AQUIND AND THE STANDARD OF REVIEW OF THE ESAs JOINT BOARD OF APPEAL AND OF THE SRB APPEAL PANEL

Aquind *e lo* standard *di controllo della commissione di ricorso congiunta delle ESAs e della commissione di ricorso di SRB*

Aquind *et le niveau de contrôle de la commission de recours des ESAs et de la commission de recours du SRB*

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SUMMARY: 1. Is *Aquind* a game-changer in the theory and practice of the standard of review for the BoA and the AP? – 2. Parallels with the intensity of the review of the European courts.

1. Is *Aquind* a game-changer in the theory and practice of the standard of review for the BoA and the AP?

Pursuant to Article 60 of the ESA 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

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[1] Regulation (EU) 1093/2010 of the European Parliament and of the Council, Regulation (EU) 1094/2010 of the European Parliament and of the Council, Regulation (EU) 1095/2010 of the European Parliament and of the Council, of 24 November 2010, in *OJ*, L 331 of 15 December 2010 (hereinafter, collectively, the "ESAs Regulations").

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].

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 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 academic literature there seems to be no clear consensus.

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[3]. 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»[4].

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

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[2] Regulation (EU) 806/2014 of the European Parliament and of the Council, of 15 July 2014, in *OJ*, L 225 of 30 July 2014 (hereinafter "SRMR").

[3] General Court, 20 September 2019, case T-125/17, *BASF Grenzach GmbH v ECHA*, ECLI:EU:T:2019:638, paras 60 and 65, and paras 87-89; General Court, 18 November 2020, case T-735/18, *Aquind v ACER*, ECLI:EU:T:2020:542, paras 50-70. Within the appeal introduced against the *Aquind* decision, the application for interim suspension was rejected with order of the Vice-President of the Court of 16 July 2021. The *BASF* case is closed, because the related appeal was dismissed; see Court of Justice, order of the Vice-President of 28 May 2018, case C-565/17 P, *BASF v ECHA*, ECLI:EU:C:2018:340.

[4] Case T-125/17, *BASF v ECHA*, para 59.

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»[5].

For the board of appeal of ACER the General Court, in *Aquind*, judging of a decision of ACER adopted pursuant to the original wording of the ACER regulation, noted that the board of appeal, under that version of the regulation, could exercise the powers which lie within the competence of the agency or remit the case[6]. 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 Campos Sanchez-Bordona suggested to the Court to follow this course of action[7]. Something that the Court ultimately did with its judgment of 9 March 2023[8]. 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 and in our view may prove in due course misguided. To reach such conclusion, it would be necessary to argue that the findings 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 have clear implications on the governance itself of the relevant agencies), and they may have an impact on the intensity of the review. Whereas the boards of appeal of EUIPO, CPVO and ECHA and, at the time of the decision challenged in *Aquind*, also ACER 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 work as a first warning 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"

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[5] Case T-125/17, *BASF v ECHA*, para 89.

[6] Case T-735/18, *Aquind v ACER*, para 27.

[7] Opinion of AG Capos Sanchez-Bordona, 15 September 2022, delivered in case C-46/21 P, *ACER v Aquind*, ECLI:EU:2022:C:695.

[8] Court of Justice, 9 March 2023, *ACER v Aquind*, C-46/21 P, ECLI:EU:C:2023:182.

(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"[9]. 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, because the boards of those agencies have the same powers as the original agency's decision-maker whose decision is appealed in front of them. This is not the case for all boards of appeal.

More specifically, this reasoning is not applicable to the BoA and AP[10]. These two bodies are not in "functional continuity" with the decision makers of their respective agencies (who, by the way, are the governing bodies of the respective 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[11] and its most recent 2024 further revision send mixed signals. The 2019 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 EASA 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

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[9] General Court, 12 December 2002, case T-63/01, *Procter & Gamble v OHIM (soap bar shape)*, ECLI:EU:T:2002:317, paras 21-22; General Court, 8 March 2012, case T-298/10, *Gross v OHIM,* ECLI:EU:T:2012:113, para 105; as to the CPVO, see General Court, 18 September 2012, case T-133/08, *Schräder v CPVO,* ECLI:EU:T:2008:511, para 137 and, on appeal, Court of Justice, 21 May 2015, C-546/12 P, *Schräder v CPVO*, ECLI:EU:C:2015:332, para 73.

[10] Y. HERINCKX, *Judicial Protection in the SRM*, para 20.

