

# ABoR: experiences after two years

Presentation by Professor René Smits at the seminar  
*The European Banking Union and Its Instruments -  
Experience from the First Years of an Interplay with  
National Banking Supervision and Resolution,*  
Florence (I), 11 October 2016

- *Professor, Law of the Economic and Monetary Union, University of Amsterdam*
- *Alternate Member, Administrative Board of Review (ABoR), European Central Bank*
- *Assessor, Competition College, Belgian Competition Authority (BCA)*
- *Consultant, EMU law and EU banking regulation, RS Law & Society Consulting B.V.*

**No disclosure of privileged information**

**Subject to professional secrecy**

**Speaking in a personal capacity**

# Review panels in financial sector

- EBA, ESMA, EIOPA: Joint Board of Appeal (JBoA)\*
- ECB: Administrative Board of Review (ABoR)\*\*
- SRB: Appeal Panel \*\*\*

\* Articles 58-61 of Regulation 1093/2010 establishing EBA, as amended, and Articles 58-61 of Regulations 1094/2010 and 1095/2010 establishing EIOPA and ESMA, respectively

\*\* Article 24 of Regulation (EU) No 1024/2013 ('SSM Regulation') and ECB Decision of 14 April 2014 concerning the establishment of an Administrative Board of Review and its Operating Rules (ECB/2014/16)

\*\*\* Article 85 of Regulation (EU) No 806/2014 of 15 July 2014 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

## Different approach to challenges: internal review (ECB) vs. Joint Board of Appeal (EBA, ESMA, EIOPA)

- ❑ Independence of review and appeal the same Art. 24(4) SSM Regulation: “The members of the Administrative Board of Review shall act independently and in the public interest. (...)” Art. 59(6) EBA/ESMA/EIOPA Regulations: “The members of the Board of Appeal shall undertake to act independently and in the public interest. (...)”
- ❑ Legal expertise: ECB may provide ABoR with input, whilst having sufficient own expertise; Joint Board of Appeal has its own expertise Art. 58 (2) EBA Regulation: “The Board of Appeal shall have sufficient legal expertise to provide expert legal advice on the legality of the Authority’s exercise of its powers.” Art. 20(2) SSM Regulation: “[ABoR] shall have sufficient resources and expertise to assess the exercise of the powers of the ECB (..)”<>Art. 6(3) ECB Decision 2014/16: “The ECB shall provide the Administrative Board with appropriate support including legal expertise to assist in the assessment of the exercise of the powers of the ECB”
- ❑ Suspension of contested decision: Joint Board of Appeal ESAs versus Governing Council ECB decides
- ❑ Prior venue required before going to Luxembourg? Prior appeal before Joint Board is required (Art. 61(1) EBA/ESMA/EIOPA Regulations) Review against ECB is optional, so direct appeal to ‘Luxembourg’ is possible (preamble and Article 19 Decision ECB/2014/16)

# Different legal bases explain differences

- ABoR independent internal review mechanism of an EU *institution*, whose ultimate decision-making body is the Governing Council
  - Joint Board of Appeal, SRB Appeal Panel are review bodies for *agencies*
- 

- *Article 263, 4<sup>th</sup> paragraph, TFEU*: Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.
- *Article 263, 5<sup>th</sup> paragraph, TFEU*: 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.

# Difference in outcome

- CJEU accessible through JBA or SRB Appeal Panel only, ABoR *alternative* route (cheap, fast and independent) to ‘Luxembourg’
- No publication of ABoR *Opinions* on ECB site
- While SRB Appeal Panel *Decisions* are summarised and JBA *Decisions* are given in full

