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# A promise kept? The first years of experience of the Appeal Panel of the SRB

*Within the institutional architecture for financial supervision within the EU, courts coexist with quasi-courts, i. e., review bodies like the ESAs Joint Board of Appeal, the SSM's Administrative Board of Review (ABoR) and the SRB's Appeal Panel. This has parallels e. g. US Administrative Law Judges (ALJs). Some argue that this flight away from courts is justified because administrative law and procedure are more flexible. Yet administrative mechanisms are deceptively simple. This paper offers a cautionary tale about the complexities of all quasi-judicial arrangements and their competing and complementary role with courts and presents an analysis of the European framework from both a functional and a comparative perspective.*

Contents



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## I. A short comparative premise as a cautionary tale on the importance and the complexities of administrative remedies

In the EU law of finance, courts coexist with quasi-courts, i. e., review bodies like the ESAs Joint Board of Appeal, the SSM's Administrative Board of Review (ABoR) and the SRB's Appeal Panel.[1] This has parallels e. g. US Administrative Law Judges (ALJs). Some argue that this flight away from courts is justified because administrative law and procedure are more flexible and benefit from specialised knowledge. Yet administrative mechanisms are deceptively simple. A closer look at the federal system of Administrative Law Judges (ALJ) in the field of finance through the SEC ALJs offers a cautionary tale against the complexities of all quasi-judicial arrangements and their competing and complementary role with courts.

In the United States ALJs perform their duties pursuant to the Administrative Procedure Act (APA) enacted by Congress in 1946 to create an independent and impartial cadre of case adjudicators within federal agencies. ALJs perform their duties 'in an impartial manner', are authorized to preside at the taking of evidence in hearings and they render 'recommended' and 'initial' decisions. However, these 'initial decisions' are ultimately subject to review by the agency officials, 'who shoulder the burden of political pressure'.[2] In principle, the agency officials review *de novo* and have full discretion to affirm, reverse, modify, set aside or remand for further proceedings in whole or in part to the ALJs. However, absent an appeal or an express choice to review by the agency officials themselves, the initial decision becomes the final decision without any modifications.[3] Even so, the aggrieved person can, within 60 days, ask for the 'review of the order in the US Courts of Appeals for the circuit in which he resides or has his place of business, or for the District of Columbia Circuit'.[4] This means that:

> [T]he ALJ function is itself the product of a hard-fought compromise between New Deal-era 'institutionalists' seeing a need for government employees who would adhere strictly to their agencies' policies (...) versus conservative

1) *Merijn Chamon, Annalisa Volpato and Mariolina Eliantonio* (eds), Boards of Appeal of EU Agencies (OUP, 2022); *Barbara Marchetti* (ed), Administrative Remedies in the European Union. The emergence of a Quasi-Judicial Administration (Giappichelli 2017). More specifically on quasi-judicial remedies in the European law of finance, compare the contributions collected in Quaderni della Ricerca Giuridica della Consulenza Legale, Banca d'Italia No 84, https://www.bancaditalia.it/pubblicazioni/quaderni-giuridici/2018-0084/qrg-84.pdf, accessed 1 September 2022, and *M. Lamandini and D. Ramos Muñoz*, 'Law and Practice of the ESAs' Board of Appeal and of the SRB Appeal Panel: A View from the Inside' [2020] CMLR 57, 119 – 160.

2) *Steven A. Glazer*, 'Towards a Model Code of Judicial Conduct for Federal Administrative Law Judges' [2012] Administrative L Rev 64, 342 (hereafter *Glazer*, 'Towards a Model Code of Judicial Conduct').

3) *Thomas C. Rossidis*, 'Article II Complications Surroundings SEC_Employed Administrative Law Judges' [2016] St. John's L Rev 90, 782 (hereafter *Rossidis*, 'Article II Complications').

4) 15 U.S. Code s 78y(a)(1).

> 'judicialists' who sought to constrain New Deal agencies like (...) the Securities and Exchange Commission (SEC) within strict due process requirements (...).[5]

Essentially, ALJs work as 'the agency counterpart to judges in a courtroom'.[6] In March 2016, 1,792 ALJs served 30 federal agencies,[7] in a wide array of administrative matters, from social security benefits to international trade. The most controversial – and the one which attracted most of the constitutional attention – are the SEC's five ALJs, because the Dodd Frank Act enabled the SEC to exercise administrative enforcement, specifically the imposition of monetary penalties, from ALJs without the need, as originally foreseen by the 1934 Act, to seek an order from federal courts (§§ 21 – 25). This more than doubled the yearly number of ALJs proceedings, leading some commentators to conclude that 'Dodd-Frank has changed the landscape of the securities industry by taking traditionally litigated cases out of the federal court system'.[8] The SEC, when seeking to enforce federal law, brings administrative enforcement actions against alleged wrongdoers and delegates the task of presiding over enforcement proceedings to ALJs. The ALJs' proceeding resembles a trial before a federal district court, but with modified and more flexible rules of procedure and evidence. After a hearing, the ALJ issues the initial decision, including findings of fact and law and relief, if any.

In response to this new enforcement practice, defendants started to challenge the SEC administrative proceedings as unconstitutional, contesting the ALJs' appointment system in use from the SEC as a breach of Article II of the US Constitution. The U.S. Supreme Court, with a landmark judgment of 21 June 2018, in *Lucia v. SEC*[9] held that SEC's ALJs are 'inferior officers of the United States subject to the Appointments Clause of the Constitution' and must therefore be appointed to their positions alternatively by the President, a Court of Law or the Head of Department. Since prior to November 2017 none of those appointing authorities had a role in the appointment of SEC's ALJs, ALJs had to be re-appointed.

The situation looks different in the EU, but still has several institutional weaknesses. Professor *Luca De Lucia* offered a few years ago 'a microphysics of administrative remedies in the EU after Lisbon'[10] and in that context discussed administrative remedies. He noted that:

> [I]n the last twenty years, a specific type of administrative remedy has established itself against the individual decisions of European agencies. They are administrative appeals which must be activated prior to those of the courts, to be addressed to independent commissions set up within the agencies themselves. In the future, – according to various documents of the Commission – this model should represent the ordinary instrument of administrative protection towards 'satellite' administrations. This perspective has recently been repeated in the joint statement on decentralized agencies and the subsequent common approach of Parliament, the Council and the Commission signed on the 12 June 2012, which devotes an entire paragraph to the Boards of Appeals.

Unlike their designation, in almost all cases, as boards of appeal (or slight variations thereof, like the appeal panel of the SRB), and 'despite a manifest commonality of purpose, these various Boards of Appel constitute a somewhat disparate class'.[11] Those with a longer tradition and much workload and case law are, so far, those that deal with intellectual property in the European Union Intellectual Property Office (EUIPO, previously named OHIM) for trademarks and designs and the Community Plant Variety Office (CPVO), and outside EU agencies, the Boards of Appeal of the European Patent Office under Articles 21 and 22 of the European Patent Convention. Boards of Appeal are, moreover, a common feature with most EU agencies in regulated sectors, like the European Aviation Safety Agency (EASA), the European Chemicals Agency (ECHA), the Agency for the Cooperation of Energy Regulators (ACER); 'the EU Agency for Railways was recently given its Board of Appeal which, in addition to standard power of annulment of decisions of the Agency, has the authority to arbitrate certain deadlock situations between the Agency and national safety authorities'.[12]

