Some Reflections on the Standard of Review in the Experience of the ESAs Joint Board of Appeal and of the SRB Appeal Panel

by

Marco Lamandini*
and
David Ramos Muñoz**

In light of the experience we surmise that, in the EU law of finance, both for European courts and the BoA and AP the question is not about changing the standards of review as they stand; it is about ensuring that the standard of legality review is meaningfully applied, because the reviewing court or quasi court is capable of engaging in a dialogue with the supervisory institution in its own terms and challenge its reasoning, having due regard to all factual elements of the case. What kind of error of assessment counts as 'manifest' cannot be determined independently of the Court's understanding of what falls within the acceptable range, which, in turn, cannot be established without reference to the court's willingness to take an hard, or better said, closer look at all factual and legal elements of the reasoning. Thus, albeit with nuances often determined by the specific features of each case, in the supervisory and resolution context it seems to us that the marginal v full review debate is, in the Banking Union, more academic than practical and that a full assessment of facts, to the extent that procedural rules allow a proactive evidentiary role, Q&A and expert witness, and a stringent review of the interpretation and application of law (and thus of the substantive legality) is possible, and thus full legal accountability and full effective judicial protection is warranted.

* Marco Lamandini is professor of commercial law at the Alma Mater Studiorum Università degli Studi di Bologna. He also serves as a vice-chair of the Academic Board of the European Banking Institute (EBI) and as a member of the Academic Board of the European Capital Markets Institute (ECMI). He has been the second President of the Joint Board of Appeal of the European Financial Supervisory Authorities and is a member of the Appeal Panel for the Single Resolution Board (SRB), as well as a member of the Italian Arbitro Bancario Finanziario.

** David Ramos Muñoz is associate professor of commercial law at Universidad Carlos III de Madrid, and a regular visiting professor at the Alma Mater Studiorum Università degli Studi di Bologna. He is a member of the European Banking Institute (EBI) and of the European Law Institute (ELI). He is an alternate member of the Joint Board of Appeal of the European Financial Supervisory Authorities and an alternate member of the Appeal Panel for the Single Resolution Board (SRB).

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Table of Contents

1. A Premise. 951
2. Theory and Practice of the Standard of Review for the BoA and the AP . . . 952
3. Parallels With the Intensity of the Review of the European Courts 962
4. BoA and AP in Dialogue With the CJEU? 968

1. A Premise.

Pursuant to Article 60 of the ESAs Regulations[1] any person, including competent authorities, may appeal against a decision of ESMA, EBA or EIOPA referred to in Article 17, 18 and 19 and any other decision taken by any of these authorities in accordance with the Union acts referred to in Article 1(2). The Board of Appeal (hereinafter "**BoA**") shall decide upon the appeal. The BoA may confirm the decision taken by the authority or remit the case. In case of remittal, the authority shall be bound by the decision of the BoA and shall adopt an amended decision. The decision of the BoA can be challenged for annulment before the General Court pursuant to Article 61. Almost identical provisions apply to the Appeal Panel (hereinafter "**AP**") of the SRB, pursuant to Article 85 and 86 SRMR.[2] The AP's remit is however confined to the decisions of the Board referred to in Articles 10(10), 11, 12(1), 38 to 41, 65(3) 71 and 90(3) SRMR. Article 85 further specifies that "if the appeal is admissible, the AP shall examine whether it is well founded".

Knowing who can appeal, what can be appealed, and what are the consequences of the decision upon appeal cannot fully capture the dynamics involved in the review process. "Standard of review" is the term normally used for this purpose, but even this term is often used in a reductionist way, to explain the approach that courts, or administrative bodies, formally use to examine the decisions of administrative agencies and bodies (standard of review in the narrow sense), leaving aside other elements of how the revision is done in practice (standard of review in a broader sense). In this paper we wish to briefly

1 Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010; Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010; Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 (hereinafter, collectively, the "**ESAs Regulations**").

2 Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 (hereinafter "**SRMR**").

discuss the standard of review adopted so far by both administrative review bodies, trying simultaneously to classify the formal standard of review used (in a narrow sense) but to also show how that standard is deployed in practice, transcending the formal labels (broader sense). We show that:

(a) First, the BoA and the AP consider themselves not in 'functional continuity' with their respective authorities' decision-making bodies, which means that they do not perform a *de novo* assessment of the subject-matter of the appealed decision and limit their scrutiny to the manifest error of assessment. This manifest error standard applies when the applicable legal framework grants to the authority straight discretion ("policy discretion", in the taxonomy recently proposed by Advocate General Emiliou in his Opinion in *Crédit Lyonnais*)[3] but also when the open-texture nature of the relevant rules entails a margin of appreciation in adopting the appealed decision ("technical discretion" due to relatively undetermined legal concepts, in the taxonomy of AG Emiliou).

(b) Second, despite this formal standard, in their review of the appealed decisions the BoA and the AP closely scrutinize factual and legal errors (substantive legality) as well as the respect of procedural rights, and apply a demanding standard on the duty to state reasons. However, such more demanding standard in practice is deployed only if the errors in fact or law, or the statement of reasons, are contested with the grounds of appeal.[4]

(c) Third, the BoA and AP strive to be fully in line with settled case-law of the European courts, but this case-law is in the making, also as regards role and standard of review of administrative review bodies. This poses challenges in its own right.

2. *Theory and Practice of the Standard of Review for the BoA and the AP*

There is no express guidance in the Regulations on how the BoA or AP should decide upon the appeal and examine whether it is well-founded. Article 263

3 AG Emiliou, 27 October 2022, *European Central Bank v Crédit Lyonnais*, C-389/21 P, ECLI:EU:C:2022:844 paras. 47–48.

4 For the principle that the subject of the procedure before a board of appeal is "determined by the pleas put forward by the applicant in the context of the action before the board", complemented by "pleas which must be raised of its own motion" by the board of appeal, EGC, 20 September 2019, *BASF v ECHA*, T-125/17, ECLI:EU:T:2019:638, para. 65. For the Administrative Board of Review established by Regulation (EU) No 1024/2014, compare, however, EGC, 17 November 2021, *Trasta Komercbanka v BCE*, T-247/16 RENV, para. 45.

TFEU provides that European courts shall limit their scrutiny to the "*review [of] the legality*" of the appealed decisions or expressly specifies that the review shall be based (only) "*on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers*". There is no comparable provision for the BoA or the AP in the founding regulations for the ESAs or the SRB, nor elsewhere. Thus, the question arises whether context and finality may support the conclusion that the standard of review is the same of the European courts. The answer is still not conclusive.

