ADMINISTRATIVE REVIEW MECHANISMS WITHIN THE ECB

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Abstract

The single supervisory mechanism and the single resolution mechanism are the two main pillars of the European banking union. These complex frameworks encompass innovative quasi-judicial systems which allow undertakings and national authorities to contend certain decisions taken respectively by the ECB and the SRB, through two technical independent bodies, namely an Administrative Board of Review (ABoR) and an Appeal Panel. Through a comparison of the founding provisions of these two panels with other similar experiences in highly regulated technical sectors, it is argued that the current architecture of non-judicial remedies available in the banking union is not set up as a single unitary model, but as an hybrid one with distinctive features adapted to the peculiarities of supervisory and recovery functions. It is questionable whether such characteristic may impair the position of private individuals and the ability to cope with the complex matters concerned in an effective way.

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1. Introduction

The single supervisory mechanism (SSM)[1] and the single

*Bank of Italy, Consumer Protection and Anti-Money Laundering Directorate. The opinions, findings, conclusions or recommendations expressed in the paper are those of the authors only and do not involve the responsibility of the Bank of Italy.

[1] For a preliminary analysis of the SSM, see S. Antoniazzi, *L'Unione bancaria*

resolution mechanism (SRM) are the two main pillars of the European banking union. These complex frameworks ideally continue the political and legal track prompted in the EU by the global financial crisis, which eventually resulted in the creation of the three European Supervisory Authorities (ESAs) and the extension of powers of the European Central Bank (ECB)[2]. Despite being founded on different legal bases and decisional paths, the SSM and the SRM intend to pursue certain common objectives: indeed, both aim to safeguard financial stability within the Union in general and the Eurozone in particular. From this main objective, further sub-objectives can be identified as preeminent, such as the enhancement of safety and soundness of credit institutions, the protection of investors and depositors, the preservation of public trust in the financial system, and the prevention of contagion and domino effects in the light of a smooth functioning of the single internal market.

The SSM and the SRM encompass all the financial "entities" of the Eurozone: these will be supervised and resolved according to flexibly distributed functions and tasks, in an institutional realm in which intersections, exceptions and risks of overlapping between European and national institutions are as much as distinctive rules and precise dividing lines. The two mechanisms provide for the use of heterogeneous powers and instruments assigned to public actors which strongly differ for their respective tradition, responsibility and resources.

The high degree of substantial and procedural sophistication of the two pillars may have overshadowed certain of their most interesting and innovative characteristics which directly touch upon the protection of individuals and the possibility to contend the decisions taken by the authorities:

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europea: i nuovi compiti della BCE di vigilanza prudenziale degli enti creditizi e il meccanismo unico di risoluzione delle crisi bancarie, Riv. it. dir. pubbl. comun., (2014) 359, and L. Donato, R. Grasso, *Gli strumenti della nuova vigilanza bancaria europea. Oltre il testo unico bancario, verso il "single supervisory mechanism"*, in Banca Impr. Soc., (2014) 3. For a critical approach to certain problems posed by the SSM under the perspective of European administrative law, see E. Chiti, *Il meccanismo di vigilanza unico: un passo avanti e tre problemi*, in Giorn. dir. amm. 1025, (2013).

[2] See M. Mancini, *Dalla vigilanza nazionale armonizzata alla Banking Union*, in Banca d'Italia - 73, Quaderni di Ricerca Giuridica della Consulenza Legale, September 9 (2013).

reference is made to the quasi-judicial systems of review of certain supervisory and recovery decisions which are respectively entrusted in an *Administrative Board of Review* (ABoR) within the SSM, and in an *Appeal Panel* within the SRM.

This paper analyzes such internal review mechanisms, so as to verify whether these mirror similar tools adopted in other fields of European law; the aim of this exercise is to gather a preliminary understanding of the possible extent of intervention by such newly established review bodies. The contribution is structured as follows: the first two paragraphs describe the functioning and powers of the ABoR and the Appeal Panel; the third paragraph briefly describes the tasks and powers of other similar quasi-judicial review bodies established in the fields of intellectual property, functioning of the internal market and financial regulation in the EU, while the last paragraph will briefly discuss similarities and divergences. It is argued that the appeal bodies established within the SSM and the SRM have not been designed according to a unitary model: indeed, they represent a distinctive framework for technical review of decisions which is adapted to the functions, goals and peculiarities of the systems they belong to.

2. The review of supervisory decisions within the SSM

Under the SSM, both the ECB and national supervisory authorities (NSAs) are entitled to adopt certain decisions towards regulated entities, in accordance with a set of criteria laid down in Regulation No. 1024/2013 (the SSM Regulation). In this respect, Regulation No. 468/2014 on the functioning of the SSM explicitly defines the «ECB supervisory decision» as a legal act adopted by the ECB in the exercise of the tasks and powers conferred on it by the SSM Regulation, which takes the form of an ECB decision, is addressed to one or more supervised entities or supervised groups or one or more other persons and is not a legal act of general application[3].