Crucially for our purposes, appeal bodies are also the tool of choice to scrutinize agency action in financial supervision and resolution because the authorities' decisions are subject to review by three appeal bodies: the ESAs Board of Appeal, the ECB's Administrative Board of Review, and the SRB's Appeal Panel, arguably to improve their decision-making, review their legality, and bolster their legitimacy. Can these bodies be successful in the law of finance? A definitive answer would be possible if there were a single blueprint and the same institutional design for all of these bodies, and for what they are supposed to do. Unfortunately, there is not. Being hybrid bodies, they combine features from two archetypes: the advisory committees, which contribute to an agency's decision internally, before that decision is adopted, and the courts that, independently from the agency, revise, and annul, that agency's decisions after they are adopted. A combination of both is good for policy experimentation and academic debate, but their effects are hard to measure. What seems not debatable, however, is that 'appeal bodies' (to use a generic, all-encompassing term) are European lawmakers' tool of choice in areas characterized by (i) technically complex decisions (ii) adopted by EU agencies, i. e. where

5) *Steven A. Glazer*, 'Towards a Model Code of Judicial Conduct', 345. For a vivid discussion of the implications of these two competing philosophies, compare *Antonin Scalia*, 'The ALJ Fiasco – A Reprise' [1979] 47 U. Chi. L. Rev. 57.
6) *Lucille Gauthier*, 'Insider trading: The Problem with the SEC's In-House ALJs' [2017] Emory Law Journal 67, 129, quoting *Jeffrey S. Lubbers*, 'Federal Administrative Judges: A Focus on Our Invisible Judiciary' [1981] 33 Admin. L. Rev 109, 110.
7) Ibid, 130.
8) *Rossidis*, 'Article II Complications' (n 3), 784.
9) *Lucia v. SEC* [2018] 595 U.S. No. 17-130 (2018); *Lucia v. SEC* [2018] 138 S. Ct. 2044.
10) *Luca De Lucia*, 'A microphysics of European Administrative Law: Administrative Remedies in the EU after Lisbon' [2014] Eur Pub L 20, 277 – 308.
11) *Yves Herinckx*, compare *Herinckx Y*, 'Judicial Protection in the Single Resolution Mechanism' in Robby Houben and Werner Vandenbruwaene (eds), The Single Resolution Mechanism, vol 2 (Intersentia 2017) 77 – 118 (hereafter *Herinckx*, 'Judicial Protection in the Single Resolution Mechanism').
12) *Herinckx*, 'Judicial Protection in the Single Resolution Mechanism'. For a cross-agencies view of EU appeal bodies, compare *Alina Trapova*, 'Expert opinion on the harmonisation of the EU appeal bodies' (EUIPO, 15 October 2020) (on file with the author).

the EU has moved beyond policy formulation into the potentially more intrusive implementation.

A 2019 reform limits review by the Court of Justice of the European Union (CJEU) in cases decided by some of these appeal bodies and then revised by the General Court.[13] This suggested that (some) appeal bodies offered sufficient safeguards to justify the exclusion of an ultimate judicial review by the highest court, i. e., to be treated as courts, or quasi-courts, of first instance. 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 Appeal Panel). This provides the framework to test from their practice to what extent also the Appeal Panel has so far proved itself fit to offer to the appellants a timely and fair handling of their cases and to support a limitation of appeals before the CJEU, as it happened for decisions by appeal boards with a longer tradition.

## II. Features of institutional design of the Appeal Panel

The Appeal Panel of the SRB is established by Article 85 of the SRM Regulation[14] with five members and two alternates. It comprises individuals of high repute and a proven record of relevant knowledge and professional experience, including resolution experience, appointed for a five-year term by the SRB following a public call for expressions of interest published in the Official Journal, with no shortlisting by the European Commission, nor statements before the European Parliament.[15] Members 'shall not be bound by any instructions' and must 'act independently and in the public interest'.[16] The first composition of the Appeal Panel reflected geographical diversity within the Union, with members of seven different nationalities, two women in the group, and a significant variety of experiences (three law professors; an experienced international lawyer; two former senior officials at central banks, one former Administrative Board of Review member; and the former chair of the German stability mechanism for banks' restructuring). Partial replacement took place over the years, with two alternates of different nationalities becoming members and two new alternates being appointed. There was also a change in the position of Chair and Vice-Chair.

Appointment rules are relevant in combining lawyers and non-legal experts. This enhances the collective understanding of the issues, but also raises questions. A first, practical, issue concerns drafting (especially drafting legal documents). While this might pose an insurmountable problem for monocratic courts (if, say, each judge, lawyer or not were to be solely responsible of a specific opinion with no support or infrastructure), collegial work and substantial secretarial support, can help handle the difficulty, which means that expertise in substance can help trump mastery of the arcane art of 'legal writing'. This raises a second issue. A mixed expertise only works if another element, the Appeal Panel Secretariat's support, is duly acknowledged. The Secretariat is functionally independent from other SRB functions, albeit it lacks budgetary autonomy. The Secretariat has done a lot to suitably assist the members, and its resources have been strengthened, but the contrast with Union or US courts' resources is still striking, especially given the impact of this support on the quality of adjudicatory outcomes.

The Appeal Panel was first appointed at the end of 2015; its first action was to adopt its Rules of Procedure (which were more recently updated and may further be amended in the near future to take stock of the experience), and it started operating on 1 January 2016. The Rules underscore the Secretariat's functional separation and segregation of duties from all other SRB activities (Article 4) to the effect that 'no information passes from the Secretariat to the Single Resolution Board ('Board') or any affiliated authority other than the Appeal Panel'. They further specify that the language of the appeal proceedings is the language of the contested decision; if the contested decision is issued in more than one of the languages of the Union and the English language is among such languages,[17] the language of the appeal shall be English, unless the parties agree on a different language instead (Article 5(2)).[18] Once the appeal is notified to the Board, the Board can submit a response within two weeks of service of the notice of appeal, unless the Board asks for an extension of another two weeks. This occurred in practice, but the Board always justified the request for such an extension (and the Appeal Panel granted it). The appellant is usually granted the opportunity to submit a reply and, where deemed necessary, also the Board has been authorized to submit a rejoinder prior to the hearing.

Appeals can be (and sometimes have been) joined 'where two or more appeal notices have been filed in respect of the same matter or involve the same or similar issues' (Article 13). More specifically, the Appeal Panel consolidated appeals in several cases where the same appellant had challenged different SRB decisions. Alternatively, the AP did not consolidate some appeals but nonetheless held joint hearings, when different appellants challenging different decisions raised the same or similar issues. Article 14 of the Rules provides that 'where a party has, without reasonable excuse, failed to comply with a direction of the [Appeal Panel] or a provision of these Rules, the [Appeal Panel] may, where that party is the appellant, dismiss the appeal wholly or in part'. To do so, however, the Appeal Panel

13) Regulation 2019/629 amending Protocol No 3 of the Statute of the Court of Justice of the European Union [17 April 2019] OJ L 111. Official Journal of the European Union, 25 April 2019 L 111/1 L:2019:111:TOC, especially new Art 58a, introduced by Art 1 of the Regulation.

14) Regulation (EU) No 806/2014 of the European Parliament and of the Council establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund (SRM R) [2014] OJ L/225.

15) On the AP, compare *Herinckx Y*, 'Judicial Protection in the Single Resolution Mechanism'; *Tomé Feteira and Luís Silva Morais*, 'Judicial review and the banking resolution regime. The evolving landscape and future prospects' (2018) 84 Quaderni di Ricerca Giuridica, Banca d'Italia 53, 53 – 70.

16) Art 85(2) and (5) of the SRM Regulation.

17) The Appeal Panel clarified that a courtesy translation into English does not qualify English as one of the languages in which the contested decision was issued: compare decision of 19 June 2019 in *Appellant v the Single Resolution Board* [2019] AP Case 19/18.