In the literature there seems to be no clear consensus. Some have argued, for instance, that the BoA is vested with the power to make an unlimited and full[5] review this could take the BoA to reconsider all aspects of the merit of the decision), or that the AP is vested with a comprehensive review which encompasses also the discretion exercised by the authority.[6] Others have argued that, since the BoA noted that an appeal is a very different procedure from a judicial review under Article 263 TFEU, 'the impact of this is that market participants will have greater opportunity to challenge ESMA for a failure to act than is possible for other forms of EU (in)action'.[7] Others[8] have suggested, on the contrary, that (i) since appeals before boards of appeal are grounded on the legal basis of Article 263(5) TFEU, (ii) the 2019 reform of the CJEU Statute which acknowledges the role of some of these boards of appeal is premised on the assumption that their administrative review offers a first instance legality review, and (iii) the appealable decisions are bound in their content by the rule of law, the standard of review should not be different than the one of European courts under Article 263 TFEU. Yet another view has argued (in relation to the AP) that, although the AP's administrative review must remain a legality review, and the AP 'may not be at liberty merely to substitute its own appraisal to that of the SRB', 'the applicable standard of review at the level of the AP is that of the 'error of assessment', meaning that 'the error

5 *Matteo Gargantini*, 'La registrazione delle agenzie di rating e il ruolo della Commissione di ricorso delle Autorità europee di vigilanza finanziaria (nota a Commissione di ricorso delle Autorità europee di vigilanza finanziaria, 10 gennaio 2014)', Rivista di Diritto Societario 2014, 416.

6 *Dominik Skauradszun*, 'Legal Protection against Decisions of the Single Resolution Board pursuant to Article 85 Single Resolution Mechanism Regulation', ECFR 2018, 139.

7 *Ryan Murphy*, The effective enforcement of economic governance in the European Union: brave new world or a false dawn?, in: Sara Drake/Melanie Smith (eds.), New Directions in the Effective Enforcement of EU Law and Policy, 2016, p. 316, citing *BoA decision Investor Protection Europe v ESMA* (fn. 21 below).

8 *Ginevra Greco*, Le Commissioni di ricorso nel sistema di giustizia dell'Unione Europea, 2020, p. 170.

need not be manifest in the same manner as it does before the CJEU; because of its mixed composition the Appeal Panel can be expected to investigate more thoroughly whether the economic assessment made by the SRB was not erroneous'.[9]

In this latter line of reasoning, one may be tempted to look for a conclusive answer at the case-law, still in the making, concerning the standard of review of other boards of appeal in place at European agencies outside finance. In particular, the conclusions reached in 2019 and 2020 by the General Court for the boards of appeal of ECHA and ACER seems to offer some guidance, at least for those bodies.[10] The General Court held that the board of appeal of ECHA is not called

"to conduct a 'de novo' evaluation (...), that is to say an evaluation of the question whether, at the time when it rules on the action, in the light of all the relevant elements of fact and law, in particular scientific issues, a new decision with the same operative part as the decision contested before it may be lawfully adopted"[11]

However,

"the review, by the board of appeal, of scientific assessments in an ECHA decision is not limited to verifying the existence of manifest errors, On the contrary, in that regard, by relying on the legal and scientific competences of its members, that board must examine whether the arguments put forward by the applicant are capable of demonstrating that the considerations on which that decision of the ECHA is based are vitiated by error".[12]

For the board of appeal of ACER the General Court, in *Aquind*, noted that the board of appeal can exercise the powers which lie within the competence of the agency or remit the case.[13] Thus, it reaffirmed in this context that the administrative review should undertake a full review that is not limited to "manifest errors" in decisions entailing complex technical and economic assessments. *Aquind* was appealed, and in his Opinion on such appeal, Advocate General

9 *Yves Herinckx*, Judicial Protection in the Single Resolution Mechanism, in: Robby Houben/Werner Vandenbruwaene (eds.), The Single Resolution Mechanism, vol 2, 2017, para. 26.

10 EGC, 20 September 2019, *BASF v ECHA*, T-125/17, ECLI:EU:T:2019:638, paras. 60 and 65 and 87–89; EGC, 18 November 2020, *Aquind v ACER*, T-735/18, ECLI:EU:T:2020:542, paras. 50–70. *Aquind* is currently on appeal in as *ACER v Aquind*, C-46/21 P (pending); on appeal the application for interim suspension was rejected with order of the Vice-President of the Court of 16 July 2021. BASF is closed, because the appeal in *BASF v ECHA*, was dismissed with order of the Vice-President of the Court, ECJ, 28 May 2018, *BASF v ECHA*, C-565/17 P(R), ECLI:EU:C:2018:340.

11 EGC, 20 September 2019, *BASF v ECHA*, T-125/17, ECLI:EU:T:2019:638, para. 59.

12 EGC, 20 September 2019, *BASF v ECHA*, T-125/17, ECLI:EU:T:2019:638, para. 89.

13 EGC, 18 November 2020, *Aquind v ACER*, T-735/18, ECLI:EU:T:2020:542, para 27.

Campos Sanchez-Bordona suggested to the Court to follow this course of action.[14]

Very recently, with its judgment of 9 March 2023 [for the publisher: here then include the following footnote, which will be a new footnote 15 with the following text: ECJ, 9 March 2023, ACER v Aquind, C-46/21, ECLI:EU: C:2023:182) the Court of Justice confirmed the views of the General Court and of the Advocate General. Thus, it would be tempting to conclude that there is a clear "doctrine" for the standard of review of administrative appeal bodies, which all of them are expected to follow. Yet, such conclusion would be premature. To reach it, it would be necessary to conclude that the conclusions reached by the Court for boards of appeal of other agencies may be applied by analogy to the BoA or the AP, because their defining features do not present relevant differences.

Yet, there are quite visible, and quite relevant, differences between other bodies and the BoA and AP. Such differences are not a mere accident, but the result of institutional design, and they may have an impact on the intensity of the review. Whereas the boards of appeal of EUIPO, CPVO, ECHA, ACER and EPO can exercise on appeal *any power which lies within the competence of the agency* or remit the case, other boards of appeal such as the BoA and AP can only confirm or remit. Such difference may warn against any automatic inference by analogy.

To better exemplify the difference, consider that the CJEU disregards EUIPO boards of appeals as a 'court or tribunal' to the effect of preliminary references because they enjoy "the same powers as the examiner" and there is thus "continuity of their functions with the agency" (something that we may term "functional continuity"), in the sense that "an action before the EUIPO Board of Appeal forms part of the administrative registration procedure, following an interlocutory revision by the first department to carry out an examination, pursuant to Article 60 of Regulation No 40/94".[15] The same functional continuity was found by the General Court for the ECHA's and ACER's boards of appeal. in the cases referred to above.

