"Building an effective Banking Union is one of the priorities for the future of the whole European integration process. There are still a myriad of questions which are largely unexplored and that deserve further discussion. This book satisfies such a need by tackling both constitutional and substantive matters in a clear and authoritative style. The various contributions are cleverly organised as to form a coherent narrative."

—**Andrea Biondi**, Chair of European Law, King's College London, UK

"The international team of authors whose contributions are assembled in this book under the leadership of Mario P. Chiti and Vittorio Santoro are guiding the reader in the labyrinth of the fascinating developments of EU law due to the consolidation of the European Banking Union. This is an up-to-date and comprehensive companion to a field that is indispensable for any serious scholar of EU law and banking law."

—**Jacques Ziller**, Professor of European Union Law, University of Pavia, Italy

"Authoritative and timely on a subject of the first importance, this new handbook will be a chief reference point for all those interested in the place of the Banking Union in EU integration. Critical and constructive, it should appeal to practitioners and scholars alike."

—**Richard Rawlings**, Professor of Public Law, University College London, UK

This handbook analyses the European Banking Union legal framework focusing on legislative acts (regulations and directives), case law and the resolution procedures. In addition, it will pay attention to the division of responsibilities between the ECB and the national authorities, with special attention to the Single Supervisory Mechanism (SSM) and the Single Resolution Mechanism (SRM). To give a more complete picture, the book will also cover the implementation of European Deposit Insurance Scheme (so called third pillar) still under construction.

Mario P. Chiti is Emeritus Professor of Administrative Law, University of Firenze, Italy and the Jean Monnet Chair ad personam of European Administrative Law.

Vittorio Santoro is Professor of Business Law at the University of Siena, Italy, and PhD Coordinator in Jurisprudence of the Universities of Siena and Foggia, Italy.