18) The issue of language has been recently addressed in a series of procedural orders duly reflected in the final decision of 13 February 2023 in *Appellant v the Single Resolution Board* [2023] AP Case 3/22.

must 'give the parties notice so that they have an opportunity to make representations against the making of such an order'. This power has been used by the Appeal Panel where the appeal was not sufficiently clear in its grounds[19] or where the party had failed, during the proceedings, to abide by a procedural order.[20] Parties can produce documents with the appeal and the response and can also request that the other party produce further documents (Article 16). In case of disagreement on the production of further documents, the Appeal Panel can give directions but further documents are admitted only if the Appeal Panel considers them necessary for the just determination of the appeal.[21] With the Appeal Panel's permission, a party may also adduce expert evidence in the form of a written statement (Article 17) and of oral evidence (Article 19) at the hearing (where the expert, like witnesses, if any, can be examined and cross-examined under the control of the Chair). The Appeal Panel, especially in access to documents cases under Regulation (EU) No 1049/2001 ordered to the Board, referring by analogy to Article 104 of the Rules of Procedure of the General Court, the confidential disclosure only to the Appeal Panel of the relevant document(s), specifying that those documents could not be accessed during the proceedings by the Appellant and were not part of the file.[22]

As to the hearing, several aspects deserve specific analysis. First, the Appeal Panel hearing is 'held in private, unless exceptional circumstances require otherwise' (Article 18(5) Rules of Procedure). This is justified by the highly sensitive nature of resolution. The hearing is recorded, and the Secretariat takes minutes, but these are only created for internal purposes of the AP. Second, the parties are entitled to make oral representations before the Appeal Panel, and a hearing is held, although both parties can decline their right to be heard. Even if both parties do so, the Appeal Panel may nevertheless require oral representations if it considers it necessary for the just determination of the appeal (Article 18(1) Rules of Procedure). The Appeal Panel gives directions on the order and form of oral representations, setting a timetable. As a matter of practice, the parties are first invited to make their representations (the appellant first). Then, they answer questions posed by the Appeal Panel and finally make a brief final reply, if they wish to do so.

Only exceptionally did the Appeal Panel authorize the submission of post-hearing briefs or notes. Unless there are special circumstances not to do so, usually at the end of the hearing the Chair informs the parties that the evidence is then complete and therefore that the appeal is considered lodged as of the date of the hearing for the purposes of Article 85(4) SRM Regulation (Article 20 RoP). The Appeal Panel decision must therefore be adopted and notified to the parties within 30 days. Deliberations take place in private and no dissenting opinions, if any, are attached to the decision, which is published in anonymised form and in such a format that the confidentiality of sensitive information is preserved (Article 24 RoP). Parties are previously offered the opportunity to timely submit, upon receipt of the decision, to the Appeal Panel a list of clerical errors, if any, for correction and requests for redactions. This has not prevented, so far, the publication of the adopted decision only with minor redactions.

The Appeal Panel's remit is (perhaps excessively) narrow, and comprises only the matters mentioned in Article 85(3) of the SRM Regulation: administrative contributions, determinations of the Minimum Requirement for own funds and Eligible Liabilities ('MREL'), impediments to resolvability, and access to documents. Other SRB decisions (notably, the adoption of the resolution plan, or the adoption of a resolution scheme) fall outside its remit. This is proving a breeding ground of complexities in the interplay with the judicial review of the General Court. One example is the situation where an Appellant challenges the substantive legality of a MREL decision before the Appeal Panel, while arguing that the MREL determination is also affected by the resolution strategy delineated in the decision adopting the resolution plan, *and* alleges that such decision on the resolution plan is also invalid, but the appellant can only challenge the resolution plan through an action of annulment before the General Court.[23]

Within its remit, the Appeal Panel's role is less administrative and more quasi-judicial: unlike other appeal bodies, which may exercise the same powers of the agency, and, e. g., issue a new decision (e. g., ECHA, in Art. 93 (3) of Regulation 1907/2006, REACH) the Appeal Panel may confirm the contested Board's decision or remit the case. Furthermore, in which case the Board is then bound by the Appeal Panel decision, and obliged to adopt an amended decision.[24] This makes it also different from the SSM Administrative Board of Review,[25] which can be better understood against the background of the fifth paragraph of Article 263 of the Treaty on the Functioning of the European Union ('TFEU') which allows the establishment of pre-judicial control mechanisms (recourse to which would amount to an additional admissibility condition for an action for annulment before the General Court) only for Union *agencies, bodies or offices* – but not for Union institutions.[26] In light of this, of the Governing Council's decision-making power, the Administrative Board of Review does not take a 'decision' but 'express[es] an opinion.'[27] If it 'remits the case,' the new draft decision 'shall take into account the opinion of the [ABoR]' and will then be submitted to the Governing Council, which adopts the final decision. However, and crucially, the new European Central Bank ('ECB') decision can abrogate the initial decision, replace it with an amended decision, *or* replace it with a decision of identical content. Neither the Supervisory Board's

19) *Appellant v the Single Resolution Board* [2019] AP Case 22/18.
20) *Appellant v the Single Resolution Board* [2019] AP Case 12/18.
21) *Appellant v the Single Resolution Board* [2019] AP Cases 09, 11, 13, 16/18 and Case 02/19.
22) For the finding that such documents cannot be accessed by the Appellant in the exercise of its right to the access of the file, see *Appellant v. the Single Resolution Board* [2023], AP Cases 04/22 and 06/22.
23) Consider *Appellant v the Single Resolution Board*, pending AP Case 1/22 and Case T-71/22.
24) Art 85(8) of the SRM Regulation. For a specification of this duty, see decision of 28 June 2021, *Appellant v. the Single Resolution Board* [2022], AP Case 1/21.
25) Compare *Concetta Brescia Morra*, 'The Administrative and Judicial Review of Decisions of the ECB in the Supervisory Field', 81 Quaderni di Ricerca Giuridica, Banca d'Italia, 109, 109 - 132; *Tomé Feteira and Silva Morais*, 61.
26) The fifth paragraph of Article 263 TFEU reads as follows: 'Acts setting up bodies, offices and agencies of the Union may lay down specific conditions and arrangements concerning actions brought by natural or legal persons against acts of these bodies, offices or agencies intended to produce legal effects in relation to them'.
27) Article 24(7) of the SSM Regulation.

new draft decision, nor the new Governing Council decision (adopted via the non-objection procedure) is subject to further review by the Administrative Board of Review. Thus, despite its importance to enhance the quality of ECB supervisory decision-making, the Administrative Board of Review is closer to a fully internal mechanism than a quasi-judicial body. This impression was confirmed by the General Court and the CJEU in the *Landeskreditbank* case, where the courts considered that the ECB had complied with its duty to state reasons as a result of the arguments discussed by the Administrative Board of Review in its opinion, i. e. the courts found the ABoR to be a fully internal ECB feature.[28]

## III. The practice of the Appeal Panel in a nutshell: the main cases decided so far

Although comprising a short timespan of less than ten years, the abundant practice of the Appeal Panel seems to confirm that expert review is appropriate in the law of finance, including the context of resolution. The Appeal Panel has received a constant flow of appeals, of growing importance and complexity.

### 1. The first round of manifestly inadmissible cases

At the very outset, a majority of those appeals were beyond the Appeal Panel remit and manifestly inadmissible because they concerned ex ante contributions to the Single Resolution Fund, and thus the Appeal Panel adopted a majority of shortly motivated inadmissibility orders.[29] Judging from hindsight from the workload of the General Court on this resulting from the lack of a filter, and considering that such workload could be handled by the Court only years after the adoption of the contested decisions, this limitation of the remit was perhaps unfortunate.

The main decisions[30] in the cases where the appeals were not manifestly inadmissible are considered in some detail below, grouped into three main classes: decisions on administrative contributions to the SRB expenses; decisions on MREL determinations and internal MREL waivers; and decisions on access to documents.