Yet, this reasoning is not applicable to the BoA and AP.[16] These two bodies are not in "functional continuity" with the decision makers of their respective

14 AG Campos Sánchez-Bordona, 15 September 2022, *ACER v Aquind*, C-46/21 P, ECLI:EU:2022:C:695.

15 EGC, 12 December 2002, Procter & Gamble v OHIM (soap bar shape), T-63/01, ECLI: EU:T:2002:317, paras 21–22; EGC, 8 March 2012, Gross v OHIM, T-298/10, ECLI: EU:T:2012:113, para 105; as to the CPVO, EGC, 18 September 2012, Schräder v CPVO, T-133/08, ECLI:EU:T:2008:511, para 137 and, on appeal, ECJ, 21 Mai 2015, Schräder v CPVO, C-546/12, ECLI:EU:C:2015:332, at para 73.

16 *Herinckx* (fn. 9), para. 20.

agencies, and cannot exercise the powers which lie with the authority. They can only either confirm the appealed decision as it stands or remit the case to the authority. If they cannot substitute their decision for that of the authority, it should logically follow that these bodies not only cannot make any de novo assessment of the agency's determination, but are also vested with the task of ensuring the legality of its actions, as courts typically do.

In turn, the 2019 Court reform[17] sends mixed signals. The reform stipulates that "an appeal brought against a decision of the General Court, which, in turn, follows the decision of an independent board of appeal of EUIPO, CPVA, ECHA and EUASA shall not proceed unless the Court of Justice first decides that it should be allowed to do so". At first glance, this would suggest that the lower administrative review of the named boards of appeal is deemed sufficiently reliable, and part of the European administration of justice (*lato sensu*), to justify a limitation on appeal.

And yet, the reform leaves plenty of doubts. First, it did not allow those administrative review bodies with the possibility to make preliminary references. Thus, it remains unclear how administrative review bodies, subject to the review of the General Court, can be trusted with the decision, but not with the possibility of a dialogue with the Court to ensure their proper interpretation and application of EU law. Second, the BoA and AP are not included among the appeal bodies subject to the reformed rules, despite they are *not* in functional continuity with their agencies and are therefore less embedded into the agency and more court-like. The possible reason is that, since these bodies are more recent, the Courts preferred to wait and see if these bodies prove their worth with a longer track record. And indeed, with its more recent 30 November 2022 request, submitted by the ECJ pursuant to the second paragraph of Article 281 TFEU with a view to amending Protocol 3 of the Statute, the ECJ proposes to extend the same mechanism to all boards of appeal established as of 1 May 2019 (including the BoA and the AP).

For these reasons one needs to be prudent before assuming that the evolving case-law on other boards of appeal, namely those of ECHA and ACER,[18] may be applied by analogy to the BoA and the AP without any qualifications. Nor, to our mind, does the argument put forward by the General Court looks entirely convincing. In the General Court's view, these boards of appeal must

17 Regulation (EU) 2019/629 of 17 April 2019 amending Protocol No 3 of the Statute of the Court of Justice, OJ L 111/1. For a discussion of the proposal, *Jacopo Alberti*, 'The draft amendments to CJEU's Statute and the future challenges of administrative adjudication in the EU', Federalismi.it 3/2019, 1–32.

18 EGC, 20 September 2019, BASF v ECHA, T-125/17, paras 60 and 65, and paras 87–89; EGC, 18 November 2020, Aquind v ACER, T-735/18, paras 50–70.

carry out a full review that is not limited to manifest errors in decisions entailing complex technical and economic assessments, because otherwise *this would mean that the General Court would be carrying out its limited review of the decision of the board of appeal which would be in itself the result of a limited review, in violation of the principle of effective judicial protection*. This view of the ever-narrowing review is visually very powerful, suggesting that an error could slither forward, overlooked, from one stage of review to another. Yet, is it accurate? Other examples show that there are failsafe mechanisms to prevent this from happening. In composite proceedings the pleas for annulment may also refer to preparatory acts which are part of the proceedings leading to the adoption of the final decision.[19] Thus, to the extent that errors of the agency's decision are not remedied and thus incorporated by reference into the decision of the board of appeal which confirms such decision, they would be assessed by the General Court in its review of the board of appeal decision. Furthermore, the General Court scrutiny is not marginal on factual and legal errors, and is only confined to the "manifest error" in those parts of the challenged decision which entail complex technical and economic assessments. In other words, the General Court would be able to subject to its review, as part of its review of the board of appeal decision, also the agency's decision, and the risk "of a limited review of a limited review" as described by the court seems to us to morph into the more familiar review that the European courts do in annulment proceedings of any other agencies' decision resulting from composite proceedings. If the legality review offered by the General Court and the Court of Justice is, by itself, not sufficient to ensure judicial protection, then the whole system is in breach, regardless of the standard of review applied by the appeal bodies, for all the decisions that fall outside their respective remits. Contrary to this (over)simplification, we believe that the review by the Courts is thorough and demanding, regardless of the label one attaches to it. The same happens with the review by the Appeal Panel and the Board of Appeal.

An example is illustrative. In the SRB context, resolution decisions are not subject to an appeal before the AP. They are directly challenged before the General Court. The intensity of the scrutiny of the General Court on such decisions can be characterized as a quite exacting. It comprises the scrutiny that the evidence relied on by the SRB in its resolvability decision is factually accurate, reliable and consistent, and also whether it constitutes *all* the relevant information which must be taken into account in order to asses a complex situation *and* whether that information is capable of supporting the conclusions

19 *Filipe Brito Bastos*, 'Derivative illegality in European composite administrative procedures', CMLR 55 (2018), 101–134.

drawn from it.[20] This is exactly the same type of scrutiny that would take place in the case of an MREL decision (under articles 12 *et seq* SRMR) appealed before, and confirmed by the AP, and is subsequently challenged (as AP decision) before the General Court.

Looking at the practice of the BoA and AP, we observe that, although in a decision[21] the BoA – quite incidentally – seemed to acknowledge that an appeal could allow, at least in some circumstances, a somehow wider consideration on the merit, beyond the legality review applied by the CJEU, so far, both the BoA and the AP have considered that their review (i) cannot lead to a de novo evaluation and (ii) needs to respect the margin of appreciation which the applicable rules confer upon the agency and its decision-making bodies. To that aim, in *Scope Rating v ESMA*[22] the BoA clarified that it is not "in functional continuity with the ESMA's Board of Supervisors" noting that:

"(unlike other boards of appeal of European agencies, e.g., EUIPO), the Board of Appeal does not enjoy the same powers as the ESMA Board of Supervisors and there is not, thus, in the merit, full continuity of its functions with the agency decision-maker".[23]

The BoA consistently concluded that:

"[the Board of Appeal is not empowered to second guess decisions of the Board of Supervisors which entail a margin of appreciation and the Board of Appeal's review is limited to verifying whether ESMA, in adopting its determination, complied with all applicable procedural rules, duly stated the reasons, accurately stated the facts or committed a manifest error of assessment of a misuse of powers".