[11] Regulation 2019/629 of the Council and the European Parliament, of 17 April 2019, *amending Protocol No 3 of the Statute of the Court of Justice*, in *OJ*, L 111 of 25 April 2019. For a discussion of the proposal, J. ALBERTI, *The draft amendments to CJEU's Statute and the future challenges of administrative adjudication in the EU*, in *Federalismi.it*, 3/2019, 6 February 2019, p. 1-32.

and AP were 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 were more recent, the Courts preferred to wait and see if these bodies proved their worth with a longer track record. And indeed, with its more recent 2024 reform, Article 58a of Protocol 3 of the Statute has been finally amended 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[12], 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 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[13]. 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 part 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 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

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[12] General Court, 20 September 2019, case T-125/17, *BASF Grenzach GmbH v ECHA*, ECLI:EU:T:2019:638, paras 60 and 65, and paras 87-89; General Court, 18 November 2020, case T-735/18, *Aquind v ACER*, ECLI:EU:T:2020:542, paras 50-70.

[13] F. BRITO BASTOS, *Derivative illegality in European composite administrative procedures*, in *CMLR* 55 (2018), pp. 101-134.

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 the remit of the AP (which does not encompass all SRB's decision) and which are scrutinized directly by the General Court.

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, ex ante contributions to the single resolution fund and resolution decisions are not subject to an appeal before the AP. They are directly challenged before the General Court. Judging from experience, 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 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 drawn from it[14]. 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) or an administrative contributions' decision is 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[15] 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*[16] the BoA clarified that it is not "in functional continuity with the ESMA's Board of

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[14] General Court, 1 June 2022, case T-481/17, *Fundación Tatiana Pérez v SRB*, ECLI:EU:T:2022:311; General Court, 1 June 2022, case T-510/17, *Del Valle Ruiz v SRB*, ECLI:EU:T:2022:312; General Court, 1 June 2022, case T-523/17, *Eleveté Invest Group v SRB*, ECLI:EU:T:2022:313; General Corut, 1 June 2022, case T-570/17, *Algebris v Commission*, ECLI:EU:T:2022:314; General Court, 1 June 2022, case T-628/17, *Aeris Invest v Commission and SRB*, ECLI:EU:T:2022:315.

[15] ESAs BoA, decision of 10 November 2014, case 2014-D-05, *Investor Protection Europe v ESMA* (hereafter "BoA decision *Investor Protection Europe v. ESMA*").

[16] ESAs BoA, decision of 28 December 2020, case 2020-D-03, *Scope Ratings v ESMA*.

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»[17].

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[18], most notably in the access to document 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 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.

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[17] The Board of Appeal referred to General Court, 12 December 2002, case T-63/01, *Procter & Gamble v OHIM,* ECLI:EU:T:2002:317, paras 21-22.

[18] SRB AP, decision of 19 June 2019, case 21/2019, *X v SRB*, para 39; see also SRB AP, decision of 28 June 2021, case 1/21, *[.] v SRB*.

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[19]. 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: «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 liabilities 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"[20]. 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

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[19] General Court, 23 September 2020, case T-411/17, *Landesbank Baden Württenberg v SRB*, ECLI:EU:T:2020:435 and, on appeal, Court of Justice, 15 July 2021, joint cases C-584/20 P and C-621/20 P, *European Commission v Landesbank Baden Württenberg*, ECLI:EU:C:2021:601; General Court, 6 October 2021, joint cases T-351/18 and T-584/18, *Ukrselhosprom Versobank v European Central Bank,* 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 SRB AP, decision of 13 February 2023, case 3/22, *Appellant v SRB*.

[20] See to this effect General Corut, 14 September 2018, case T-733/16, *La Banque Postale v European Central Bank*, ECLI:EU:T:2018:477, para 58; General Court, 14 September 2018, case T-745/16, *BPCE v European Central Bank,* ECLI:EU:T:2018:476; General Court, 14 September 2018, case T-758/16, *Crédit Agricole v European Central Bank*, ECLI:EU:T:2018: 472; compare also General Court, 14 April 2021, case T-504/19, *Crédit Lyonnais v European Central Bank*, ECLI:EU:T:2021:185.

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[21] and remitted the case to the SRB, noting that: «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

[21] The Appeal Panel made reference, by analogy, to the Opinion of AG Kokott, 27 January 2011, delivered in case C-263/09 P, *Edwin Co. Ltd*, ECLI:EU:2011:C:30, paras 55, 57 and 64.

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)».

2. 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[22]. 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 and full review[23], the standard of review in the cases in the law of finance

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[22] A. KALINTIRI, *What's in a name?*, in *CMLR*, 2016, pp. 1283-1316; A. FRITZSCHE, *Discretion, scope of judicial review and institutional balance*, in *CMLR*, 2010, pp. 361-403.

[23] Compare e.g. E. WYMEERSCH, *The European Financial Supervisory Authorities or ESAs*, in E. WYMEERSCH, K. HOPT, G. FERRARINI (eds.), *Financial Regulation and Supervision. A Post-Crisis*

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[24] of sufficiency of motivation)[25] e.g. in the antitrust context[26].