### 2. Cases on administrative contributions

The key point of the Appeal Panel substantive decisions on administrative contributions to the SRB expenses has been the tension between legal certainty and proportionality. The rules that determine contributions must take into consideration the entity's circumstances (e. g. whether it is a licensed institution, its size and risk profile) so as to render contributions proportionate. However, those contributions must also be based on clear-cut definitions and criteria that determine scope, time period and method of calculation, and regulate special cases, such as banking groups. Appellant entities have raised interpretative issues about their subjective circumstances, or objective ones (e. g. the calculation), which allegedly rendered the contribution excessive or no longer due. As to the *subjective scope of application* of SRMR provisions, the Appeal Panel held that SRMR and Commission Delegated Regulation No 1310/2014 limited their scope to entities referred to in Article 2 SRMR. Thus, if an entity originally included in the ECB list[31] had ceased to be such during the relevant period, it could no longer be required to contribute to the SRB administrative costs. Despite some ambiguities in Regulation 1310/2014 the Appeal Panel acknowledged that a regulation is presumed to be lawful and only the CJEU has the power to declare it invalid;[32] this cannot be done by national courts[33] or administrative authorities,[34] nor Union bodies[35] including authorities dealing with administrative appeal procedures, e. g. the Appeal Panel.[36] Yet, the Appeal Panel also held that between two possible readings, it should prefer the one which would respect the lawfulness of the Commission Regulation should the Court decide on the issue.[37]

28) Case T-122/15, *Landeskreditbank Baden-Württemberg v ECB* [2017] ECLI:EU:T:2017:337, para 121 – 132 and Case C-450/17 P, *Landeskreditbank Baden-Württemberg v ECB* [2019] ECLI:EU:C:2019:372, para 87 – 102.

29) This occurred e. g. with an initial batch of briefly motivated inadmissibility decisions, where the AP indicated that review of *ex-ante* contributions to the SRF fell outside the AP's remit under Art 85, See AP decisions in cases 2/16 to 4/16 and 6/16 to 14/16, 18 July 2016. An application against the SRB requests for *ex-ante* contribution was dismissed by the GCEU on procedural grounds with T-446/16 *NRW Bank v SRB* [2019] EU:T:2019:445; the judgment was annulled and remanded by the CJEU in case C-662/19 P *NRW Bank v SRB* [2021] ECLI:EU:C:2021:846; most notably, the SRB decision on the calculation of the 2017 ex ante contributions was annulled on procedural grounds in Case T-420/17, *Portigon v SRB* [2020] ECLI:EU:T:2020:438 (on appeal in case C-664/20, pending); another application against ex ante contributions was upheld by General Court in Case T-411/17 *Landesbank Baden-Württemberg v SRB* [2020] ECLI:EU:T:2020:435, yet the judgement was annulled on appeal by the CJEU in Joined Cases C-584/20 P and C-621/20 P *Commission v Landesbank Baden-Württemberg* [2021] ECLI:EU:C:2021:601. The following SRB 2021 decision calculating the 2017 ex ante contributions was, in turn, challenged in Case T-142/22 (pending). There are currently several other pending actions against the SRB concerning the ex ante contributions. (e. g. from Cases T-391/22 to T-432/22) as well as against ECB irrevocable payment commitment measures concerning *ex ante* contributions to the SRF (eg in cases T-186/22, *BNP Paribas*, T-187/22, *BPCE*, T-188/22, *Crédit agricole*, T-189/22, *Confédération nationale du Crédit Mutuel*, T-190/22, *Banque Postale* and T-191/22, *Société Générale*).

30) All those Appeal Panel decisions, in anonymised version, are accessible at https://www.srb.europa.eu/en.

31) For a similar finding that the ECB has no longer competence for supervision following the withdrawal of the license Case T-139/19 *Pilatus Bank v ECB* [2021] ECLI:EU:T:2021:623.

32) Case C362/14 *Schrems* [2015] EU:C:2015:650, para 61 (hereafter *Schrems*); Case C188/10 and C189/10 *Melki and Abdeli* [2010] EU:C:2010:2016, para 54; Case 101/78 *Granaria* [1979] EU:C:1979:38, paras 4 and 5 (hereafter *Granaria*); Case 63/87 *Commission v Greece* [1988] EU:C:1988:285, para 10; Case C475/01, *Commission v Greece* [2004] EU:C:2004:585, para 18.

33) *Schrems* (n 303), para 62; Case C456/13 *T&L Sugars* [2015] EU:C:2015:284, paras 45 to 48; Case C583/11 *Inuit Tapiriit Kanatami* [2013] EU:C:2013:625, paras 92 and 96; Case C344/04 *IATA* [2006] EU:C:2006:10, paras 27 to 30; Case C314/85 *Foto-Frost* [1987] EU:C:1987:452, paras 14 to 17.

34) *Schrems* (n 204), para 52; *Granaria* (n 303), para 6; Case C533/10 *CIVAD* [2012] EU:C:2012:347, para 43.

35) Case T13/97 *Losch* [1998] EU:C:T:1998:230, para 99; Case T154/96 *Chvatal and Others v Court of Justice of the European Communities* [1998] EU:T:1998:229, para 112.

36) Case F128/12 *CR v Parliament* [2014] EU:F:2014:38, paras 35, 36 and 40; Case T218/06 *Neurim Pharmaceuticals v OHIM* [2008] EU:T:2008:379, para 52; Case T120/99 *Kik v OHIM* [2001] EU:T:2001:189, para 55.

37) The AP also discussed whether the Board request for contribution could legitimately encompass the entire year 2015, since the appellant had ceased to be a regulated entity in July 2015. On this the Appeal Panel was prudent and held that the Commission Regulation could legitimately be construed, as the Board did, as setting contributions for a full calendar year. Yet it noted that *de lege ferenda*, an approach based on a *pro rata temporis* calculation would be justified, more proportionate, and could be considered by the European Commission in the future. Indeed, such a *pro rata* system was eventually adopted by Commission Delegated Regulation No 2017/2361 on the final system of contributions to the administrative expenditures of the Single Resolution Board [14 September 2017] OJ L 337 (hereafter Delegated Regulation No 2017/2361).

In 2018 the Appeal Panel decided three other cases on the calculation of contributions to its administrative expenses for the year 2018 based, this time, upon Commission Delegated Regulation, No 2361/2017.[38] In case 4/2018 the Appeal Panel noted that a bank has to pay the administrative contributions, even if it is declared failing or likely to fail, so long as its license is not withdrawn. In case 5/2018 the Appeal Panel held that in groups, there is a single debtor for the group, which is the same entity that must pay the supervisory fees to the SSM.[39] In case 6/2018 the appellant had undergone a comprehensive restructuring and claimed that 2020 was the planned time for closure of its voluntary winding up process, a process during which the appellant had received funding from the German Deposit Guarantee Scheme. The Appeal Panel reiterated the principle that the appellant was still a licensed credit institution and was therefore liable to pay administrative contributions.