The AP, in turn, has constantly held[24], most notably in the access to documents saga concerning the resolution of Banco Popular Español, that:

"in its assessment – to ensure the functionality of the Board and to respect the role and division of tasks provided for by the SRMR and Regulation 1049/2001 – the Appeal Panel must certainly verify if the Board complied with all relevant substantive and procedural rules, properly stated its reasons and did not incur in any manifest error, but cannot substitute its opinion for that of the

20 EGC 1 June 2022, Fundación Tatiana Pérez v SRB, T-481/17, ECLI:EU:T:2022:311, EGC 1 June 2022, Del Valle Ruiz v SRB, T-510/17, ECLI:EU:T:2022:312, EGC 1 June 2022, Eleveté Invest Group v SRB, T-523/17, ECLI:EU:T:2022:313, EGC 1 June 2022, Algebris v Commission, T-570/17 ECLI:EU:T:2022:314 and EGC 1 June 2022, Aeris Invest v Commission and SRB, T-628/17, ECLI:EU:T:2022:315.

21 BoA, 10 November 2014, *Investor Protection Europe v. ESMA*, 2014-D-05 (hereafter BoA decision *Investor Protection Europe v. ESMA*).

22 BoA 28 December 2020, Scope Ratings v ESMA, 2020-D-03.

23 The Board of Appeal referred to ECG 12 December 2002, Procter & Gamble v OHIM, T-63/01, ECLI:EU:T:2002:317, paras 21–22.

24 AP, X v SRB, 19 June 2018, Case 21/2019, para 39; see also AP, 28 June 2021, *X v SRB*, Case 1/2021.

Board where the applicable legal provisions grant a margin of appreciation to the Board, which means that, on issues where the assessment of the facts may render to different interpretations, e.g. the impact of certain disclosures on decision-making or legal proceedings to the effect of the exceptions to access to documents under Regulation 1049/2001, the Board's margin of appreciation must be also respected by the Appeal Panel, unless there is a specific reason not to do so".

In other words, both the BoA and the AP have held that they are tasked to perform a full review of law *and* of facts, and these can be better appraised thanks to a composition of both boards which ensure technical expertise also beyond legal knowledge. Their sole limitation is that, to the extent that the authorities' governing bodies are, under the applicable legal framework, granted "discretion" e.g., where a provision expressly states that the agency "may" (or may not) grant a certain derogation from a requirement, or a margin of "technical" appreciation, the suitability of the discretionary choices cannot be subject to a de novo assessment and their review is confined to manifest errors in assessment. There are, however, two further qualifications which may act as notes for caution.

First, the BoA and AP review implies a close scrutiny of all errors of facts and of law, extended to the verification not only that the evidence relied on by the agency is factually accurate, reliable and consistent, but also whether if constitutes all the relevant information which must be taken into account in order to asses a complex situation and whether that information is capable of supporting the conclusions drawn from it. This means that the appeal body must be able to examine other evidence that it considers relevant for the assessment of the complex situation.

Second, any time an appealed decision rests on a discretionary choice, the statement of reasons is considered key, and the requisite standard to be met by the decision is exacting.[25] An example taken from the AP practice in case 2/2021 may help clarifying this point. In the context of so called iMREL waivers, Article 12h SRMR as amended by Regulation 877/2019 provides that:

1. The Board *may* waive the application of Article 12g in respect of a subsidiary of a resolution entity established in a participating Member State where: [...] *(c) there is no current or foreseen material practical or legal impediment to the prompt transfer of own funds or repayment of liabil-*

25 EGC 23 September 2020, Landesbank Baden Württenberg v SRB, T-411/17, ECLI:EU:T:2020:435 and on appeal ECJ 15 July 2021, European Commission v Landesbank Baden Württenberg, C-584/20 and 621/20, ECLI:EU:C:2021:601; EGC 6 October 2021, Ukrselhosprom Versobank v European Central Bank, T-351/18 and T-584/18, ECLI:EU:T:2021:669, paras 385-387. This is also consistent with the ABoR practice, which recently published a statement that disclosed that a recurring element in ABoR opinions has been the need for the ECB to provide adequate reasoning of its decisions, and with the AP practice, as recently recalled by the AP, Appellant v SRB, 13 February 2023, Case 3/22.

ities by the resolution entity to the subsidiary in respect of which a determination has been made in accordance with Article 21(3), in particular where resolution action is taken in respect of the resolution entity.

It is apparent that Article 12h(1) SRMR requires a two-pronged test: (1) *after* ascertaining certain preconditions, the Board (2) *may* waive the application of Article 12g SRMR. According to the case-law of the General Court, when a prudential rule confers to the competent authority the power to grant derogations from the applicable prudential regime when certain conditions are met, the authority is granted technical *discretion* to refuse such derogations "even when the conditions set out in that provision are met".[26] This is valid also for the first period of Article 12h SRMR.

Yet, the condition of Article 12h SRMR that "there is no current or foreseen material practical or legal impediment to the prompt transfer of own funds or repayment of liabilities", is formulated in an open-textured way, and thus lends a margin of appreciation to the agency in assessing whether such condition is met. The assessment whether the conditions of Article 12h SRMR are met is not an exercise of discretion in the proper sense, but rather a verification that the factual and legal requirements of Article 12h(1)(c) SRMR are satisfied. Nonetheless, due to the relative open-ended nature of the requirement, the assessment is not clear-cut and it implies a complex, factual and legal assessment which entails a margin of appreciation, yet more constrained and limited than the one granted in the second stage of the assessment, where the Board is literally given the discretionary power not to grant the waiver, even if all conditions are met. In the current practice of the AP, the review of both assessments needs to ensure at the same time appropriate deference to the technical evaluation of the agency and a fine-tuned, yet close scrutiny of its legality, in order to ensure that also the exercise of fully fledged discretion granted by the first period of Article 12h SRMR does not go unchecked and is weighted against general principles like proportionality, reasonableness and equal treatment. Confronted with this issue, the AP, in case 2/21 considered insufficient the statement of reasons of an appealed decision concerning the refusal of a waiver from iMREL pursuant to Article 12h SRMR[27] and remitted the case to the SRB, noting that:

26 See to this effect, EGC, 14 September 2018, La Banque Postale v European Central Bank, T-733/16, ECLI:EU:T:2018:477, at para 58; EGC, 14 September 2018, BPCE v European Central Bank, T-745/16, ECLI:EU:T:2018:476 and EGC, 14 September 2018, Crédit Agricole v European Central Bank, T-758/16, ECLI:EU:T:2018: 472; compare also EGC 14 April 2021, Crédit Lyonnais v European Central Bank, T-504/19, ECLI: EU:T:2021:185.