[3] Article 2(1), line 26), of the Regulation on the functioning of the SSM. No definition of «NSA's supervisory decision» is provided, although this could be implicitly understood as any decision taken by the competent NSA in the exercise of the residual supervisory powers conferred by the SSM Regulation and the relevant national law, and according to the procedures laid down by

Any natural or legal person may request the ABoR to review an ECB supervisory decision adopted under Regulation 1024/2013 which is addressed, or is of a direct and individual concern, to that person. In particular, the ABoR is entitled to assess the procedural and substantive conformity with the SSM Regulation of the decisions taken by the ECB, according to a procedure laid down in article 24 of the SSM Regulation itself.

The ECB supervisory decisions which may be subject to such internal administrative review can be categorized in two different classes. The first category comprehends the decisions concerning the establishment of subsidiaries and the exercise of freedom of establishment by credit institutions which are registered in any EU Member State not participating to the banking union; this category also includes the decisions of the ECB which apply the European and national provisions on prudential requirements, including organizational arrangements, own funds and - most remarkably, for the scope of this review - early intervention and resolution planning. The second category includes the decisions which approve or do not object to draft supervisory decisions by NSAs submitted to the ECB: reference is made to the so called *common procedures* which are regulated under Part V of Regulation No. 468/2014, and which extend beyond the ordinary scope of supervision on significant entities.

According to the wording of article 24(1) of the SSM Regulation, the ABoR is established by the ECB to carry out an *internal administrative review* of the decisions taken by the ECB itself in the exercise of powers conferred on it by the SSM Regulation. Therefore, the ABoR is intended to be an internal body of the ECB: it has been established in April 2014 with decision ECB/2014/16, which also contains certain important provisions on its scope of review and functioning.

The legal framework provided equips the ABoR with an extent of operational powers and arrangements aimed at preserving its independence, and attempting to ensure a sufficient level of resources and expertise to assess the effective exercise of powers by the ECB. In particular, it is established that the members of the ABoR shall be individuals of high repute from Member States, with a proven record of relevant knowledge and

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the latter.

professional experience to a sufficiently high level in the fields of banking and other financial services; current staff of the ECB, of NSAs or any other institution involved in the carrying out of the tasks conferred on the ECB by the SSM Regulation, is not allowed to be appointed as a member of the ABoR. Furthermore, members of the board shall not be bound by any instructions; they are appointed by the ECB for a five-year term following a public call for expressions of interest published in the Official Journal of the EU.

Article 24(1) of the SSM Regulation describes the review procedure before the ABoR. This is triggered by a written request by the natural or legal person concerned, which must be submitted within one month of the date of notification of the decision to the appellant, or, in the absence thereof, of the day on which it came to the knowledge of the latter. The request is accompanied by a statement of grounds, and it is subject to a preliminary ruling on its admissibility[4].

The submission of the instance for review does not suspend the contended decision: nevertheless, the Governing Council of the ECB, upon a proposal of the ABoR, has the power to order the suspension upon request of the appellant and after having heard the opinion of the Supervisory Board. Decision 2014/16 specifies that the suspension can be granted only when the Governing Council is satisfied that the request for review is admissible and not obviously unfounded (*fumus boni iuris*) and the immediate application of the contested decision may cause irreparable damage (*periculum in mora*). It appears that this assessment will be conducted by the ABoR in submitting is proposal for suspension to the Governing Council: nevertheless, it is interesting to note that the suspensory power is granted to a body which *prima facie* did not exercise its power to object as provided under article 26(8) of the SSM Regulation, thus acknowledging to a later contended decision. In the light of the short timing established to submit a request for review before the ABoR, the Governing Council would be called to reexamine the very same decision at the latest by 35-40 days after its adoption (*rectius*: missed objection to such decision).

[4] In particular, the ABoR must establish whether and to what extent the request for review is admissible; any evaluation must be reported in the opinion submitted to the supervisory board.

The ABoR shall adopt an opinion on the requested review within a time period appropriate to its urgency and, in any case, no later than two months from the date of receipt of the notice of review. Following its analysis, the ABoR drafts an opinion which is approved by a simple majority of its members and which is not binding for the decisional bodies of the ECB. In particular, the ABoR may propose to either abrogate the initial decision, replace it with a decision of identical content or with an amended one; in the latter case, the ABoR shall also indicate the amendments to be included.

