

# Review of Supervisory Decisions in the New European Regulatory Landscape

Prof René Smits  
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# EBA and ECB supervisory decisions - 1

## Supervisory 'reach'

- “ **European Banking Authority:** ‘override’ powers vis-à-vis State supervisors
- “ **European Central Bank:** direct supervisory decisions, and ensuring consistent and effective supervision in Single Supervisory Mechanism (= ECB + State supervisors)

# EBA and ECB supervisory decisions - 2

## Geographical scope

- “ **European Banking Authority:** entire EU (28 Member States)
- “ **European Central Bank:** SSM participants, i.e. 18 (as of 1 January 2015: 19) Euro Area Member States plus any non-euro area Member State that enters into ‘close cooperation’ with ECB

# Review panels

“ EBA, ESMA, EIOPA: Joint Board of Appeal (JBoA) \*

“ ECB: Administrative Board of Review (ABoR) \*\*

“ Judicial review by CJEU

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\* 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)

# Cross-sector versus single-sector review mechanism

## Sectors covered:

“ **Joint Board of Appeal:** banking, securities, insurance, pension funds

“ **ABoR:** banking

# Single Supervisory Mechanism (SSM)

- “ Review against National Competent Authority (NCA) decisions
- “ Whom to address (national review proceedings or ABoR/CJEU)?

## 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 to provide ABoR with input; 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. 6(3) ECB Decision 2014/16:

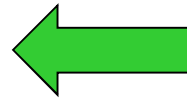
“The ECB shall provide the Administrative Board with appropriate support including legal expertise to assist in the assessment of the exercise of the powers of the ECB”

- Suspension of contested decision: Joint Board of Appeal ESAs versus Governing Council ECB decides

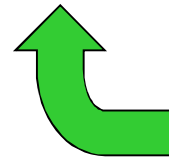
- Prior venue required before going to Luxembourg?

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)



Joint Board of Appeal



Administrative Board of Review



# JBoA: interesting case law already

“ SV Capital OÜ (24 June 2013 and 14 July 2014)

“ Standard Rating (10 January 2014)

# Administrative review against ECB

- ECB-internal review process
- “an optional review for persons to whom a decision of the ECB under Regulation 1024/2013 is addressed, or to whom such decision is of direct and individual concern, before bringing proceedings before the Court of Justice”  
(4<sup>th</sup> recital, preamble, ECB Decision 2014/16)
- Direct recourse to CJEU possible  
(Art. 24 (11) SSM Regulation and Art. 19 ECB Decision 2014/16)
- NB prior ‘review’ of draft supervisory decisions  
(Art. 31 SSM Framework Regulation\*: right to be heard)

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\* Regulation ECB/2014/17 of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the ECB and national competent authorities and with national designated authorities (SSM Framework Regulation), OJ L 141/51, 14 May 2014.

# Administrative Board of Review (ABoR)

- An ECB-internal review board
- 5 (+ 2 alternates) independent and experienced members, appointed by Governing Council for 5 years
- ECB to assist ABoR with legal expertise, also on ECB powers under SSM Regulation (Art. 6(3) Decision ECB/2014/16 establishing Board and setting out Operational Rules)

# Administrative review proceedings - 1

- Applicant files notice of review within 1 month
- Applicant may request suspensive effect of review
- Suspension of decision *may* be granted by Governing Council upon Administrative Board of Review proposal if review request is admissible and not “obviously unfounded” and “immediate application of the contested decision may cause irreparable damage”
- Scope of review: “the relevant decision’s procedural and substantive conformity with Regulation 1024/2013” and limited to grounds submitted by applicant, so:
  - no application of wider principles or provisions (but Charter\* applies)
  - no ex officio widening of review grounds

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\* Article 51 Charter of Fundamental Rights of the European Union (Official Journal of the European Union, C 326/391, 26 October 2012)

## Administrative review proceedings - 2

- Administrative review only once: new decision after review can be contested in judicial review only  
(Art. 11(2) ECB Decision 2014/16 and Art. 24 (7) SSM Regulation)
- Closed oral hearing between applicant and ECB possible
- Evidence: written statements, witnesses, expert opinions
- Access to file except for confidential information (correspondence between ECB and NCAs possibly excluded)  
(Art. 20(3), (4), (5) ECB Decision 2014/16)
- Review opinions to be adopted by 3 of 5 Board members  
(Art. 24(3) SSM Regulation and Art. 16(3) ECB Decision 2014/16)

# Administrative review proceedings - 3

- Non-binding opinion within 2 months of application to Governing Council: abrogate, maintain, amend decision

(Article 7 SSM Regulation; Article 16 ECB Decision 2014/16)

- Supervisory Board receives opinion and prepares new decision for submission to Governing Council (Article 17 ECB Decision 2014/16)
- Review Board opinion, draft decision Supervisory Board, decision of the Governing Council notified to parties (Article 18 ECB Decision 2014/16)
- Costs in case of unsuccessful review applications! (Art. 21 ECB Decision 2014/16)

# Single Resolution Mechanism (SRM): EBA-similar appeals procedure

- Similar appeals procedure arrangements for SRM  
(Art. 85 SRM Regulation\*)
- Appeal Panel to be established
- Six week appeals period – one month: appeals decision
- Then, recourse to the CJEU
  
- Thus: approach to review of legal acts: EBA, SRM ↔ ECB

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\* Regulation (EU) No 806/2014 of the European Parliament and of the Council 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, Official Journal of the European Union, No. L 225/1, 30 July 2014.