### 3. MREL determinations

A second crucial and, in recent times, growing line of action for the Appeal Panel has been based on the rules on Minimum Requirements for own funds and Eligible Liabilities (MREL), which highlights the importance, in a seemingly 'dry' and technical field, of expert judgment on divisive issues. MREL rules ensure that a bank has sufficient instruments to write-down or convert to ensure an orderly resolution under the bank's proposed resolution strategy.[40] Thus, among all capital and liability instruments subject to write down, MREL rules identify a narrower sub-set whose characteristics make such write down particularly easy.[41] In its first case in 2018[42] the Board made an MREL determination that was below 8 % of total liabilities including own funds (TLOF). Since resolution rules provide that the single resolution fund (SRF) resources can be tapped only after capital/liabilities reaching 8 % TLOF are bailed-in,[43] the appellant was concerned that a target below that level posed the risk that, at the point-of-non-viability (PONV) of the failing credit institution authorities would have to implement the strategy without relying on SRF resources. The Appeal Panel held that the Board's decision was justified. The MREL requirement was calibrated to ensure that the target of the relevant credit institution, *measured against its risk weighted assets*, compared in a balanced way with the average national banks and average Banking Union banks and was *proportionate* in light of the bank's size, funding and business models and risk profile, the impact of that bank's failure on financial stability, and the need to prevent competitive distortions. Yet, the threshold of bailed-in instruments equivalent to 8 % TLOF could still be reached using not only MREL instruments but also liabilities that, although not qualifying as MREL, are nonetheless not excluded from bail-in,[44] e. g. those with a less than one year maturity. Since this was a reasonable view, the Board had the ultimate decision, which had to be respected. Thus, even MREL rules, which provide a (supposedly) clear calculation method, are open for interpretation on critical aspects that create tensions between entity and resolution authority, as well as between resolution authorities themselves, which require weighing the provisions' goals with the authorities' margin of appreciation.

A different aspect of MREL determination, and notably the one concerning the ammunition of internal MREL within banking groups and the conditions for the replacement of internal MREL (iMREL) with parent companies guarantees was brought to the attention of the Appeal Panel in more recent appeals. In cases 2/21, 3/21, 1/22 and 2/22 credit institutions had submitted requests for a waiver of the iMREL related to some of their subsidiaries. The parent entity then issued, in case 2/21, a letter of comfort and in case 3/21 guarantees that had been accepted by the ECB in the context of capital and liquidity waivers; in both cases, though, the Board rejected the application for the waiver finding that there was not sufficient assurance to the Board that the resources necessary for loss absorption and/or recapitalisation would be available when needed, i. e., in a 'gone concern' scenario. The Appeal Panel clarified, first, that the condition required for the granting of an iMREL waiver by Article 12h(1)8(c) SRM Regulation, and notably that no material impediment to the transfer of funds exists, does not necessarily require the issuance of a guarantee, but does not exclude either that, in the specific circumstances of each case, such a guarantee may be considered necessary by the SRB. This finding has however been brought to the attention of the General Court by France in pending case T-540/22.

The Appeal Panel also held that the conclusions reached by the Board as to why such a guarantee may be needed, and why the one offered by the credit institution may not meet the SRB expectations, need to be duly reasoned and, if a claim in this respect is raised by the appellant, also checked in their substantive legality. In case 2/2021 the Appeal Panel remitted the case to the Board finding that the reasons were insufficient; in case 3/2021, on the contrary, the Appeal Panel confirmed the decision, noting that the reasons were sufficient to meet the requirement pursuant to Article 296 TFEU, and that the substantive legality of such reasons could not be reviewed due to the absence of a specific ground of appeal raised by the appellant in that respect.

38) Delegated Regulation No 2017/2361, 6. According to such Delegated Regulation, the SRB was required to calculate in 2018 the administrative contributions for 2018 as well as the *final* settlement for administrative contributions for the years 2015 to 2017, taking into account the provisional advances calculated and paid by the relevant entities under Regulation No 1310/2014 in the previous years.

39) Art 2(3) of Delegated Regulation 2361/2017, and Art 4 of Regulation (EU) No 1163/2014 of the European Central Bank of 22 October 2014 on supervisory fees (for the group's 'fee debtor').

40) For a brief description of MREL, compare *M. Lamandini and D. Ramos Muñoz*, 'Minimum Requirement for Own Capital and Eligible Liabilities' in Vittorio Santoro and Mario Chiti (eds), The Palgrave Handbook of European Banking Union Law (Palgrave McMillan, Springer International 2019), 321.

41) Art 45 (4) Directive 2014/59/EU of the European Parliament and of the Council establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council Text with EEA relevance [2014] OJ L 173 (hereafter BRRD) (instruments issued and fully paid up, not owed to, funded, guaranteed, or funded by the institution, with more than 1-year maturity, not comprising deposits or derivatives.

42) SRB Decision 8/18 *A v SRB*, 16 October 2018.

43) Art 44(4) and 44(5) BRRD (n 78).

44) The bail-in eligible liabilities are contemplated in Art 44 BRRD (the bail-in sequence is in Art 48 BRRD). The liabilities eligible to fulfil MREL are regulated under Art 45 (4) BRRD.

In case 2/22 the Appeal Panel judged inadmissible the appellant's claim concerning the alleged mis-determination of the iMREL due to the reference in the right to be heard assessment memorandum attached to the iMREL decision to Article 10a SRMR, which was read as implying that the appellant had also to satisfy a notional combined buffer requirement on top of the MREL requirement. The Appeal Panel considered the issue at length, yet found in the end that the claim fell outside its remit: something which witnesses once again the excessively narrow remit of the Appeal Panel. The reasoning of the Appeal Panel is presented here, as it illustrates the technical complexities of the type of situations subject to review:

> 88. (...) the response given by the Board in Section IV of the RTBH Memorandum needs to be understood, in the Appeal Panel's view, as a warning that, according to the Board, Article 10a SRMR applies also to [ . ], even if it is not a resolution entity, and even if it is not subject to a supervisory CBR on an individual level (which applies however on a sub-consolidated and consolidated level). Under that interpretation, [ . ]'s existing own funds could be insufficient to meet both the iMREL requirements, and also the 'notional' CBR on top of iMREL pursuant to Article 10a SRMR, calculated applying by analogy the methodology set out in Commission Delegated Regulation 2021/1118 on top of iMREL. 89. In other words, the Board's response in Section IV of the RTBH Memorandum needs to be interpreted as a description of the consequences that may arise, in the Board's view, after the iMREL determination is set and is fully complied with by [ . ] using its existing own funds. 90. Therefore, in the Appeal Panel's view the Contested Decision, including Section IV of the RTBH Memorandum does not impose any legally binding limitation as to [ . ]'s own funds that can account for, and can be used to meet the iMREL requirement. If the Contested Decision had intended to impose such a result, Article 1 ought to have expressly specified that [ . ] could use to meet the iMREL-TREA target set out in Article 1 only own funds not used to comply with the CBR provided for in Article 10a SRMR, applicable by analogy also to [ . ], in the amount determined in application of the methodology set out in Delegated Regulation 2021/1118. 91. There is nothing in the text of the operative part of Section IIc of the Contested Decision nor in its recitals that makes or suggests such requirement nor prevents [ . ] from accounting all its own funds against its iMREL targets as set out in Article 1, or excludes any own funds from such calculation. 92. This is in line with the principle, acknowledged by the Board in the course of the appeal, that there is a 'stacking order' between MREL (including iMREL) and CBR, meaning that institutions meet the MREL/iMREL requirement first and then the CBR. The Appeal Panel further notes that, in the given circumstances of the present case, since [ . ] is not subject to a CBR at individual level, there are no own funds at individual level earmarked for CBR. 93. In addition, the Appeal Panel notes that the situation described in Article 10a SRMR occurs when a credit institution meets the CBR in addition to its Pillar 1 and Pillar 2 capital requirements, but fails to meet the 'notional' CBR in addition to the MREL. Thus, in the Appeal Panel's view, to assess a CBR shortfall under Article 10a SRMR (where applicable), the entity must first be MREL compliant, which means that available own funds must have been accounted for MREL, under Article 10a. 94. Furthermore, the consequences under Article 10a SRMR are not automatic, and have their own procedure. Article 10a paragraph (1), provides for (i) the notification by the credit institution to the national resolution authority and the SRB, (ii) for the Board's power to prohibit distributions beyond the Maximum Distributable Amount related to MREL (hereinafter 'M-MDA') (iii) an exercise of such a power only after the Board makes an assessment 'after consulting the competent authorities, including the ECB, where applicable'. Such assessment needs to be repeated at least every month for as long as the entity continues to be in the relevant situation. Finally, Article 10a, paragraph (3) requires that the Board exercises those powers if it finds that the entity is still in the situation referred to in paragraph (1) nine months after such situation has been notified by the entity, unless the Board finds that certain derogatory conditions listed in Article 10a, paragraph (3) are met. 95. The text of Article 10a SRMR indicates that the procedure under Article 10a (i) is 'downstream' to the MREL decision, (ii) must be initiated after the MREL decision is taken and only as a result of the specific assessment under Article 10a SRMR and (iii) materializes in a decision posterior and different from the MREL decision, which is adopted under a different legal basis (Article 10a instead of Article 12 SRMR). 96. This is also consistent with a teleological interpretation, because in the Appeal Panel's view, the only CBR which can be determined in a MREL decision under Article 12d SRMR is the one expressly mentioned in Article 12d(6) SRMR, i. e. the market confidence amount which is included in the recapitalisation amount. However, as the Board concedes in the present appeal, this is not the case of the Contested Decision which, in the determination of the iMREL targets for [ . ], does not incorporate a market confidence charge. 97. This means, in the Appeal Panel's view, that with its response in Section IV of the RTBH Memorandum the Board could not, and did not limit the possibility for [ . ] to meet the MREL requirements set out in Article 1 of Section IIc of the Contested Decision with its own funds available as specified in Article 2, nor affected the calculation of iMREL in any way. The Board merely warned the Appellant that, contrary to the Appellant's understanding, the Board, after the iMREL decision, would have assessed if [ . ], after complying with iMREL, using its own funds, complied also with the additional requirements under Article 10a SRMR, with the effects contemplated under Article 10a SRMR. 98. The Appeal Panel finds therefore that: (a) the Contested Decision did not refer to the requirement of a CBR under Article 10a SRMR in a way that could result in the exclusion of own funds from the calculation of iMREL, or in a way that could affect iMREL calculations and the meeting of the iMREL targets set out