Upon receipt of the ABoR's opinion, the Supervisory Board shall propose a new draft decision to the Governing Council by 10 or 20 days, depending on whether the new draft is equivalent to the contended decision or it implies the abrogation or the reform of the latter. In submitting such new draft decision, the Supervisory Board may also consider elements other than the grounds indicated by the applicant in its notice of review, and which were relied upon by the ABoR in submitting its opinion. Finally, the new draft decision is deemed adopted unless the Governing Council objects within a maximum period of ten working days[5].

3. The review of decisions within the SRM framework

The SRM Regulation provides for an application of the tools and recovery and resolution powers laid down in the BRRD to the

[5] Article 31(5) of Regulation No. 468/2014 establishes that when an urgent supervisory decision is adopted, a party must be given the opportunity to comment in writing on the facts, objections and legal grounds relevant to such decision without undue delay *after* its adoption. These comments in writing must be submitted within a time limit of two weeks from receipt of the ECB supervisory decision. On application of the party, the ECB may extend the time limit, subject to the general limit of six months. The ECB will review the decision in the light of the party's comments and may either confirm it, revoke it, amend it or revoke it and replace it with a new supervisory decision. This review power resembles a *tertium genus* in respect of the reexamination power of the ABoR and the right to be heard provided in the ordinary adoption of supervisory decisions. The decisions taken following this procedure may also be appealed before the ABoR, as no provision explicitly excludes them from the scope of review of the appeal panel.

peculiarities and features of the banking union[6]. The final version of the SRM Regulation is the pragmatic result of a complex compromise, in which legal and political constraints came to a partial solution in order to ensure the fullest respect of the limits set by Article 114 TFUE as legal ground and a political oversight at the highest level for resolution actions under specific critical circumstances. The SRM is built around a Single Resolution Board (SRB) - some sort of a ECB's "little brother" - and the national resolution authorities (NRAs) established according to the relevant provisions of the BRRD; in addition, certain responsibilities are attributed to the Commission and the Council in the specific context of recovery procedures, with particular regard to those cases in which relevant public interests are at stake[7].

The SRM Regulation encompasses certain provisions on judicial[8] and non-judicial remedies which can be activated to

[6] Article 7(3), paragraph four, last sentence, of the SRM Regulation. A relevant number of provisions of the SRM Regulation reproduces the BRRD: according to Wymeersh, e Zavvos - Kaltsouni, this technique is used to permit to a single resolution authority to use the regulation as the legal basis for its actions and for the use of the powers conferred, thus avoiding any recourse to national law implementing the BRRD. Wymeersh observes that, within the SRM Regulation, the *Single Resolution Board* will delegate the national resolution authorities to apply the resolution measures addressed to single entities and groups which are deemed to be significant; national resolution authorities will apply the internal provisions implementing the BRRD, although the provisions of the SRM Regulation would be intended to prevail in case of any inconsistency, according to the principle of *primauté*: see, E. Wymeersh, *Banking Union; Aspects of the Single Supervisory Mechanism and the Single Resolution Mechanism compared*, in 290 ECGI Law Working Paper, 3-5, (2015) See also, G.S. Zavvos, S. Kaltsouni, *The single resolution mechanism in the European Banking Union: Legal Foundation, Governance Structure and Financing*, research paper available at http://www.istein.org/, also published in *Research Handbook on Crisis Management in the Banking Sector* (2015), 12.

[7] On the role of the Council and the Commission, and the importance of financial stability in the balance of recovery powers see G.S. Zavvos - S. Kaltsouni, *cit.*, at 30.

[8] With regard to jurisdictional remedies, the SRM Regulation contains provisions referred both to EU and national remedies. With respect to remedies available in the EU, Article 86 establishes that Member States and the Union institutions, as well as any natural or legal person, may institute proceedings before the ECJ against decisions of the Board, in accordance with Article 263 TFEU. In the event that the SRB has an obligation to act and fails to take a decision, proceedings for failure to act may be brought before the ECJ pursuant

contend a limited number of decisions taken for the recovery of entities falling in the realm of the banking union: resolution decisions are strictly out of the scope of such review. Quasi-judicial remedies are of particular interest, as they are introduced and regulated directly by the SRM Regulation itself; in particular, the later provides for the establishment of a review body internal to the SRB, *i.e.* the Appeal Panel. Upon request by any natural or legal person, including NRAs, this Panel will be entitled to review a closed number of decisions taken by the SRB as far as addressed to that person or of direct and individual concern to the latter.

