidity → Need for thorough analysis of instrument
 - *Crédit Lyonnais I* (T-504/19) → ECB excluded only 66% of exposures
 - Assessment of probability of default based on ratings & CDS + scenarios of 'gravely distressed conditions'
 - Rejected assessment of risk of withdrawals for failure to consider some factors: (i) 'safe investments' increase (not decline) in a crisis; (ii) funds were 'not invested in any asset' but transferred to CDC; (iii) dual guarantee → no analogy with regular
 - *Crédit Lyonnais II* (C-389/21 P) → General Court went too far, substituting its view for the ECB
 - Court did not verify "material accuracy, reliability and consistency" of assessment. Used same facts for different conclusion.
 - Article reformed (formerly Art. 429(14), then Art. 429a(1)(j) CRR)

Standard of review in practice: AP MREL cases

- Case 1/2022
 - (i) MREL RCA post-resolution group *in the resolution plan*; (ii) possibility of TLAC add-on; (iii) Market Confidence Charge (MCC) and its base amount (=CBR) without upwards/downwards adjustment; (iv) also for subsidiary
 - Methodologies: in line with text and finality of SRMR
 - Failure to justify assessment and methodology in the decision
- Cases 2 & 3/2023
 - Setting of MREL-LRE → 8% of Total Liabilities and Own Funds (TLOF) to enable SRF intervention → TLOF included 'promotional loans' (excluded, e.g., from leverage ratio (Art. 429a CRR))
 - Justification of 8% TLOF succinct, but clear enough (entity's size) + TLOF does not allow discretionary exclusion of exposures.

Some reflections

- Standard of review and legitimacy
- What exercise? Assessment (probability), interpretation (finality), and values (acceptability)
- Important (and often overlooked) aspects:
 - (i) Concrete legislative framework → Text and context
 - (ii) Finalistic/teleological interpretation
 - (iii) Burden of proof
 - (iv) Considerations of value
- Specialist review v. generalist review. Not 'either/or'.
 - Court's view: assessment of facts ('science') for "error".
 - Problem: difficulty of arguing probabilistically in the abstract.
 - Potential: assessment of facts; analysis whether assessments *and* justification consistent with legislative purpose (hybridity → finality); allocation of burden of proof; fleshing out considerations of *value* that can be settled by generalist courts.