> in Article 1 using existing [ . ]'s CET1; (b) the Contested Decision did not, and could not, include any binding determination vis-à-vis the Appellant under Article 10a SRMR, because the assessments and powers provided for in Article 10a SRMR require a different decision which is Case 2/22 29 posterior to, and downstream of, the iMREL decision (and thus other than the Contested Decision) and is grounded on a different legal basis; and (c) any such subsequent decision which the Board may possibly adopt pursuant to Article 10a SRMR as warned in Section IV of the RTBH Memorandum is not a decision among those listed in Article 85 SRMR and for which an appeal may be filed before the Appeal Panel. Such a decision pursuant to Article 10a SRMR, once adopted, would need therefore to be challenged by the Appellant directly before the General Court. 99. For these reasons, the plea concerning the alleged setting by the Contested Decision of a requirement equivalent to a CBR pursuant to Article 10a SRMR is inadmissible before the Appeal Panel. 100. It would correspond to the General Court to decide on the lawfulness of a decision pursuant to Article 10a SRMR, if it is eventually adopted by the Board (as the response in Section IV of the RTBH Memorandum suggests that it would) and in particular to decide: a) Whether Article 10a SRMR applies to a credit institution for which capital requirements at the individual level (yet not at sub-consolidated level) have been waived, although the language of the first paragraph of Article 10a, paragraph (1) SRMR refers to a situation where a credit institution 'meets the combined buffer requirement when considered in addition to' prudential own funds Pillar 1 and Pillar 2 requirements under Article 141a, points a), b) and c) CRD and is therefore not waived from such requirements; and b) Whether, in a situation such as the case at hand, the methodology set out in Commission Delegated Regulation 2021/1118, adopted in accordance to Article 45c(4) BRRD, whose express scope of application is limited to resolution entities at the resolution group consolidated level may apply for the identification of a 'notional' CBR at the individual level of an entity which is not a resolution entity. Indeed, Commission Delegated Regulation 2021/1118 expressly refers to a different context where the external MREL at consolidated level needs to be adjusted in order to take into consideration the fact that, if the resolution strategy follows a multiple point of entry approach, resolution entities and their resolution groups would not coincide with the whole perimeter of the prudential group, and thus the calculation of the CBR on top of the external MREL for each resolution entity needs to be adjusted. It remains to be clarified by the European courts if the methodology adopted in Article 3 of Commission Delegated Regulation 2021/1118 to calculate the CBR for each resolution entity is the expression of a principle that may work also in other contexts, such as the one of [ . ], which is not a resolution entity and is going to be resolved following a single point of entry approach.

In the context of the same case 2/22 the Appeal Panel further held that the SRMR does not expressly require a formal application for an iMREL waiver, noting that Article 12h and 12i SRMR, from a textual point of view, provide for that 'the Board may waive' the application of the iMREL without a specification that this can occur solely 'upon request' or 'if the credit institution so requires'. This finding did not justify, in the given circumstances of that case, the remittal of the iMREL decision, yet signaled a relevant point of law with clear implications for the SRB practice.

In case 3/22 the Appeal Panel was confronted with a MREL determination for an entity which in previous resolution planning cycles was considered apt to be liquidated under normal insolvency law, but which was classified as subject to resolution, due to a policy change in the public interest assessment (PIA) by the SRB, which included the scenario of a failure in the context of system wide events. The Appeal Panel found[45] the statement of reasons insufficient and, on the occasion, discussed at length (at §§ 60 – 80) its standard of review. Yet, it remains now to be seen what implications shall flow from the judgment of the CJEU of 9 March 2023, in *Aquind*[46] and its broad-brush endorsement of the General Court's finding that boards of appeal of EU agencies, being composed by experts which reflect the specific nature of the areas concerned, in principle should conduct a full review, extended also to errors (and not just 'manifest errors') of assessment.

In case 1/22 the Appeal Panel adopted an admissibility decision on 29 June 2022 addressing for the first time in European case-law the issue of resolution colleges' decisions, holding that a credit institution individually concerned by a joint decision of a resolution college on a MREL determination needs to challenge the college's joint decision and not the following SRB decision instructing the national resolution authority to implement such joint decision.[47] On the merits, the Appeal Panel found that, due to the interplay existing between the MREL determination and the resolution planning decision (which is outside the remit of the Appeal Panel) as to the size and profile of the credit institution concerned at the point of non-viability, if the resolution plan decision is challenged before the General Court (as it was the case at hand, in Case T-71/22), the Appeal Panel may stay the proceedings of the appeal regarding the implications for the MREL decision of the (possible) annulment of the resolution decision by the General Court. The Appeal Panel further held, as to the other grounds of appeal, that the decision had to be remitted to the Board because of its insufficient statement of reasons on several points and for having disregarded an (allegedly late) iMREL waiver request.

## 4. Access to documents

The largest caseload of the Appeal Panel has focused on access to documents under Regulation 1049/2001 on access to doc-

45) Decision of 13 February 2023, *Appellant v The Single Resolution Board* [2023], AP Case 3/22; the Appelant here is now in court, case number T-540/22 at the General Court.

46) Case C-46/21, *ACER v Aquind* ECLI:EU:C:2023:182

47) AP Case 1/2022, decision on admissibility (29 June 2022). For a similar conclusion, compare *Vittorio di Bucci*, 'Procedural and judicial implications of composite procedures in the Banking Union' in Chiara Zilioli and Karl-Philipp Wojcik (eds), Judicial Review in the European Banking Union (Elgar 2021) 114 – 129.

uments (Access Regulation) mostly (albeit not exclusively) connected to the Banco Popular resolution, with several rounds/batches of elaborated decisions. More recently, in cases 4/22 and 6/22, decisions have been adopted on the access to documents sought in the context of another of the more recent resolution cases decided by the SRB, and in case 7/22 in the context of a different case. Again, despite their seemingly narrow and rules-based context,[48] the cases illustrate the tension between key policies, principles and values. The different rounds of appeals showed a combination of case-specific details and general principles, and how minute details could decisively influence matters of principle.