27 The Appeal Panel made reference, by analogy, to AG Kokott, 27 January 2011 P Edwin Co. Ltd, C-263/09, ECLI:EU:2011:C:30, paras 55, 57 and 64.

in accordance with settled case-law, the duty to state reasons pursuant to Article 296 TFEU is of very fundamental importance (consider to this effect, judgment of 21 November 1991, Hauptzollamt München v Technische Universität München, C-269/90, paragraph 14). Only in this way can the court (and in the present appeal, the Appeal Panel) verify whether the factual and legal elements upon which Case 2/21 34 the exercise of the power of appraisal depends were present. The Appeal Panel further notes that the duty to state reasons is particularly important in the prudential and resolution context, as also significantly acknowledged by the General Court, in its judgment of 16 May 2017, Landeskreditbank Baden-Württemberg v ECB, T-122/15, ECLI:EU:T:2017:377 paragraph 122–124 and the case-law cited and in its very recent judgment of 6 October 2021, Ukrselhosprom Versobank v ECB, T-351/18 and T-584/18, ECLI:EU:T:2021:669 paragraphs 385–387. The obligation to state reasons laid down in Article 296 TFEU is an essential procedural requirement, as distinct from the question whether the reasons given are correct, which goes to the substantive legality of the contested measure. In that vein, first of all, the statement of reasons required under Article 296 TFEU must be appropriate to the measure in question and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted that measure, in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to carry out its review. As regards, in particular, the reasons given for individual decisions, the purpose of the obligation to state the reasons on which an individual decision is based is, therefore, in addition to permitting review by the courts, to provide the person concerned with sufficient information to ascertain whether the decision may be vitiated by an error enabling its validity to be challenged. Furthermore, the requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the statement of reasons to specify all the relevant matters of fact and law, since the question whether the statement of reasons meets the requirements of Article 296 TFEU must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question.

Case 2/2021 is also illustrative of another interesting aspect. If the reasons of a decision are grounded on national law, such national law can alternatively matter in the context of the review as fact or, to the extent that national law is the law that the agency is called to apply by reference of EU law, as law. In its decision of 27 January 2022 in case 2/2021 the AP was adamant in noting, in an *obiter dictum*, that, upon request of an appellant, the AP could indeed check also the substantive legality of a decision vis-à-vis aspects of national law relevant for the adoption of such decision. The AP wrote (at para 115 of its decision):

The Appeal Panel acknowledges that reference to national law in the context of the assessment of a guarantee (issued under national law) provided to meet the condition of Article 12h(c) SRMR does not transform nor incorporate that national law into EU law and such national law, in this context, may therefore be approximated to the factual sphere. However, national Case 2/21 36 law is also part of the EU rule of law, a fundamental principle of EU law. In the instant case, however, the Appellant has not raised a ground of appeal on the substantive illegality of the Contested Decision due to a false or mistaken application of French law in the assessment of the revocability and enforceability of the guarantee, which could also translate into an incorrect assessment of the SRB that the condition of letter c) of Article 12h was not met (see, by way of analogy, Opinion of

Advocate General Kokott of 27 January 2011, Edwin Co. Ltd, C-263/09 P, ECLI:EU:2011:C:30, paragraphs 55, 57 and 64). Yet, the Appellant has challenged the Contested Decision as contrary to the principle of good administration and, therefore, it is up to the Appeal Panel to ascertain if the Board duly fulfilled its obligation to state reasons laid down in Article 296 TFEU as an essential procedural requirement, as distinct from the question whether the reasons given are correct, which goes to the substantive legality of the contested measure (for which, as noted, no ground of appeal was raised).

3. Parallels With the Intensity of the Review of the European Courts

Is all this really different from the standard of review of the CJEU in its review of agencies' decisions in the EU law of finance? Is it, in other terms, still necessary that the discussion on the standard of review for the BoA and AP enters the quagmire of the often-elusive distinction between marginal and full review?

We surmise it is not, because, at least in the law of finance, the standard of review of the European courts has significantly evolved from the most traditional "hands off" understanding of the manifest error limitation to a much more exacting "hands on" approach, but one that still respects the necessary margin of technical appreciation granted by the legislators to the authorities.

Indeed, it is true that the precise intensity of administrative and judicial review of the decisions of financial supervisors needs to be calibrated on a case-by-case mode in the most complex cases, between the Scylla's and Charybdis of full and marginal review.[28] Yet, it is increasingly apparent that European courts, whilst rightly refraining from any de novo evaluation of a supervisor's complex technical and economic assessment, are keen in checking whether errors of fact or errors of law are present. To that end they (i) closely check the substantive legality of the decision, (ii) extend their verification of facts not only that the evidence relied on by the agency is factually accurate, reliable and consistent, but also whether if constitutes all the relevant information which must be taken into account in order to asses a complex situation and whether that information is capable of supporting the conclusions drawn from it and (iii) are demanding on the requisite standard of the statement of reasons. Indeed, although at the early days of the inception of the Banking Union the literature was still focusing on the binary distinction between marginal v full review[29],

28 *Andriani Kalintiri*, 'What's in a name?', CMLR 2016, 1283–1316; *Alexander Fritzsche*, 'Discretion, scope of judicial review and institutional balance', CMLR 2010, 361–403.

29 Compare e.g. *Eddie Wymeersch*, The European Financial Supervisory Authorities or ESAs, in: Eddie Wymeersch/Klaus Hopt/Guido Ferrarini (eds.), Financial Regulation and Supervision. A Post-Crisis Analysis, 2012, p. 294; *Paolo Chirulli/Luca De Lucia*, 'Specialised Adjudication in EU Administrative Law: the Boards of Appeal of EU agen-

the standard of review in the cases in the law of finance of the Court has developed over time to ensure full effectiveness of the fundamental right of judicial protection, drawing lessons from the parallel evolution (also on requirement[30] of sufficiency of motivation)[31] e.g. in the antitrust context.[32]

In particular recent case-law of the GCEU vis-à-vis the ECB and the SRB,[33] clearly showed that European courts are becoming bolder and more willing to elaborate the criteria of manifest error, duty to state reasons and excess of power, and control of the substantive legality of the decision to grant themselves a sufficient leeway for effective and robust judicial control. This, in our view, blurs the lines between error and manifest error, and morphs the controversy over the two yardsticks into a semantic one.