Similarly to the founding rules of the ABoR described above, the SRM Regulation establishes certain minimum requirements and independence safeguards for the Appeal Panel and its members. First of all, it is stated that the Appeal Panel must have sufficient resources and expertise to provide expert legal advice on the legality of the exercise of powers conferred to the SRB: note that the wording of the clause is slightly different from the one used for the ABoR in the SSM Regulation, as the latter refers to the capacity of the ABoR to assess "*the exercise of the powers of the ECB*" under Regulation No. 1024/2013.

Secondly, the SRM Regulation establishes that members of the Appeal Panel and two alternates will be appointed by the SRB for a term of five years, which may be extended once, following a public call for expressions of interest published in the Official Journal of the EU; similarly to their colleagues of the ABoR, the members of the Panel will not be bound by any instructions. The five members will be selected according to criteria which resemble those applied to the ABoR: indeed, these will be individuals with high repute from the Member States and with a proven record of relevant knowledge and professional experience, including *resolution* experience, to a sufficiently high level in the fields of banking or other financial services; current staff of the Board, as well as current staff of NRAs or other national or Union institutions involved in performing the tasks conferred on the SRB

to Article 265 TFEU. The SRB will have to take the necessary measures to comply with the judgment of the ECJ. With regard to national judicial remedies, the SRM Regulation establishes that, according to national laws, the courts of Member States will have to *i)* verify the legality of any decisions adopted by NRAs pursuant to a provision of the SRM Regulation, and *ii)* establish the liability in tort of NRAs.

by the SRM Regulation will be automatically excluded from the selection.

Article 85(3) of the SRM Regulation enlists the exhaustive categories of decisions adopted by the SRB which can be subject to the review of the Appeal Panel. First of all, the Panel will review any decisions which declare the inadequacy of measures to address or remove substantive impediments to resolvability of an institution, and instructing the NRAs to require the institution, group, parent undertaking or subsidiary concerned to take the measures listed in Article 10(11) of the SRM Regulation. Secondly, the Appeal Panel can be asked to review those decisions which permit or deny the possibility to apply simplified obligations in relation to the drafting of resolution plans or wave the obligation of drafting such plans, pursuant to Article 11 of the SRM Regulation. Thirdly, it will review those decisions which establish the minimum requirements for own funds and eligible liabilities which significant entities and groups are obliged to fulfill at any time, according to Article 12(1) of the SRM Regulation, as well as those decisions which apply penalties and fines according to articles 38-41 of the SRM Regulation. Finally, the Appeal Panel will be in charge of reviewing certain decisions of the SRB which appear to be of residual relevance, including those concerning the determination of fees due by the entities to contribute to the SRB's administrative expenses pursuant to Article 65(3) of the SRM Regulation, the deferral of extraordinary *ex post* contributions due under Article 71, and the decisions on the access to documents held by the SRB, pursuant to Article 90(3) of the SRM Regulation and Regulation (EC) No. 1049/2001[9].

The concerned natural or legal person must file the appeal in writing together with a statement of grounds within six weeks of the date of notification of the decision, or, in the absence of such notification, of the date on which the decision came to its knowledge. The Appeal Panel will have to decide by simple majority on the referred matter at the latest within one month after lodging of the appeal. Decisions taken by the Appeal Panel are binding for the SRB, and they can be appealed before the

[9] Regulation (EC) No. 1049/2001 of the European Parliament and the Council, of May 30, 2001, regarding public access to European Parliament, Council and Commission documents.

European Court of Justice (ECJ) under Article 263 TFUE: such rulings may either confirm the decision taken by the SRB or remit the case to the latter. Pursuant to Article 85(8), the SRB shall adopt an amended decision following a referral by the Appeal Panel: even though this provision does not clarify whether the Appeal Panel should propose amendments to the decision, it can be argued that these will be derived from the reasoning which must be mandatory provided in its statement by the Appeal Panel itself, pursuant to Article 85(9) of the SRM Regulation.

According to Article 85(6), the submission of an appeal does not automatically suspend the decision contended; nevertheless, the Appeal Panel may grant such suspensory effect if it is satisfied that circumstances so require. The phrasing of such provision is rather vague and ambiguous, as it is not clear whether the circumstances it refers encompass only the risks which may arise from the straight application of the decision before the Appeal Panel completes its review, or a preliminary assessment of the grounds of the review.

4. Some earlier examples …

The European legal framework provides various examples of appeal bodies which have similar characteristics to the panels described above.