A relevant issue of procedural detail was the admissibility of 'second appeals' against Board's (new confirmatory) decisions to comply with a prior Appeal Panel decision, i. e. when a first appeal had resulted in a decision against the Board, and the second appeal alleged that the Board, adopting an amended decision following the Appeal Panel decision, had not complied with the latter. The Appeal Panel held that such 'second' appeal was admissible. When adopting a revised decision to comply with Appeal Panel findings the Board was not extending the original decision: it was replacing it with a new decision, the only one with legal effects.[49] The second appeal could be useful to address the Board's possible good faith errors in implementing Appeal Panel findings, or clarify the Appeal Panel's view; an efficient way to timely ensure compliance, enhance certainty and protect the appellant's rights. Notice the relevance of a seeming minute matter for the Appeal Panel's competence-competence, i. e. the power to rule on its own competence. The Appeal Panel did that by underlining the differences with Administrative Board of Review, where there is no second review, *because the ECB's Supervisory Board is not bound to follow ABoR's opinion.* Conversely, however, if the Appeal Panel did not allow the 'second appeal', the SRB would be bound to follow the Appeal Panel's view, but it, not the Appeal Panel, would have the last word on how to do so. Conversely, however, to avoid that the second appeal turned into a full *ex novo* review or gave rise to an endless cycle of appeals the Appeal Panel clarified that such appeal can only concern matters where the SRB's view had been found to be incorrect.[50]

Going into the decisions' substance, the fundamental question raised in those appeals was how much access had been granted by the SRB to the documents supporting the Banco Popular resolution decision to the shareholders or subordinated bondholders who had suffered the loss of money as a result. The Appeal Panel' s first and clear answer was 'not nearly enough'. The same answer was also repeated, yet in more targeted and nuanced terms, in successive rounds of appeals which resulted in additional disclosures by the SRB. More specifically, the Appeal Panel had to examine the SRB refusal to disclose key resolution documents (e. g. Resolution Decision, Valuation Report, or Resolution Plan) in light of the right that 'any citizen' has to disclosure, and elaborate some general criteria to balance the right of access and the public interest. A key to the Appeal Panel decisions were the arguments that: (i) conferral of powers to EU agencies is conditional upon respect of fundamental rights, and effective judicial review; and (ii) administrative safeguards, including access to documents or the duty to state reasons, are instrumental to effective judicial review. On these grounds, the Appeal Panel held that the SRB's refusal to access the Valuation Report *in its entirety* erred in law, since the report was a critical part of the resolution decision, and formed a legal unity with it, and thus had to be disclosed at least partially. Then, the SRB was only partly justified in refusing access to other documents. The Resolution Decision itself, some parts of the Resolution Plan and other relevant documents could be disclosed in a redacted, non-confidential form, without endangering any public interest, including financial stability, also in light of the fact that disclosure would take place months after the resolution decision was adopted.

Successive rounds of appeals over roughly similar cases let the Appeal Panel further develop a stable framework of analysis to balance the competing interests at stake in the following structured manner: (a) the right of access is a transparency tool of democratic control of European institutions, bodies and agencies available to all EU citizens irrespective of their interests in subsequent legal actions;[51] (b) the purpose of the Access Regulation ' is to give the fullest possible effect to the right of public access to documents and to lay down the general principles and limits on such access' (recital 4) and 'in principle, all documents of the institutions should be accessible to the public' (recital 11). This Regulation implements Article 15 TFEU which establishes that citizens have the right to access documents held by all Union institutions, bodies and agencies, and is also a fundamental right under Article 42 of the Charter. However, certain public and private interests are also protected by way of exceptions and the Union institutions, bodies and agencies should be entitled to protect their internal consultations and deliberations where necessary to safeguard their ability to carry out their tasks (recital 11). (c) Exceptions must be applied and interpreted narrowly.[52] (d) Union institutions, bodies and agencies can rely in relation to certain categories of administrative documents on a general presumption that their disclosure would undermine the purpose of the protection of an interest protected by the Access Regulation.[53]

To add more complexity, a balance between similar principles was also being drawn in parallel by the CJEU in the successive cases of *Espirito Santo I*,[54] *BaFin v Ewald Baumeister*,[55] *UBS*

48) For a thorough discussion, compare *René Smits and Nikolai Badenhoop*, 'Towards a single standard of professional secrecy for supervisory authorities: A Reform Proposal' [2019] ELR 3, 295 – 318.
49) AP decisions in AP Cases 2/18, 3/18, 18/18 and 19/18.
50) AP Case 2/18.
51) Case C-60/15 *Saint-Gobain Glass Deutschland* [2017] ECLI:EU:C:2017:540, para 60 and 61 and Case T-376/13 *Versorgungswerk der Zahnärztekammer Schleswig-Holstein v European Central Bank* [2015] ECLI:EU:T:2015:361, para 20.
52) Case C-280/11 *Council v Access Info Europe* [2013] ECLI:EU:C:2013:671, para 30.
53) Case C-404/10 *Commission v Edition Odile Jacob* [2012] ECLI:EU:C:2012:393; Case C-514/07 P, *Sweden and Others v API and Commission* [2010] ECLI:EU:C:2010:541; Case C-365/12 P *Commission v EnBW* [2014] ECLI:EU:C:2014:112; Joined Cases C-514/11 P and C-605/11 P *LPN and Finland v Commission* [2013] ECLI:EU:C:2013:738; Case C-562/14 P, *Sweden v Commission* [2017] ECLI:EU:C:2017:356.
54) Case T-251/15 *Espirito Santo Financial v ECB* [2018] ECLI:EU:T:2018:234; reversed on appeal in Case C-442/18 P *ECB v Espirito Santo Financial* [2019] ECLI:EU:C:2019:1117.
55) Case C-15/16 *Bafin v Ewald Baumeister* [2017] ECLI:EU:C:2017:958.

*Europe*,[56] *Enzo Buccioni*, [57] *Espirito Santo II*[58] and *Di Masi and Varoufakis v ECB*[59]. A constant challenge was the asymmetry between narrowness of the Appeal Panel's remit and the broad scope and relevance of the matters at stake, e. g. the Appeal Panel cannot review the legality of the resolution scheme, or the application of resolution tools, in light of their impact on fundamental rights, but this tension was key to gauge the relevance of the disclosures sought. Thus, the Appeal Panel had to construe the matter noting that, even if it could not decide on the legality of the measures, it assumed that the resolution framework enabled the respect of property rights since: (i) resolution action is adopted only when a bank is failing or likely to fail, (ii) resolution is implemented at the point of non-viability and (iii) Article 20 SRMR establishes compensation to shareholders or bondholders under the 'no creditor worse off' principle, i. e. to not obtain in resolution a treatment which less favourable than in insolvency. Thus, document disclosure had to permit the proper scrutiny of such safeguards, by democratically elected bodies, and, crucially courts. This had direct implications for the right to an effective judicial protection under Article 47 of the Charter. As the rounds of appeals went on, the Appeal Panel found that successive SRB disclosures in response to Appeal Panel decisions offered the information needed to initiate legal proceedings, and to enable a review of the Banco Popular resolution actions. Thus, the *public* dimension of judicial accountability was respected, without unduly undermining the protection of the countervailing interests acknowledged by the Access Regulation. Should any further disclosures be *individually* needed by an EU court, the Court could order them in the specific proceedings, or ask the Board the necessary questions. In this way, the Appeal Panel surgically distinguished an individual's rights in court proceedings (over which the Appeal Panel was not competent) and those rights'relevance for the public interest.