As an author nicely put it[34], the judicial review of discretion in the Banking Union has moved from soft to harder look. European courts attach much importance to process-based review, and in some decisions they do not evaluate the choices made by EU legislators or Member States, but focus on the factors considered in the decision and its justification.[35] Some provisions, such as Article 41 of the EU Charter of Fundamental Rights provide for the 'duty to give reasons' as a source of scrutiny, and procedural safeguards are very relevant. Also, European courts acknowledge the importance of 'discretion', and are deferential to administrative authorities. Yet, they reject ideas such as that agencies may not be bound by a court's interpretation of a legal term, or that an issue may be 'committed to agency discretion'. EU courts have the ultimate responsibility to interpret EU law, and, in the presence of open-textured con-

cies', ELR 2015, 832–857; for a review limited to questions of law *Andreas Witte*, 'Standing and judicial review in the new EU financial markets architecture', JFR 2015, 245; *Joana Mendes*, 'Discretion, care and public interests in the EU Administration: Probing the limits of law', CMLR 2016, 53, 419–452; *Marco Lamandini*, 'Il diritto bancario dell'Unione', Banca, borsa e tit. cred. 2015 I, 423; and *Marco Lamandini*, Il diritto bancario dell'Unione, in: Raffaele D'Ambrosio (ed.), Quaderni di Ricerca Giuridica della Consulenza Legale, 2016, p. 81, 441.

30 ECJ 2 December 2009, *Commission v Ireland*, C-89/08 ECLI:EU:C:2009:742.

31 ECJ 29 June 2010, *E and F.*, C-550/09, ECLI:EU:C:2010:382.

32 ECJ 16 Mai 2000, France v Ladbroke Racing and Commission, C-83/98, ECLI:EU:C:1999:577; ECJ 6 November 2012, Otis and Others, C-199/11, ECLI:EU:C:2012:684.

33 Compare *René Smits/Federico Della Negra*, 'The Banking Union and Union Courts: Overview of cases', <https://ebi-europa.eu/publications/eu-cases-or-jurisprudence/> last accessed 17 April 2023.

34 *Michael Ioannidis*, The judicial review of discretion in the Banking Union: from "soft" to "hard(er)" look, in: Chiara Zilioli/Karl-Philipp Wojcik (eds.), Judicial Review in the European Banking Union, 2021, p. 130.

35 *Koen Lenaerts*, 'The European Court of Justice and Process-Based Review', Yearbook of European Law 31 (2012), 3–16.

cepts and provisions they will discuss whether an agency's interpretation is 'the' reasonable interpretation, rather than 'a reasonable enough' interpretation. In doing so, Courts provide an authoritative interpretation of key concepts of the law of finance, and incidentally bolster the legitimacy of supranational authorities which could otherwise be contested at a national level.

Just to add a few examples, in *ABLV v SRB*[36] the U.S. Department of Treasury through the Financial Crimes Enforcement Network (FinCen) announced a draft measure to designate ABLV Bank as an institution of primary money laundering concern pursuant to Section 311 of the USA PATRIOT Act. After such announcement the bank was no longer able to make payments in the US dollars and this triggered a liquidity crisis which led the ECB to communicate to the bank that, in order to avoid default, if had to have 1 billion Euro in cash by a set deadline in its account with the Latvian Central Bank. The alleged unlawfulness of the FinCen announcement and thus of the reaction to it by the ECB and SRB and the ECB determination of such amount were challenged by the bank as disproportionate in the context of the application for annulment of the SRB decision based upon the FOLTF assessment made by the ECB, but the claim was rejected by the Court noting that also a liquidity constraint could trigger the failing or likely to fail of a bank and *that the appellant had not given evidence of the implausibility of the ECB conclusions*.[37] This shows how the General Court claims the ultimate authority to determine *the* correct meaning of open-textured provisions according to their finality while maintaining a deferential approach to administrative authorities. Is this merely a sideshow to lend legitimacy to any decision by those authorities? The answer is a clear 'no', as in other cases the Court has disagreed with those authorities, sometimes controversially.

In the *Banque Postale – Crédit Agricole* cases (or the 'Livret' cases),[38] and the subsequent *Crédit Lyonnais* case[39] the General Court decided over the ECB's refusal to exclude from the calculation of the leverage ratio the exposures re-

36 EGC 6 July 2022, ABLV Bank v SRB, T-280/18 ECLI:EU:T:2022:429.

37 EGC 6 July 2022, ABLV Bank v SRB, T-280/18, paras 94 and 116–124.

38 EGC 14 September 2018, BPCE v. ECB, T-745/16, ECLI:EU:T:2018:476. Six practically identical cases were decided the same day, and the rulings had a practically identical content, involving the largest French banking groups. See the summary by René Smits. Judgments of the General Court of 13 July 2018 in Cases T-733/16,T-745/16,T-751/16, T-757/16,T758/16,T-768/16; ECLI:EU:T:2018:476. https://ebi-europa.eu/wp-content/uploads/2022/04/Summaries-RS.pdf Last accessed 17 April 2023. Compare also *Ioannidis* (fn. 33), p. 138–142.

39 EGC 14 April 2021, Crédit Lyonnais v European Central Bank, T-504/19, ECLI:EU:T:2021:185 (hereinafter *Crédit Lyonnais*).

sulting from different types of accounts (Livret A, LEP, LDD).[40] These were special tax-exempt savings accounts regulated by the French Financial and Monetary Code, where a part of the funds received by the banks was held centrally by the Caisse des dépôts et consignations ("**CDC**"), a French public financial institution. The leverage ratio is an institution's capital measure divided by *total* liabilities[41] (i.e., not risk-weighted liabilities, as in the capital ratio). However, there is the possibility of a discretionary exclusion by the ECB from the ratio's denominator of exposures arising from deposits that the bank must transfer to a public sector entity to fund general interest investments.[42] Several French banks sought ECB authorization to exclude the balance of these accounts from the denominator of the leverage ratio, and this was rejected by the ECB. The banks argued that the ECB exceeded its competence or, alternatively, committed an error of law, manifest error of assessment, and violated EU principles. The General Court accepted that, in trying to reconcile the logic of the leverage ratio, which considers a bank's total exposure, and the Commission's objective to exclude certain low-risk exposures that did not reflect an investment choice by the bank, the law granted the ECB ample discretion. Nonetheless, the Court held that the ECB had committed an error in law, because it had exercised its discretion in a way that would deprive the legal provision of any practical effect. The ECB's argument to exclude the exposures was that they were state-guaranteed assets, and thus carried the risk of default by the French State'. Yet, since the provision permitted the exclusion of