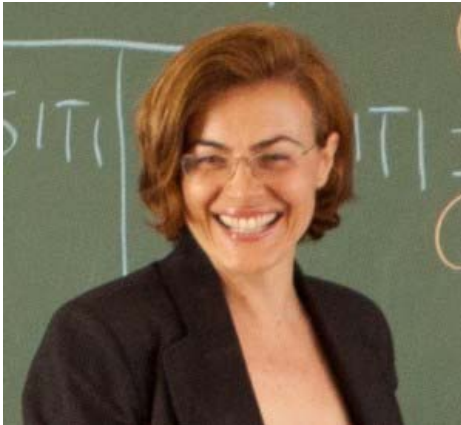
# Numbers

- 6 JBA decisions thus far
- 18 ABoR proceedings (15 Opinions; 3 withdrawn)
- 14 cases before SRB Appeal Panel
- Court case on JBA decision
- Pending court cases after ABoR review

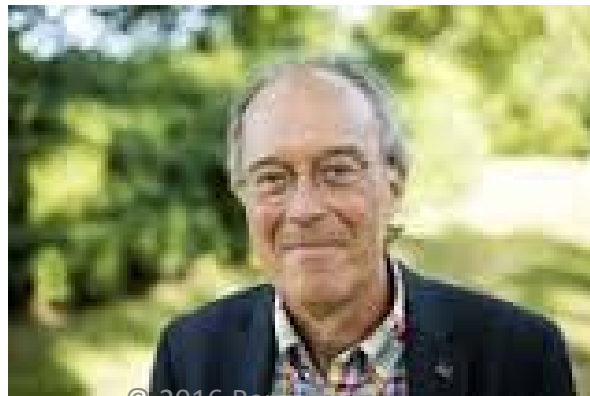
-----

- 18 ABoR cases came from nine Member States

# ABoR



11 October 2016



© 2016 Renie Smits



# Basics on ABoR review - 1

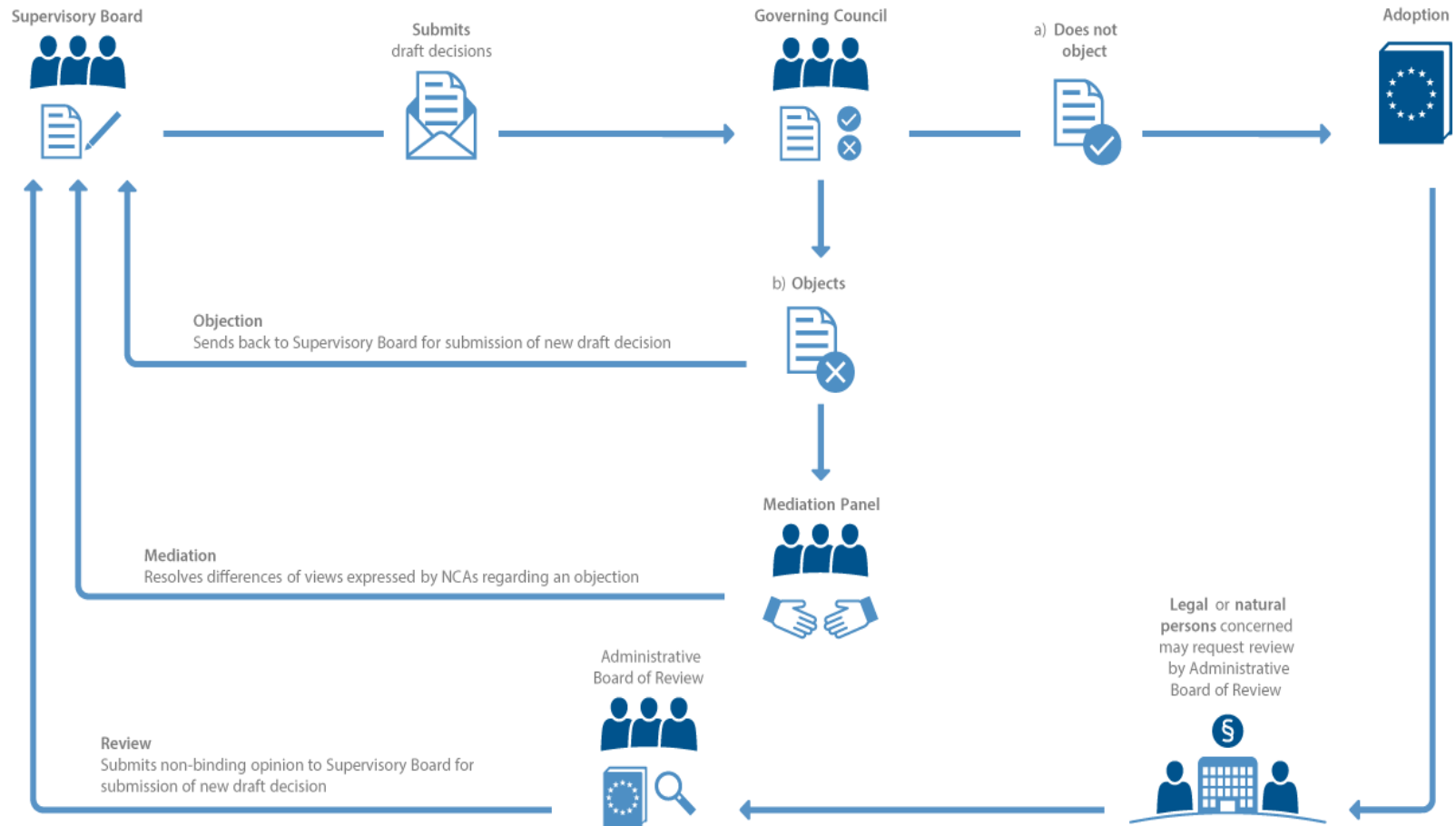
A body composed of:

- **“independent” members:**
  - shall act independently and in the public interest
  - shall not be bound by any instructions
  - they shall make a public declaration of commitments and a public declaration of interests indicating any direct or indirect interest which might be considered prejudicial to their independence or the absence of any such interest;
  - should not be current staff of the ECB, as well as current staff of competent authorities or other national or Union institutions, bodies, offices and agencies who are involved in the carrying out of the tasks conferred on the ECB by the SSM Regulation
- **with relevant knowledge and professional experience in the fields of banking or other financial services**

# Basics on ABoR review - 2

- Any natural or legal person may request a review of a decision taken by **the ECB** in the exercise of the powers conferred on it by the SSM Regulation **which is addressed to that person, or is of a direct and individual concern to that person**
- ABoR **shall express an opinion** within two months from the receipt of the request and remit the case for preparation of a new draft decision to Supervisory Board
- Supervisory Board shall take into account the opinion of the ABoR and shall promptly submit a new draft decision to the Governing Council. The **new draft decision shall abrogate the initial decision**, replace it with a decision of identical content, or replace it with an amended decision
- The review **is without prejudice to the right to bring proceedings before the Court of Justice of European Union (CJEU)** in accordance with the Treaties

# The ECB decision-making process



# Basics on ABoR review - 3

## ABoR:

- rules on the admissibility of the request before examining whether it is legally founded (rules about the standing are the same as those provided by TFEU for having standing before CJEU)
  - assessment is limited to the examination of the grounds relied upon by the applicant as set forth in the notice of review (on the contrary the Supervisory Board may also take other elements into account in its proposal for a new draft decision)
  - may propose to Governing Council to suspend the contested decision if:
    - the request for review is admissible and not obviously unfounded;
    - it considers that the immediate application of the contested decision may cause irreparable damage.
- Hearing
  - Confidential nature of proceedings