ISBN 978-3-030-13474-7
9 783030 134747
www.palgrave.com

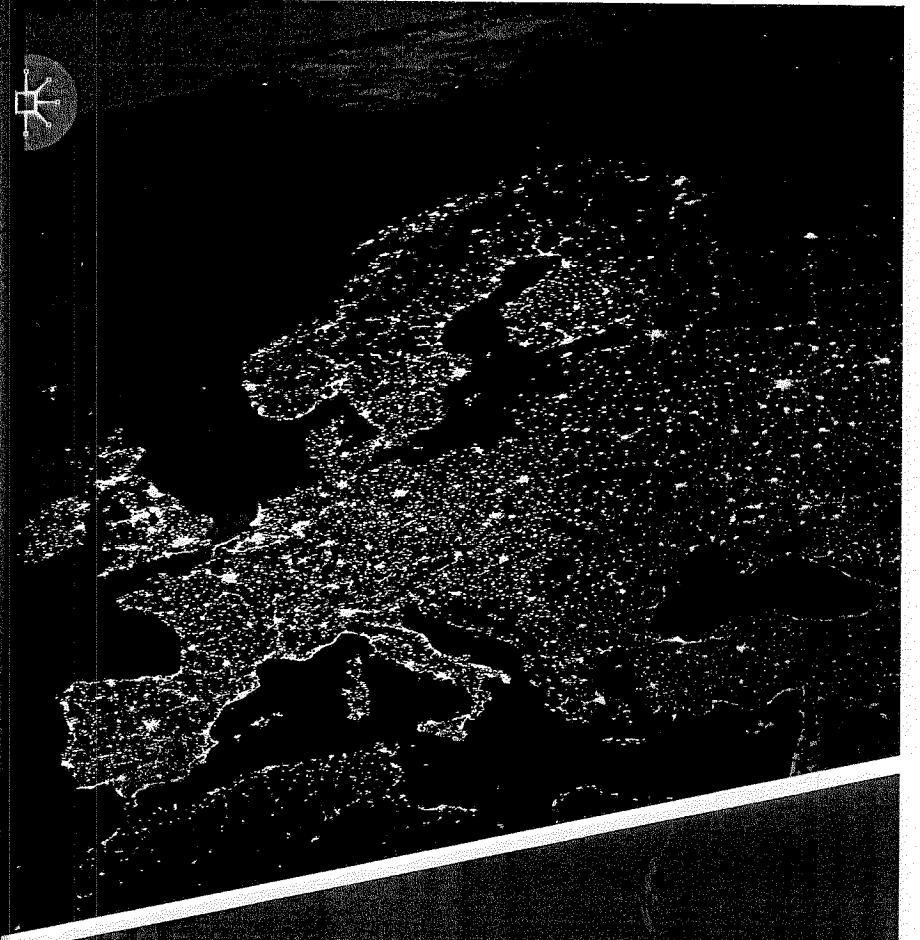
palgrave
macmillan

The Palgrave Handbook of European Banking Union Law

Edited by Mario P. Chiti · Vittorio Santoro

PALGRAVE HANDBOOKS

palgrave
macmillan



The Palgrave Handbook of European Banking Union Law

Edited by
Mario P. Chiti · Vittorio Santoro

palgrave
macmillan

Judgements and orders of the General Court

Case T-786/14, *Bourdouvali/Council of the European Union*, 13.7.2018
Case T-680/13, *Chrysostomides/Council and Others*, 13.7.2018
Case T-733/16, *Banque Postal/ECB*, 13.7.2018
Cases T-133/16 to T-136/16, *Caisse régionale de crédit agricole mutuel Alpes Provence/ECB*, 13.7.2018
Case T-712/15, *Crédit mutuel Arkéa/ECB*, 13.12.2017; on appeal before the Court of Justice in Case C-152/18
Case T-247/16, *Trasta Kommercbanka/ECB*, [order] 12.9.2017
Case T-122/15, *Landeskreditbank Baden-Württemberg/ECB*, 16.5.2017; on appeal before the Court of Justice in Case C-450/17
Case T-191/99, *David Petrie and others/European Commission*, 11.12.2001
Case T-132/96 and T-143/96, *Freistaat Sachsen and Others/Commission*, 15.12.1999

European Court of Human Rights

Decision 9.4.2015, *Adorisio/The Netherlands*, no. 47315/13, 48490/13 and 49016/13
Decision 10.7.2012, *Grainger/United Kingdom*, no. 34940/10
Decision 24.11.2005, *Capital Bank AD/Bulgaria*, no. 49429/99
Decision 21.10.2003, *Credit and Industrial Bank/the Czech Republic*, no. 29010/95

Austria

Verfassungsgerichtshof, 3.7.2015, G 239/2014 ua, G 98/2015-27

Germany

Bundesverfassungsgericht, 2 BvR 1685/14, 2BvR 2631/14 (Bankenunion) [pending]
Landesgericht (LG) München I, 8.5.2015, 32 O 26502/12, *Bayern LB/Hypo Alpe Adria*, 32 O 26502/12
Bundesgerichtshof (BGH), 1.7.2014, II ZR 381/13

Spain

Tribunal Supremo, Sala de lo Civil, 20.1.2014, *Caixa d'Estalvis del Penedés (hoy la entidad Mare Nostrum, S.A.)/Marbres Togi S.L.*
Tribunal Supremo, Sala de lo Civil, 9.5.2013, *Asociación de Usuarios de los Servicios Bancarios/Banco Bilbao Vizcaya Argentaria, SA*
Tribunal Supremo, Sala de lo Civil, 21.11.2012, 2012:11052

United Kingdom

UK Supreme Court, 24.11.2016, *Goldman Sachs International/Novo Banco SA*, [2016] EWCA Civ 1092
UK High Court of Justice, Commercial Court, 7.8.2015, *Goldman Sachs International/Novo Banco SA*, [2015] EWHC 2371 (Comm)

Contents

Howarth D. and Quaglia L. (2016), *Internationalised banking, alternative banks and the Single Supervisory Mechanism*, *West European Politics*, 39:3, 438–461

Jans J. H. (2000), *Proportionality Revisited*, *Legal Issues of Economic Integration*, 27, 239–265

Joosen B., Lamandini M., Lehmann M, Lieverse K. and Tirado I. (2018), *Stability, Flexibility and Proportionality: Towards a Two-Tiered European Banking Law?*, European Banking Institute *Working Paper* Series 2018, no. 20

Lautenschläger S. (2017), *Is Small Beautiful? Supervision, regulation and the size of banks*, Statement at an IMF seminar, Washington DC, 14 October 2017, available at https://www.bis.org/review/r171018b.htm (last visited 19 October 2018)

Moloney N. (2014), *European Banking Union: Assessing its Risks and Resilience*, *Common Market Law Review*, 51, 1609–1670

Riles A. (2014), *Managing Regulatory Arbitrage: A Conflict of Laws Approach*, *Cornell International Law Journal*, 47, 63, 68–76

Ringe W.-G. (2016), *Regulatory Competition in Global Financial Markets — The Case for a Special Resolution Regime*, *Annals of Corporate Governance*, 1, 175–247