> only exposures to public service entities having a State guarantee, a refusal given on the theoretical ground that a State may be in a payment default situation, without consideration of the likelihood of such a possibility in the case of the State concerned, would amount to rendering the possibility envisaged by [the relevant provision] virtually inapplicable in practice.[43]

Furthermore, in the Court's view, the risk of excessive leverage arose from the eventual need for a bank to take measures like the distressed selling of assets, which could result in losses and valuation corrections in scenarios of insufficient liquidity. Such fire sales could occur during the time lag (the 'adjustment period') between the bank's position and the CDC position, and, since the ECB had admitted that the adjustment period did not give rise to a liquidity risk, it could not exceed the 'gravely stressed conditions' envisaged by the liquidity ratio. Thus, the ECB could not reject without a thorough examination

40 These included the *Livret A* (Savings passbook A), the Livret d'épargne populaire (Popular Savings Passbook) ('LEP'), and the *Livret de Développement Durable et solidaire* (LDD) accounts.

41 Art. 429(2) CRR.

42 Art. 429(14) CRR.

43 EGC 14 April 2021, Crédit Lyonnais v European Central Bank, T-504/19 ECLI:EU : T:2 021:185, para 86. See also para 88.

of the characteristics of the instrument involved. Also, the large volume (or concentration) of the exposures was not enough to exclude them, because this might be relevant only if the bank could not obtain payment, and would have to have recourse to forced sales of assets.

The subsequent *Crédit Lyonnais* case assessed an ECB decision after *Banque Postale – Crédit Agricole*, where the bank alleged argued that the ECB had not properly implemented the Court's ruling. At this point, the ECB had strengthened its reasoning, and the Court accepted that it had 'analysed the likelihood of default' by the French state, by referring to data of credit ratings (which were not top ratings) and credit default swaps (with a non-negligible probability of default). The Court also accepted that the ECB had justified the scenarios of 'gravely distressed conditions', with examples of massive withdrawals within a short period drawn from past practice, and that, once the risk of default is non-negligible, the size, or concentration of exposures, may be a relevant consideration. Also, in devising a methodology for determining the exclusions from the leverage ratio, which included the concentration of exposures, the ECB had not exercised any regulatory power, beyond its supervisory powers. Yet, the Court in *Crédit Lyonnais* still rejected the ECB's assessment of the risk of withdrawals, followed by distressed sales, because, in its view, it failed to consider some key characteristics of the accounts. First, they were considered a 'safe investment', and thus 'in a banking crisis, rather than declining as a result of withdrawals' they 'tend to increase'. Second, unlike regular deposits, which may be invested in any way, the funds under the 'Livréts' were transferred to the CDC, and could not be invested in high-risk or illiquid assets. Third, rather than deposit insurance, they benefitted from a dual guarantee from the French state. Thus, the ECB could not draw an analogy with past cases of massive withdrawals from 'regular' sight deposit accounts, and, absent an assessment based on experience with similar products, considerations about the risk of default by the French state, and the volume and concentration of CDC exposures were insufficient. The exposures were, thus, excluded from the calculation of the leverage ratio.

In *Crédit Lyonnais* the Court pushed finalistic interpretation one step further, opening itself to criticism. Its conclusions still wait for the final say of the Court of Justice on appeal, but with a recent (and quite insightful) Opinion, Advocate General Emiliou[44] invited the Court to annul the judgment. Yet this Opinion still confirms that European courts should not shy away from closely scrutinizing the factual and legal basis of complex technical assessment which imply a margin of appreciation or even straight discretion from the side of the

44 AG Emiliou, 27 October 2022, European Central Bank v Crédit Lyonnais, C-389/21 P, ECLI:EU:C:2022:844.

authority, provided that (i) the conclusion of the court is based on findings supported by adequate reasoning and appropriate evidence (something that Advocate General Emiliou found it was lacking in the General Court ruling)[45] and (ii) courts do not replace their de novo evaluation to the one of the authority if "in light of the margin of discretion enjoyed, a reasonable application of the relevant provision"[46] has been made.

It seems to us that the intensity of the review of the European Courts in those cases in the law of finance perfectly suits also to the BoA and the AP. Both for courts and the BoA and AP the question is not about changing the standards of review as they stand; *it is about ensuring that the standard of legality review is meaningfully applied, because the reviewing court or quasi court is capable of engaging in a dialogue with the supervisory institution in its own terms and challenge its reasoning, having due regard to all factual elements of the case. What kind of error of assessment counts as 'manifest' cannot be determined independently of the Court's understanding of what falls within the acceptable range, which, in turn, cannot be established without reference to the court's willingness to take an hard, or better said, closer look at all factual and legal elements of the reasoning.* Thus, albeit with nuances often determined by the specific features of each case, in the supervisory and resolution context it seems to us that the marginal v full review debate is, in the Banking Union, more academic than practical and that a full assessment of facts, to the extent that procedural rules allow a proactive evidentiary role, Q&A and expert witness, and a stringent review of the interpretation and application of law (and thus of the substantive legality) is possible, and thus full legal accountability and full effective judicial protection is warranted. It remains to be seen, when confronted with complex technical assessments based on alternative options on future, hypothetical scenarios which are all technically and factually conceivable, the authority has necessarily chosen one, whether or not the review can extend to verify:

a) not only that the preferred option is not implausible but that it is also the "most likely" (or "more likely than not") according to the so called "balance of probability" test as described by Advocate General Kokott in the antitrust context first in *Bertelsmann*[47] and more recently in *CK Telecoms;*[48] and

45 AG Emiliou, 27 October 2022, European Central Bank v Crédit Lyonnais, C-389/21 P, ECLI:EU :C :2022 :844, para 127.

46 AG Emiliou, 27 October 2022, European Central Bank v Crédit Lyonnais, C-389/21 P, ECLI:EU :C :2022 :844, paras 123 and 128.

47 ECJ 10 July 2008, Bertelsmann and Sony Corporation of America v Impala, C-413/06 P, ECLI:EU:C:2008:392, paras. 207–208.

48 AG Kokott, 20 October 2022, European Commission v CK Telecoms UK Investments Ltd., C-376/20, ECLI:EU:C:2022:817, paras. 56–58. Consider in the literature, *Andria-*

b) that the choice made is not only factually supported by the evidence in the file but also is proportionate, reasonable and not discriminatory.