In particular settled case-law of the GCEU vis-à-vis the ECB and the SRB[27], clearly showed that European courts have become 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[28], 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[29]. 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 concepts and provisions they will discuss whether an agency's interpretation is 'the' reasonable interpretation, rather than 'a reasonable

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Analysis, 2012, p. 294; P. CHIRULLI, L. DE LUCIA, *Specialised Adjudication in EU Administrative Law: the Boards of Appeal of EU agencies*, in *ELR*, 2015, pp. 832-857; for a review limited to questions of law see A. WITTE, *Standing and judicial review in the new EU financial markets architecture*, in *JFR*, 2015, p. 245; J. MENDES, *Discretion, care and public interests in the EU Administration: Probing the limits of law*, in *CMLR*, 2016, pp. 419-452; M. LAMANDINI, *Il diritto bancario dell'Unione*, in *Banca, borsa e tit. cred.*, I, p. 423; M. LAMANDINI, *Il diritto bancario dell'Unione*, in R. D'AMBROSIO (ed.), *Quaderni di Ricerca Giuridica della Consulenza Legale*, 2016, p. 441.

[24] Court of Justice, 2 December 2009, case C-89/08 P, *Commission v Ireland,* ECLI:EU:C:2009:742.

[25] Court of Justice, 29 June 2010, case C-550/09 P, *E and F.*, ECLI:EU:C:2010:382.

[26] Court of Justice, 16 May 2000, case C-83/98 P, *France v Ladbroke Racing and Commission*, ECLI:EU:C:1999:577; Court of Justice, 6 November 2012, case C-199/11, *Otis and Others*, ECLI:EU:C:2012:684.

[27] Compare R. SMITS, F. DELLA NEGRA, *The Banking Union and Union Courts: Overview of cases*, available at this link: https://ebi-europa.eu/publications/eu-cases-or-jurisprudence/.

[28] M. IOANNIDIS, *The judicial review of discretion in the Banking Union: from "soft" to "hard(er)" look*, in C. ZILIOLI, KARL-PHILIPP WOJCIK (eds.), *Judicial Review in the European Banking Union*, 2021, p. 130.

[29] K. LENAERTS, *The European Court of Justice and Process-Based Review*, in *Yearbook of European Law*, 2012, pp. 3-16.

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.

It seems to us that the intensity of the review under the settled case-law of the European Courts 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 a 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*[30] and more recently in *CK Telecoms*[31]; and

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

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[30] Court of Justice, 10 July 2008, case C-413/06 P, *Bertelsmann and Sony Corporation of America v Impala*, ECLI:EU:C:2008:392, paras 207-208.

[31] Opinion of AG Kokott, 20 October 2022, delivered in case C-376/20 P, *European Commission v CK Telecoms UK Investments Ltd*., ECLI:EU:C:2022:817, paras 56-58. Consider in the literature, A. KALINTIRI, *Evidence Standards in EU Competition Enforcement – The EU Approach*, 2019, p. 78, and J. MENDES (ed.), *EU Executive Discretion and the Limits of Law*, 2019.

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'[32]. This is desirable. 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.

[32] R. GEIGER, D.-E. KHAN, M. KOTZUR, *European Union Treaties*, 2015, p. 872.

ABSTRACT

Questo contributo verrà pubblicato nel Fascicolo speciale degli atti del Convegno "Quo vadis, Boards of Appeal? The evolution of EU Agencies' Boards of Appeal and the future of the EU system of Judicial Protection" tenutosi presso l'Università di Ferrara in data 8-9 Febbraio 2024 a conclusione dei lavori del Modulo Jean Monnet "EU Specialized Judicial Protection" del Prof. Jacopo Alberti. In particolare, questo contributo verrà pubblicato nella seconda sezione del Volume, che ricostruisce i dibattiti della Tavola rotonda "Boards of Appeal, standard of review and the right to an effective judicial protection".

This contribution will be published within the Special Issue on the proceedings of the conference "Quo vadis, Boards of Appeal? The evolution of EU Agencies' Boards of Appeal and the future of the EU system of Judicial Protection", held at the University of Ferrara on February 8th – 9th 2024, as the closing event to Prof. Jacopo Alberti's Jean Monnet Module "EU Specialized Judicial Protection". More specifically, this contribution will be included within the Volume's second section, which traces the debates developed over the roundtable "Boards of Appeal, standard of review and the right to an effective judicial protection".

Le présent article sera publié dans l'Édition Spéciale sur les actes de la conférence "Quo vadis, Boards of Appeal? The evolution of EU Agencies' Boards of Appeal and the future of the EU system of Judicial Protection", qui a eu lieu à l'Université de Ferrare le 8-9 février 2024, en tant que moment conclusif du Module Jean Monnet "EU Specialized Judicial Protection" du Prof. Jacopo Alberti. Plus précisément, cet article sera inclus dans la seconde section de l'œuvre, qui reconstruit les débats développés de la *roundtable* "Boards of Appeal, standard of review and the right to an effective judicial protection".