# Basics on ABoR review - 4

- **Opinion must propose whether the initial decision should be abrogated, replaced with a decision of identical content or replaced with an amended decision.** In the latter case, the **opinion should contain proposal for the necessary amendments** (Article 16(2) ECB 2014/16)
- **SB “shall take into account the opinion”** of the ABoR (Article 24(7) SSM Reg.)
- **SB shall in any case promptly submit a new draft** decision to the Governing Council and the **new draft decision abrogate the initial decision**; it may replace the original decision with a decision of identical content or replace it with an amended decision (**SB may accept in full or in part the opinion** of the ABoR) (Article 24(7) SSM Reg.)
- ABoR’s opinion **“shall be notified to the parties”** (Article 24(9) SSM Reg.) and accordingly if the parties affected by the ECB decision appeal it before the CJEU **the arguments of the ABoR will be disclosed in court and the CJEU could consider the arguments of the ABoR.**

# Extent of review

- ABoR carries out an internal administrative review pertaining to “...**the procedural and substantive conformity with this Regulation...**” of ECB decisions in prudential supervisory field
- Substantive conformity implies that ABoR review is **not limited to “infringement of an essential procedural requirements”** yet it should **respect the margin of discretion left to the ECB** to decide on the opportunity to take those decisions” (recital 64 SSM Reg.)
- Recital 64 SSM Reg. provides that the ECB should establish the ABoR “for reasons of procedural economy”
- Therefore, ABoR provides review of conformity with SSM Reg. and EU law referred to there (due process, etc.)

# ECB discretion respected

- Judicial review of legality of decision implying complicated “**economic assessment**” made by the Commission or another institution: institution has a “**broad discretion**”, **review will be confined to whether the procedural requirements** were complied with, whether
  - the statement of reason is sufficient
  - the facts are correctly reproduced
  - there wasn’t a manifestly wrong assessment
  - there wasn’t a misuse of powers.

# Issues in review cases

- Significance (of institution)
- Corporate governance
- SREP (Supervisory Review & Evaluation Process)
- Fit and proper (assessment of members of the management body)
- Withdrawal of authorisation (ECB competence for all banks in Euro Area)



# Challenges for ABoR

- National variation in prudential norms: e.g., interpreting *Code Monétaire et Financier*
- Notably in respect of Fit and Proper (FAP) assessment of directors and
- Absence of Bank Holding Company (BHC) regulation at EU level

# FAP - 1

- ❑ On the basis of limited research into a few jurisdictions only, I observe differences in the assessment of the suitability of bank directors and senior management as ‘fit & proper’
- ❑ Article 91(1) CRD IV requirements: sufficiently good reputation and (...) sufficient knowledge, skills and experience, plus: range of experiences and board diversity, sufficient time to devote to board membership, “honesty, integrity and independence of mind” to assess and challenge senior management decisions, adequate training

# FAP - 2

- ❑ Based on limited research (i.e., not covering all EA MS)
- ❑ *Ex post vs ex ante* assessment
- ❑ Informal assessments (pre-screening): due process issue in my home State subject to review by independent outsiders
- ❑ ECB calls for uniformity – quote from banking supervision website:

*“Our aim is to ensure a fair and consistent fit and proper assessment process across all euro area countries. Banks have to know what to expect. We would therefore like to see the fit and proper process become part of the revision and update of CRD IV so that the same rules are applied throughout Europe.”*

# Bank holding regulation and supervision: Europe is behind

- ❑ Again, based on limited research *in Europe*, several States apply additional rules on BHCs
- ❑ Others subject (Mixed) Financial Holding Companies ([M]FHCs) merely to CRR, CRD IV, FICOD implementation
- ❑ BRRD and SSM Regulation directly address (M)FHCs
- ❑ Consolidated supervisory standards supposedly apply to credit institutions which are expected to ensure compliance by parent and other group members .....

# Looking south for inspiration



- ❑ Upcoming review of CRR and CRD-IV provides a welcome opportunity to elucidate this issue
- ❑ And to move forward to clarity on where standards apply, and to subjecting BHCs to supervision
- ❑ Europe may look south for inspiration: African jurisdictions researched recently have established clear BHC legislation – forthcoming publication:

John Taylor and René Smits, Bank Holding Supervision:

A Comparative Inventory and A Call for Pan-African Regulation.