When considering the financial sector, the closest example is represented by the *Joint Board of Appeal* of the three ESAs, which is established pursuant to articles 58 to 60 of their respective founding regulations. This body is composed of six members appointed by the three authorities; they should have professional and expertise requirements which are rather similar to those imposed to the members of the two review bodies of the SSM and the SRM. The Joint Board must take its decisions by simple majority, although at least one member of such majority must had been appointed by the ESA whose decision is subject to review. Since its institution around five years ago, the Joint Board issued a total of four decisions to date. In its rulings, the Joint Board provided very few details and limited guidance on the role which it is called to play in the architecture of European supervision, and on its nature and functions; in addition, the ECJ still did not have the opportunity to pronounce on such important issues, as no case

examined by the Joint Board was submitted to the Court. Therefore, it is still unclear whether the Joint Board can exercise a full extent review on the matters referred to its attention, or it only has a limited role which involves a mere legality check[10].

In *Global Private Rating Company "Standard Rating" Ltd v. ESMA* (11), the Joint Board adopted a pragmatic approach in respect of the type of question concerned, *i.e.*, the denial of registration of a credit rating agency by the ESMA. Before analyzing the case submitted to its attention, the Joint Board clarified that it would have verified the respect of both substantial and procedural provisions which regulates the credit rating market in Europe (12). Nevertheless, it should be noted that such a far-reaching scope of review could be justified in the light of the peculiarities of credit rating agencies' regulation in Europe, *i.e.*, the concentration of the procedure for their recognition and registration in the hands of the ESMA, according to a model which anticipated the developments of the banking union[13].

In *SV Capital OU v. EBA*, the Joint Board affirmed that it was not in the position to call in question the discretional power of the EBA to prompt an investigative action pursuant to Article 17 of the EBA Regulation, on the ground that such profile had not been raised by the applicant[14]. It remains unclear whether such statement implies that, in the future, the Joint Board may intervene to assess the correct exercise of discretionary power by

[10] In the literature available, van Cleynenbreugel, underlined that Article 60 does not clarify "*whether the Board merely conducts a legality review or whether it enjoys unlimited jurisdiction*". See, P. van Cleynenbreugel, *Market Supervision in the European Union: Integrated Administration in Constitutional Context*, 157 (2014).
[11] BoA 2013-014.
[12] See paragraph 44 of the decision where it is stated as follows: "*The Board notes that under Article 18(1) of CRAR, where the respondent refuses to register the credit rating agency, it shall provide full reasons for its decision. Having regard to European jurisprudence, the Board considers the approach on the appeal should be as follows. With respect to the grounds raised by the appellant, the Board has to consider whether the respondent correctly applied the applicable Regulations and the other applicable instruments, whether the respondent was entitled to reach the refusal decisions, or was wrong to refuse registration, and whether the decision was vitiated by procedural irregularity or unfairness*".
[13] For such a perspective see the contribution by M. Perassi, *Verso una vigilanza europea. La supervisione sulle agenzie di rating*, in *Analisi Giuridica dell'Economia*, 407 (2012).
[14] BoA 2014-C1-02.

any of the three ESAs, thus analyzing it according to limits and criteria to be defined[15].

The European legal order offers other examples of quasi-judicial review mechanisms, which do not pertain to the financial sector; some examples, such as the twenty-eight *Technical boards of appeal*, the *Legal Board of Appeal*, the *Enlarged Board of Appeal* and the *Disciplinary Board of Appeal* of the *European Patent Office* (EPO) are actually outside the Union, having been established by international treaties signed by a large number of European countries. Certain EU review bodies were established in the context of the creation of European agencies which perform certain specific functions in a number of industrial sectors: these include the *Board of Appeal of the European Chemical Agency* (16), and the *Office for Harmonization in the Internal Market (OHIM) Boards of Appeal*.

In recent years, both the ECJ and the appeal bodies mentioned above had the opportunity to clarify their legal status and the limits of their scope of review, thus outlining a European model of quasi-judicial review. According to such model defined in the European jurisprudence, these bodies tend to be attracted by the functions and structures of the agencies and administrations they relate with: in other words, they do not have the characteristics of independent "judges", in so that they are branches of the administration called to second-guess the technical aspects of the decisions adopted "at first instance".

In *Koninklijke Philips Electronics N.V. v. EPO* (T-276/99), one of the *Technical Boards of Appeal* of the EPO affirmed that it is neither a tribunal not a judicial body, in so that it is not entitled to submit questions for a preliminary ruling under article 267 TFEU.

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[15] According to some commentators, the doubts on the role of the Joint Board and the extension of its review power should be resolved in the sense that such scrutiny should be extensive and intrude the merit of decisions taken by the ESAs. This opinion is argued on the basis that the decisions of the Joint Board can be submitted for review before the ECJ. See, E. Wymeersch, *The European Financial Supervisory Authorities or ESAs*, E. Wymeersch, Klaus J. Hopt, in G. Ferrarini (a cura di), *Financial Regulation and Supervision: a post-crisis analysis*, (2012).