Singh D. (2015), *The Centralisation of European Financial Regulation and Supervision: Is There a Need for a Single Enforcement Handbook?*, *European Business Organization Law Review*, 16, 439–465

Zetzsche D. (2016), *Competitiveness of Financial Centers in Light of Financial and Tax Law Equivalence Requirements*, E. Avgouleas, R. P. Buckley, D. W. Arner, *Reconceptualizing Global Finance and Its Regulation*, Cambridge University Press, p. 390–418

5

The System of Administrative and Jurisdictional Guarantees Concerning the Decisions of the European Central Bank

Marcello Clarich

1 Introduction

The administrative and jurisdictional remedies provided for by the European legal system in relation to the acts of the European institutions and agencies constitute an essential feature which concurs to define the European Union as an entity founded on the principle of the rule of law. The latter, in addition to other fundamental values (dignity, freedom, democracy, etc.), is referred to in Article 2 of the Treaty on European Union.

Jurisdictional remedies are recognized in the Treaties. Article 263 of the Treaty on the Functioning of the European Union grants in general terms to the Court of Justice of the European Union the power to review the legality of the acts of all the institutions and bodies, of the Union intended to produce legal effects toward third parties (Chiti 2013). The European Central Bank is certainly included in such institutions.

Administrative mechanisms of review are foreseen in several European regulations and directives, and therefore, the non-judicial review of the decisions of the European Central Bank (ECB) on banking supervision as foreseen by Council Regulation (EU) 15 October 2013 no. 1024/2013 establishing the Single Supervisory Mechanism on European Credit Institutions and

M. Clarich (✉)
Sapienza University of Rome, Rome, Italy
e-mail: m.clarich@studioclarich.it

M. P. Chiti, V. Santoro (eds.), *The Palgrave Handbook of European Banking Union Law*,
https://doi.org/10.1007/978-3-030-13475-4_5

entrusted to the Administrative Board of Review does not in itself constitute a novelty (Article 24) (Barucci and Messori 2014; Chiti and Santoro 2016; Clarich 2014).

In particular, in the banking sector, Regulation (EU) no. 1093/2010, establishing the European Banking Authority, provides for a competent Board of Appeal to decide requests for review filed against acts of the same authority (Article 60) (Brescia Morra et al. 2017; Brescia Morra 2018; Blair 2016). In addition, Regulation (EU) 15 July 2014 no. 806/2014 establishes an Appeal Panel for the purposes of deciding on appeals against decisions of the Board of Appeal on the procedures for the resolution of credit institutions (Article 85).

Administrative remedies are provided also with reference to other sectors of activity in which the regulatory authorities operate at national level. The electricity sector can be taken as an example, in fact, Regulation (EC) of 13 July 2009 no. 713 establishing the Agency for the Cooperation of National Energy Regulators grants the right of appeal against decisions of such Agency before the Board of Appeals (Article 19).

Considering the administrative nature of the remedies, according to the principles of the rule of law, it is nevertheless ensured that judicial remedies can be brought against the final decision which concludes the procedure. Administrative and jurisdictional remedies should therefore be considered as tools to be used generally in sequence. As will be seen, also Regulation (EU) no. 1024/2013 establishing the Administrative Board of Review of acts taken by the European Central Bank on banking supervision, without prejudice to the right to appeal before the Court of Justice of the European Union under the Treaties.

This essay examines the procedure and the nature of the review before the Administrative Board of Review established by Regulation (EU) no. 1024/2013 with the aim of highlighting its specific features especially concerning the parallel remedies provided for by the aforementioned European banking legislation (see De Lucia 2013).

2 The General Features of the New Administrative Remedy

The discipline of the Administrative Board of Review and the procedure rules are contained in the Article 24 of Regulation no. 1024/2013 and, on the basis of the delegation contained in para. 10 of the Article, by an ECB Decision approved on 14 April 2014 (ECB/2104/16 in GUCE 14.6.2014 L175/47).[1]

[1] See ECB/2104/16 in GUCE 14.6.2014 L175/47.

It is convenient to start from the recitals of the Regulation from which at least three indications are drawn.

Firstly, the recital no. 60 states that the Court of Justice of the European Union (CJEU) exercises, pursuant to Article 263 of the TFEU, the review of the legality of acts of, inter alia, the ECB, other than recommendations and opinions, intended to produce legal effects vis-à-vis third parties. Therefore, the last para. of the Article 24 of the Regulation, as mentioned above, expressly reserves the right to bring proceedings before the CJEU in accordance with the Treaties.