Different problems arise in the review of sanctions. European courts and quasi courts should be given also in the law of finance unlimited jurisdiction under Article 261 TFEU, in a way that their control may embrace also 'the appropriateness and fairness of the penalties imposed, meaning that the Court's own discretion replaces the Commission's discretion'.[49] This is desirable because, as Paul Tucker noted,[50] "an independent regulatory agency [should not] be able to ruin a person or business" and a demanding judicial review is the best way to ensure that this does not happen. A different (and incidental) question is, however, if quasi-court should not move, in this context, from backseat to front seat if some fines are criminal in nature ("coloration penale" according to the ECtHR case law). This is however a matter of institutional design which is clearly beyond the scope of this paper. One should be mindful, though, of the words of a writer of Victorian England, who commented the criminal jurisdiction granted to the Irish Excise Court, composed by members of the executive branch who vividly noted that decisions adopted in a meeting of "[Revenue] officers, who act alternatively as prosecutors, witnesses and judges" is "subversive of all principles of justice and [is] in theory and principle indefensible".[51]

4. BoA and AP in Dialogue With the CJEU?

Reviewing a decision invariably implies an exercise of interpretation and application of European law. The practice of the BoA and of the AP clearly shows that both *fora* follow settled case-law of the European courts to give sense to the applicable provisions. This is adamant also when, exceptionally, there may be differences in their views, as shown, in the aftermath of the *SV Capital* case[52], by *A v ESMA*[53], a case where the BoA concluded for the inadmissibility

ni Kalintiri, Evidence Standards in EU Competition Enforcement – The EU Approach, 2019, p. 78; and *Joana Mendes* (ed.), EU Executive Discretion and the Limits of Law, 2019.

49 *Rudolf Geiger/Daniel-Erasmus Khan/Marcus Kotzur*, European Union Treaties, 2015, p. 872.

50 *Paul Tucker*, Unelected power, 2018, p. 248.

51 *Chantal Stebbings*, Bureaucratic adjudication: The internal appeals of the Inland Revenue, in: Paul Brand/Joshua Getzler (eds.), Judges and Judging in the History of the Common Law and Civil Law: From Antiquity to Modern Times, 2012, p. 162.

52 EGC 9 September 2015, SV Capital OU v EBA, T-660/14 ECLI:EU:T:2015:608 and, on appeal, ECJ, 14 December 2016, SV Capital v EBA C-577/15 P, ECLI:EU:C:2016:947.

53 BoA, A v ESMA, 29 March 2021, Case 2021-D-02.

of the appeal in compliance with the findings of the Court in SV Capital but offered views based on a subsequent legislative reform to suggest a possible partial reconsideration by the Court of its precedent in *SV Capital*. Yet this was also deferentially left to the Court to consider if and when a case may have offered an opportunity to do so (at the end of day, cases are legal vehicles also for new ideas). The dialogue, however, was not taken up by the General Court because in a subsequent case, *Jakeliūnas v ESMA*[54], it reaffirmed the SV Capital precedent, without expressly y engaging with the arguments raised by the BoA in A v ESMA. The Board diligently took note and in a following case (*C v EBA*)[55] confirmed its application of the SV Capital precedent.

However, interpretation and application of EU law may occasionally prove challenging. First, when the case-law of the BoA and AP needs to develop before or in parallel with the case law of the European courts on new issues (as it happened in the Banco Popular saga as to the access to documents). Second, when the ambiguity of the applicable European rules is such that also a textual, contextual and teleological interpretation may lend to blind spots and uncertainties (as it happened in the *Nordic Banks* case)[56] or points of law are new and would thus deserve a pre-emption by the CJEU (as it happened in *Creditreform v EBA*[57], that the BoA could decide a few weeks after the *Berlusconi* case with conclusions consistent with that decision[58], which, incidentally, may however be put into question now by the findings of the General Court in the pilot judgments on Banco Popular on the issue of the relationship existing between the preparatory act of the agency and the endorsement of the European Commission).

This raises a thorny question. If the BoA and the AP, like other boards of appeal included in Regulation No 2019/629 of 17 April 2019 amending Protocol No 3 of the CJEU Statute, act *de iure* or *de facto* as first instance quasi-court and filters in the European review process, can they be really left out from the judicial dialogue with the CJEU under Article 267 TFEU?

A simple, yet formalistic answer, would be that administrative review bodies are not courts or tribunal of a Member State and thus fall outside of Article 267 TFEU. We surmise, however, that Article 267 TFEU does not prevent second-

54 EGC 10 August 2021, Jakeliūnas v ESMA, T-760/20, ECLI:EU:T:2021:512, para 20.

55 BoA, C v EBA, 21 July 2022, Case BoA-D-2022-01.

56 Discussed in *Marco Lamandini/David Ramos Muñoz*, 'Law and practice of financial appeal bodies (ESAs' Board of Appeal, SRB Appeal Panel): A View from the Inside', CMLR 2020, 132–133.

57 Discussed in Lamandini/Ramos Muñoz (fn. 55), 134, 21 July 2022.

58 ECJ 19 December 2018, Silvio Berlusconi and Fininvest v Banca d'Italia, C-219/17, ECLI:EU:C:2018:1023.

ary legislation (notably, in our case, the ESAs and SRM regulations) from possibly extending also to the BoA and AP the preliminary reference. Clearly, their case is different from the one of courts common to Member States, like the Benelux Court of Justice[59] and the Unified Patent Court. We also acknowledge that, although the Court has accepted that international agreements can confer on courts which are not of a Member State the right to make preliminary references,[60] the CJEU in *Miles and Others*[61] denied this possibility to the Complaints Boards of the European Schools.

Yet, to our minds, the factors that justified a restrictive stance in *Paul Miles* are absent in this context. First, unlike the norms concerned in *Paul Miles*, ESMA, EBA, EIOPA and the SRB interpret and apply primarily EU law, and this law would constitute the subject-matter of the appeals and of the preliminary reference. Second, unlike the European Schools, appeal bodies are not bodies of 'an international organization', but EU bodies which, moreover, participate to the Member States' legal orders in the same way as the EU as a whole is part of them. Why then, in the Court's own words in *Paul Miles*'[62] not to "envisage a development of the system of judicial protection" by expressly granting, to the BoA and AP in the ESAs Regulations and SRMR references, the power to make preliminary references where needed?

59 ECJ 4 November 1997, *Parfums Christian* Dior v Evora, C-337/95, ECLI:EU:C:1997:517.

60 *Koen Lenaerts/Ignace Maselis/Kathleen Gutman*, in: Janek T. Nowak (ed.), EU Procedural Law, 2014, p. 62.

61 ECJ 14 June 2011, Paul Miles and Others v Écoles européennes, C-196/09, ECLI:EU:C:2011:388.

62 ECJ 14 June 2011, Paul Miles and Others v Écoles européennes, C-196/09, ECLI:EU:C:2011:388, para 45.