[16] On the role of the *European Chemical Agency* and the remedies available in the field of the regulation of chemical industries and products see M. Bronckers, Y. van Gerven, *Legal Remedies Under the EC's New Chemical Legislation REACH: Testing a New Model of European Governance*, in Com. Mkt. L. Rev., 1823 (2009).

Nevertheless, in *ETA S.A. Fabriques d'Ebauches v. Piranha Marketing GmbH and Junghans Uhren GmbH* (G 0001/97), the *Enlarged Board of Appeal* stated that it can enjoy the *status* of a judicial body, as it presents characteristics which are close to those of courts; in particular, such status should be recognized as its members *i)* are not bound by instructions by other subjects, entities and institutions, *ii)* are obliged to solely respect the provisions of the European Patent Convention, *iii)* are appointed for a fixed period of time and can be removed only for cause, *iv)* are granted by provisions which ensure their impartiality, and *v)* take motivated decisions according to rules of procedure which are established by the panel itself.

In the EU, the ECJ confronted with similar issues in a number of cases. In *Procter & Gamble v OHIM*[17], the Court affirmed that the Board of Appeal of the OHMI cannot be considered as a court or tribunal, but as an internal body of the OHMI itself. In this famous ruling, the ECJ observed that the review bodies of the OHMI are composed of members whose independence is ensured by the appointment criteria and procedure, the length of their mandate and the concrete modalities according to which they exercise their functions; nevertheless, these panels are part of the administration which is in charge for the registration of Community trademarks. According to the Court, which also recalled a previous ruling by the Court of First Instance in *Procter & Gamble v OHIM (Baby-Dry)* (T-163/98) - a *functional continuity* exists among the OHUM and its internal appeal bodies, as the review boards enjoy the same powers in determining an appeal as the examiner: in this respect, the Court noted that while the Boards of Appeal enjoy a wide degree of independence in carrying out their duties, they "*constitute a department of the Office responsible for controlling, under the conditions and within the limits laid down in Regulation No 40/94, the activities of the other departments of the administration to which they belong*". Therefore, a request for review before the Boards is intended as part of the administrative registration procedure.

The principle of the "continuity in terms of functions" expressed by the ECJ dictates specific consequences with respect of the burden and content of proofs and the safeguards for private

[17] T-63/01.

individuals addressing the review bodies: for example, in *Henkel/UAMI – LHS (UK) (Kleencare)*[18], the Court of First Instance affirmed that "*the extent of the examination which the Board of Appeal must conduct is not, in principle, determined by the grounds relied on by the party who has brought the appeal*", in so that, "*even if the party who has brought the appeal has not raised a specific ground of appeal, the Board of Appeal is none the less bound to examine whether or not, in the light of all the relevant matters of fact and of law, a new decision with the same operative part as the decision under appeal may be lawfully adopted at the time of the appeal ruling*". Accordingly, in *Kaul GmbH v OHIM*, the ECJ reinstated that the continuity in terms of functions does not mean that "*a party which, before the department hearing the application at first instance, did not produce certain matters of fact or of law within the time-limits laid down before that department would not be entitled, under Article 74(2) of Regulation No 40/94, to rely on those matters before the Board of Appeal*", as such party "*is entitled to rely on those matters before the Board of Appeal, subject to compliance with Article 74(2) of that regulation before the Board*"[19].

The principle developed by the Court is intended to apply also to the review conducted by the review body of the *European Chemicals Agency* (ECHA). In *N.V. Elektriciteits – Produktiemaatschappij Zuid-Nederland EPZ Borssele The Netherlands v ECHA*, the ECJ recalled the statement expressed in the *Baby-Dry* case. In this regard, the Court considered that, according to the very same wording of the founding provisions of the two review bodies, the doctrine of the "continuity in terms of functions" should also be referred to the board of the ECHA, with all the descending corollaries in terms of discretion, decisional power and use of evidences and grounds.

5. … and a new banking union problematic model?

The identification of the effective boundaries of the power of intervention which should be attributed to the ABoR and the Appeal Panel is problematic. Certain peculiarities of their respective legal frameworks suggest that the doctrine of the "continuity in terms of functions" developed throughout years by

[18] T-308/01.

[19] ECJ, *Kaul GmbH v Office for the Harmonization of the Internal Market*, C-29/05, paragraph 29.

the jurisprudence may not appropriately fit in the cases at stake. Therefore, it is important to verify whether the European legislator opted for implementing a model which departs from the traditional review bodies with technical expertise, adapting the former to the distinctive nature of the matters concerned and the sensitivity of the issues at stake. Some preliminary remarks are identified hereafter.

