

Five minutes on: Judicial and administrative review of the ECB's prudential supervisory decisions

Remarks by René Smits

at the panel on **Developments in Europe**

5th Annual CCLS-Bank of England Conference, together with MOCOMILA, on
“Accountability”

6-7 July 2017, Bank of England, London, UK, EU

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Differences between ABoR and other review bodies

- [Joint Board of Appeal](#) EBA/ESMA/EIOPA: decides on cases; yet, EBA jurisdiction rather limited; moreover, snub by General Court in Case T-577/15 (*SV Capital OÜ v. EBA*) re EBA discretion under Art. 17 (observing *robust governance* [then: Art. 22, now Art. 74 CRD] as basis for FAP testing of *key function holders*: “the Board of Appeal did not have competence to decide on the appeal brought before it on the basis of Article 60(1) of Regulation No 1093/2010” (par. 72); EBA priority; claimant lacked standing; [decisions](#) are made public
- [SRB Appeal Panel](#): decides itself or suggests solution to SRB; [extracts](#) on SRB website
- [ABoR](#): an element in the [decision-making](#) on a (new) decision by the ECB Governing Council at the proposal of the *Supervisory Board* through the *no-objection* procedure; Opinions may become known after CJEU (*L-Bank*; T-122/15)
- Differences partially due to institutional position: EU institution (ECB) or agency (EBA, SRB)

Statistics

ABoR requests for review as at 15 June 2017	2017	2016	2015	2014
Number of requests	4	7	8	4
ECB decision confirmed	3	1	2	2
ECB decision amended / reasoning improved	-	2	4	1
Request inadmissible	-	3		-
Request withdrawn	-	1	2	1

*Source: ECB Annual Report on Banking Supervision 2016 and René Smits
NB Impact of ABoR review proceedings beyond Opinion outcome*

Types of issues before ABoR thus far

- **Determination of 'significance'** (SIs and LSIs: Article 6(4) SSM Regulation and the determination process set out in Articles 39-71 SSM Framework Regulation)
- **Issues of corporate governance** (Articles 14 (suitability of shareholders, an authorisation requirement), 22-23 (assessment of qualifying holdings, including a transparent corporate structure) and 88-95 CRD IV);
- **Outcome of the Supervisory Review & Evaluation Process (SREP)**, provided for in Articles 97-101 CRD IV, under which the competent authority reviews the arrangements, strategies, processes and mechanisms implemented by the supervised entity in order to comply with the requirements set out in the CRR and CRD IV and, as a result, may impose higher capital and liquidity requirements than statutorily prescribed in view of the riskiness of a bank's business, as well as other supervisory measures;
- **Fit and proper assessment** of members of the management body (**FAP**: Article 91 CRD IV);
- **Withdrawals of authorisation** (Articles 18 and 67(2)(c) CRD IV; Articles 80-84 SSM Framework Regulation)

Recent judgment in Case T-122/15 (*L-Bank*)

- L-Bank's arguments that it should have remained under sole German supervision are resoundingly rejected;
- Any bank claiming “particular circumstances” that justify its qualification as less significant in spite of meeting the criteria for ‘significance’ in the SSM context, needs to show that national supervision is *better able* to attain the objectives of the SSM Regulation (and not solely: just as well able);
- SSM Reg. objectives repeatedly referred to as the “consistent application of high prudential standards”;
- The **NCA**s perform *decentralised* tasks which form part of the exclusive ECB competences in the field of prudential supervision over all banks in the Euro Area; the allocation of competences to NCAs within the SSM concerns *a delegation from Union to State level*; *prudential supervision over LSIs by NCAs is not the exercise of a national power* – an unexpected reading that strongly underpins the ECB's SSM powers;
- ABoR's Opinion is given weight by the General Court as it considers an ECB Decision adopted in conformity with an ABoR Opinion “an extension of” the ABoR Opinion; ABoR's reasoning may be taken into account when assessing whether the subsequent ECB Decision is sufficiently motivated (adequately reasoned).