Yet, matters of minute detail and core matters of principle can be closely interwoven, and quasi-judicial review may demand important dosage of ingenuity to tailor solutions to a case, as shown by case 21/18, of 19 June 2019. The Banco Popular resolution decision was based on a *provisional* valuation by an independent expert. The Board considered that, despite the literal reading of Article 20 SRMR, which requires that an ex-post valuation is performed as soon as possible,[60] such *ex-post* definitive valuation was not necessary if the resolution tool (sale of business) provided a price-setting market mechanism, which replaced the provisional valuation. Any harm to shareholders due to valuation inaccuracies could be addressed through the specific valuation to determine no-creditor worse-off treatment (Valuation 3).[61] In case T-599/18 the appellant challenged before the GCEU the Board's decision not to perform an *ex-post* definitive valuation.[62] In parallel, it requested the Board access to the independent expert's economic assessments for a definitive ex-post valuation of Banco Popular and European Commission documents authorizing the Board's decision or refusing authorization. The Board refused access to these documents. Its decision was appealed before the Appeal Panel. The context of the request of access in this appeal was an action before the General Court where the appellant challenged the SRB decision not to have the ex-post valuation as a violation of Article 20(11) SRMR, and argued that if there was a margin of discretion not to order the definitive valuation, the European Commission had to endorse the SRB decision pursuant to *Meroni* case-law,[63] or there would be a violation of constitutional limits to delegation of powers. Notice that the Appeal Panel could not decide on compliance with *Meroni*, but this was key to frame the relevance of the request of access. Thus, the Appeal Panel clarified that (i) in its view *Meroni* case-law should be understood in light of the more recent judgment of 22 March 2014, *United Kingdom v European Parliament and Council*,[64] (ii) that the power to apply rules to complex factual situations does not necessarily amount to a policymaking discretionary power, which is what was considered illegitimate in *Meroni* but (iii) no SRMR provision expressly deals with a decision *not to* perform an ex post valuation, or the European Commission endorsement role, if any. Thus, the relevance of the existence of a Commission endorsement appeared to justify an overriding public interest in disclosure, but exposing all communications to public light would disproportionately impair internal decision-making. Thus, the Appeal Panel found a way to clarify the point, without ordering disclosure. It asked specific questions to the Board and confidentially examined internal communications. Then noted that the Board had clarified with its answers that the European Commission had not issued any authorization or endorsement of the Board's decision not to perform the ex post valuation.

## IV. A (provisional) conclusion

The foregoing shows that quasi-judicial review, despite the narrow remit of the Appeal Panel, has been repeatedly used to deliver a timely review, which was accepted by the parties in all cases but for rare exceptions.[65] This invites a pause to reflect on the lessons learnt, and potential improvements on the system's weaknesses. Of the many policy experiments of EU institutions, appeal bodies look set to stay in areas where there

56) Case C-358/16 *Alain Handequin and UBS Europe v DV* [2018] ECLI:EU:C:2018:715.
57) Case C-594/16 *Enzo Buccioni v Banca d'Italia* [2018] ECLI:EU:C:2018:717.
58) Case T-730/16, *Espirito Santo Financial v ECB* [2019] ECLI:EU:T:2019:161, reversed on appeal Case C 396/19 [2020] ECLI:EU:C:2020:845.
59) Case T-9798/17 *De Masi and Varoufakis v ECB* [2019] ECLI:EU:T :2019 :154 on appeal in Case C-342/19 (pending; see however the Opinion of AG *Pikamäe* of 9 July 2020 ECLI:EU:C:2020:549 who advised the Court to uphold the appeal).
60) Art 20 (10) - (11) Regulation (EU) No 806/2014 of the European Parliament and of the Council establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 [2014] OJ L 225 (hereafter SRMR).
61) Art 20 (16) SRMR (n 98).
62) Appeal rejected as inadmissible: Case T-599/18 *Aeris Invest v SRB* [2019] ECLI:EU:T:2019:740, on appeal in case C-874/19. On the merit, compare Case C-934/19 *Algebris and Ancorage Capital Group v SRB* [2021], ECLI:EU:T:2021:1042, finding that no ex post definitive valuation needed to be performed due to the resolution tool adopted in the specific case.
63) C-21/61 *Meroni v High Authority* [1962] ECLI:EU:C:1962:12. For the constitutional implications of *Meroni* and *Romano in the EMU context*, see *Koen Lenaerts*, 'EMU and the EU's constitutional framework' [2014] ELR 753.
64) C-270/12 *United Kingdom v Parliament and Council* [2014] EU:C:2014:18, paras 44 - 50.
65) See e. g. pending cases T-16/18 *Activos e Inversiones Monterosso v SRB* and T-62/18 *Aeris Invest v SRB*; more recently case T-540/2022 *France v SRB*.

is a need for specialized knowledge delivered swiftly, flexibly and impartially to balance the EU's potentially intrusive action through expert regulatory agencies with bodies that combine expert knowledge of their own with a firm anchor on fundamental rights and the rule of law.

Initial experience suggests that the Appeal Panel has ensured that appellants have 'their affairs handled impartially, fairly and within a reasonably time'.[66] What does this mean? More visibly, appellants have got a timely, inexpensive, expert review which afforded proportionate protection in line with Charter Article 41, and, we venture to say, should Charter Article 47's 'fair trial' requirements be applicable to administrative review, they would be met too.[67] Less visibly, quasi-courts have tried to carve out a place of their own in financial markets' increasingly complex architecture and governance. This requires a delicate balancing act *vis-à-vis* the established players in the review system. Towards the agencies quasi-courts need to combine the independence to decide each case based on its merits (and not the downsides for the agency) with the institutional loyalty to offer precise reasons on why a decision was wrong, which help to put it right. Towards appellants, they need to be perceived as a truly independent, competent and useful device, but also send a clear message as to what they can, and cannot, review. The third relationship is with courts. While the legislature may have established quasi-courts, only the courts' interpretation of their role can grant them a stable ground to operate. Quasi-courts thus need to persuade courts that they have a relevant role to play without interfering with courts' own, that they can help 'declutter' the courts' table without becoming 'institutional clutter' themselves. So far, they have tried to do so by combining expediency, prudence, and willingness to penetrate the minute, often abstruse details, to dig out the real issues, which can then be re-examined by the courts. Their contribution, in this relationship with courts, is that of helping to see the forest of fundamental issues through the trees of technical points, and provide a first, quick, solution for the benefit of courts and parties alike.

66) To use the words of the CJEU C-439/11 P *Ziegler SA v Commission* [2013] EU:C:2013:513, para 154.
67) For a similar conclusion compare also *Herinckx*, 'Judicial Protection in the Single Resolution Mechanism', 21.

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# Managing Diversifiable Risk in Private Equity

*We use a unique dataset to examine the diversifiable risk of private equity portfolios held by limited partners (LPs). Our simulation results show that diversification across the number deals significantly mitigates idiosyncratic portfolio risk in large LP portfolios. Especially for buyout investments, syndicated deals reduce idiosyncratic portfolio risk, whereas deals shared by several partners within the same LP portfolio increase this risk. Looking at a sample of real LPs, our findings indicate that some investors have particularly high skills in identifying the most diversified general partners and selecting the most diversified funds. Additionally, we find that certain LPs simultaneously invest in several deal partners of a syndicated deal more frequently than chance and that these deals have a favorable risk-return profile.*

**Inhaltsübersicht**



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## I. Introduction

In private equity (PE), risk diversification is more important than in public equity investments. The risk of these assets is signif-