The first interesting profile concerns the positioning of the provisions which establish the two review bodies in the context of the SSM and the SRM regulations. Indeed, it must be noted that while Article 25 on the ABoR is inserted in Part IV of Regulation No. 1024/2013, which is dedicated to the organizational principles of the SSM, article 85 on the Appeal Panel is in Title VI of the SRM Regulation, which contains the "Other Provisions", and shortly before the provisions on the recourse to the ECJ and the contractual responsibility and liability in tort of the SRB. The different placing of the two provisions might suggest that these bodies would play a different role in their respective framework: in particular, the first one would suggest that the ABoR is intended as a body assimilated in the structure of the ECB, and integrated in the system of principles and guarantees which safeguard the adoption of supervisory decisions in compliance with the rule of law; the second one may suggest that the Appeal Panel has a more independent attitude, allocated outside the administrative structure of the SRB and equipped with powers and independence benefits which would approximate it to an impartial judicial body.

The second element to be considered concerns the procedure for the appointment and renewal of the members of the ABoR and the Appeal Panel, provided that this aspect has been frequently stressed by the ECJ in its jurisprudence on review bodies. The members of the ABoR and of the Appeal Panel are respectively appointed by the ECB and the SRB, following a public procedure based on a public call for expressions of interest and according to professional and expertise requirements which mirror the prerequisites imposed for their colleagues in other appeal bodies. The professional skills required, as well as the absence of any involvement with the supervisory and resolution authorities both at national and European level, certainly represent a guarantee of independence and autonomy of the

members as individuals and the body as a whole; these criteria support the capacity of the review bodies to withstand external pressures and to cope with the issues submitted on the basis of adequate expertise and experience, similarly to the other panels described above. Remarkably, the appointment and renewal procedures by the ECB and the SRB emulate the provisions adopted for other review bodies, despite potentially being able to reduce the effective margins for independence due to the direct participation and power of choice by the controlled institutions.

A third element to be taken into account concerns the powers, procedure and means to be used for the review of the decisions according to the requests of individuals. Similarly to the *Joint Board of Appeal* of the three ESAs, the model of the panels considered herein still needs to be defined, although certain hints arise through the compared analysis of the respective relevant provisions.

Firstly, the internal procedures and powers are partially heteronomous and partially autonomous: in particular, while the rules on the functioning of the ABoR are established by a decision of the ECB, the Appeal Panel adopts and publishes its own internal rules, formally without the assistance of the SRB[20]. Nevertheless, in this respect, a discrepancy emerges when analyzing the founding provisions of the two bodies: indeed, while in the context of the SSM the power conferred to the ECB to establish the ABoR descends both from the general power of the central bank to set its internal rules and from the specific power to establish the ABoR's internal rules according to the SSM Regulation, in the SRM Regulation it is not clear what would be the scope of the provision of article 85 which empowers the SRB to establish the Appeal Panel. Article 50(1)p) of the SRM Regulation attributes to the plenary session the power to take any decision on the establishment and reform of the internal bodies of the SRB, as appropriate: it appears questionable whether this reference could be extended to the establishment of the Appeal Panel, and whether the SRB would have any power to modify the characteristics and rules of functioning of such panel provided

[20] The internal rules and procedures can be retrieved at the following address:
http://srb.europa.eu/sites/srbsite/files/2016rules_of_procedure_of_srb_appealpanel.pdf.

that the latter establishes its own internal rules; equally, the acknowledgment of such an extended autonomy may hinder the application of the principles of the "continuity in terms of functions" elaborated in the jurisprudence of the ECJ.

Secondly, it should be underlined the uncertainty of the perimeter of review remitted to both the ABoR and the Appeal Panel, and the absence of a unitary model for reference.

In particular, with regard to the ABoR, Article 10 of its founding decision reinstates that the review of the board will focus on the substantial and procedural compliance of the contended decision with the relevant rules and principles of the SSM Regulation; furthermore, Article 10 establishes that such analysis will be limited to the grounds mentioned by the concerned person in its claim, according to the principle on the correspondence between the ruling and the application. This specification contradicts the jurisprudence of the ECJ in the *Kleencare* case: as shown above, technical review bodies should take into account not only the grounds and material facts indicated by the appellants, but also all those elements considered by the deciding body in the course of the procedure which brought to the enactment of the contended decision. With regard to the Appeal Panel, no clear indication can be derived from Article 85 of the SRM Regulation: in particular, the second paragraph of such provision generically refers to the provision of legal advice on the *legality* of the SRB's exercise of its powers. This rather vague diction seems to comprehend both procedural and substantial aspects, in so that the scope of intervention of the Appeal Panel would extend to the fullest extent possible within the limits of the *Meroni doctrine*. Some concerns may derive from the reference to the "legal advice": this wording appears to suggest that the Appeal Panel does not issue a decision, but rather an opinion which nevertheless remains binding for the SRB.

In this respect, the binding effect adopted for the two systems is innovative, and it shows the highest level of inconsistency both among them and in comparison with the other models previously mentioned. Indeed, it has been observed that while the decisions of the ABoR are not binding for the Supervisory Board and the Governing Council of the ECB and will be categorized as mere opinions, the decisions of the Appeal Panel of the SRB will bind the latter and would eventually also be

anticipated by suspensory measures. Therefore, and despite the use of the term "legal advice" noted shortly above, it appears once again that the Appeal Panel enjoys the highest degree of discretion, and it will be effectively in the position to intrude in the evaluations of the decisions of the SRB brought on its desk.

As already pointed out, the power to order the suspension of decisions is allocated in a different manner in the two systems under review: indeed, while in the context of the SSM these powers can only be exercised by the body with a "strong" decisional capacity, *i.e.*, the Governing Council, the Appeal Panel enjoys such power also with a presumably higher level of discretion - in the light of the generic reference to the circumstances of the case which might justify such a suspension. The contradiction is only apparent: indeed, it should be recalled that the SRM Appeal Panel does not enjoy the power to review *any* decision taken by the SRB, the NRAs, the Commission or the Council in the context of recovery and resolution of entities, but only a limited set of measures, thus benefitting of a very limited competence in comparison with the ABoR. As a consequence, the risk to confer extensive suspensory powers to a third independent body which would be in the position to temporary block recovery and resolution decisions is comparatively reduced in respect of the potential effect of the suspension of a supervisory decision in the context of the SSM.

Finally, it is interesting to highlight the different range of individuals entitled to access the two review bodies. In particular, while access to the ABoR is granted to any natural or legal person concerned by the contended supervisory decision, recourse to the Appeal Panel is also open to claims by NRAs, which might object to the decisions of the SRB addressed to them. This peculiarity descends from the features of the SRM, under which the powers of NRAs are exercised according to instructions provided by the SRB as the single coordination point for the procedures of recovery and resolution. In this respect, the role of the Appeal Panel will be particularly sensitive: this body might indeed be called to settle disputes between SRB and NRAs, thus potentially reinforcing its impartiality and independence from the SRB.

6. Conclusions

The analysis carried out in this paper shows that the European legislator opted for a quasi-judicial system of remedies in the banking union which partially diverges from the model established in other highly regulated technical sectors. Due to its features, this system cannot be reconciled in a single unitary model; indeed, both the ABoR and the Appeal Panel present a number of hybrid characteristics which place them at cross-roads between the principle of "continuity in terms of functions" and a strong connotation as judicial and independent specialized panels. In the SSM, the extended scope of review of the ABoR and the evaluation of the sole grounds submitted by the claimant, understood as judiciary-type features, are counterbalanced by its nature as internal body of the ECB, the absence of suspensory powers and the non-binding value of its decisions; within the SRM, the Appeal Panel enjoys a higher degree of independence and the power to suspend the contended decisions and issue binding opinions, although its powers of review are limited to a minimum number of matters due to the relevance of interests at stake.

In the following years, it will be certainly interesting to assess the concrete functioning of such bodies, and to understand whether these will be in the position to critically approach the issues submitted to their attention. In respect of the ABoR, it would be interesting to note whether it will provide any public information on the approach and principles it intends to apply in analyzing the cases deferred, provided that its decisions cannot be published. Also, the current development of hearings and submission of evidence will have to be assessed, considering that these do not properly represent rights of claimants but rather mere instruments which could be used by the ABoR itself when satisfied that these would help in the decision of the case[21].

Finally, it is important to underline that the limits to the

[21] Articles 14 and 15 refer to hearing and evidence before the ABoR. These provisions do not create a right to be heard or to provide evidences: indeed, the ABoR may call for an oral hearing where it "*considers this necessary for the fair evaluation of the review*"; with regard to evidences, the applicant must request permission to adduce, in the form of a written statement, witness or expert evidence, which will be admitted by the ABoR when considered necessary "*for the just determination of the review*".

possibility to reexamine the decisions taken in the context of the SRM, combined with the restrictions of jurisdictional intervention on the resolution measures taken on the basis of the BRRD, may currently pose a serious threat to the compatibility of the system of judicial remedies with the principles of due process, as well as the right to a fair trial and practical and effective remedies as established and interpreted by the courts. Nevertheless, in the light of the experience of the *Joint Board of Appeal* of the three ESAs, and the limited recourse to its prerogative, one may maliciously question whether these bodies were actually necessary, and whether the extensive procedural guarantees available at each procedural stages of both pillars of the banking union weren't sufficient to ensure an appropriate and fruitful dialogue among individuals and authorities.