Secondly, the recital no. 64 describes the review mechanism in general terms. It clarifies that it should pertain to the procedural and substantive conformity with such Regulation of the decisions of the European Central Bank "while respecting the margin of discretion left to the ECB to decide on the opportunity to take those decisions".

Furthermore, it specifies that this is an "internal review" and that the procedure should "provide for the Supervisory Board to reconsider its former draft decision as appropriate".

Thirdly, it should be noted that the Administrative Board of Review must be composed of individuals of a high repute, ensuring an appropriate geographical and gender balance across the Member States.

Given these indications, Article 24 regulates both the composition of the Administrative Board of Review and the review mechanism.

For what concern the first aspect, the Administrative Board of Review is composed of five individuals (with two additional substitutes) of high repute, with proven record of relevant knowledge and professional experience in the field of banking services or other financial services, named afterward a public call for expressions of interest (para. 2). However, it is excluded that in-service employees of the ECB and of the European and national authorities involved in the supervisory functions can be appointed in order to avoid the internal remedy from becoming too internal. The term is of five years and can be extended only once.

Members of the Administrative Board of Review shall act "independently and in the public interest" and must therefore make a public declaration indicating any direct or indirect interest which might be considered prejudicial to their independence (para. 4).

Ultimately, the Administrative Board of Review, although incardinated within the ECB, enjoys organizational and functional autonomy which makes it a third part compared to the ECB's apparatus and other bodies. Independence is also guaranteed particularly with regard to regulated subjects through the obligation to declare conflicts of interest.

Compared to administrative remedies established in other contexts, including the financial one (Regulations (EU) no. 1093/2010 and no. 806/2014 (respectively, Article 60, para. 6, and Article 85, para. 10),[2] the Administrative Board of Review cannot adopt rules for its own functioning and procedure which Article 24 (10) refers to a decision adopted by the ECB.

Such difference is explained, as will be further examined in the next paragraph, by the nature of internal organ of the Commission.

The ECB Decision adopted pursuant to Article 24 takes over the provisions of the latter and adds some element of detail.

The Administrative Board does not have a structure of its own as the secretary functions are carried out by the Secretary of the Supervisory Board (Article 6). The Secretary carries out the examination of reviews, organizes the hearings, drafts the reports of works and keeps the register of reviews. In a broader perspective, the ECB provides the Administrative Board with adequate support including legal competences. The appropriateness of these choices, perhaps dictated by the need to contain the costs of the structure, can lend itself to some doubts, since greater division between the internal structures of the two above-mentioned organs would have ensured more clearly, even in terms of its external image, the distinction between the controlling and the controlled organ.

So far, compared to other similar commissions, especially those set up in financial matters, the Administrative Board of Review does not present particular features. For example, Article 85 (1) of the Regulation (EU) no. 806/2014 governing the Appeal Board contains provisions identical to those examined so far.

The first specific characteristic of the new remedy foreseen in the banking sectors is represented by its relationship with the appeal before the Court of Justice of the European Union. As mentioned above, para. 11 of Article 24 expressly reserves the right to bring proceedings before the CJEU in accordance with the Treaties. Therefore, as explained in recital 4 of the ECB Decision of 14 April 2014, the review is optional.

On the other hand, further sectoral disciplines generally provide that the activation of non-jurisdictional remedies is preliminary to the jurisdictional proceedings.

For instance, Article 91 of the Statute for Officials of the European Community provides that the administrative complaint (proposed before the appointing authority) constitutes a condition for the admissibility of the judicial remedy

[2] Thus, in the financial sector, in the case of the Boards of Appeal provided for by Regulations (EU) no. 1093/2010 and no. 806/2014 (respectively, Article 60, para. 6, and Article 85, para. 10).

(para. 2). Even in the case of Community trademarks, the appeal at administrative level is prejudicial to the appeal before the Court of Justice of the European Union (Article 65 of Regulation (EC) 26 February 2009 no. 207/2009).

The purpose of such remedies is to deflate jurisdictional litigation, especially in the areas, as those mentioned above, which involve a large number of stakeholders, have lower costs and short-term decision-making, and guarantee a greater specialization.

Even in financial matters, both in the case of the European Banking Authority and in the case of the Board responsible for the resolution of credit institutions (Single Resolution Board), the provisions issued by the competent bodies can be appealed before the Court of Justice of the European Union only when there is no right of appeal before the Board of Appeal (Article 61 of Regulation no. 1093/2010 and Article 86 of Regulation (EU) no. 806/2014) (see Lamandini 2014).

To sum up, the new administrative remedy established under the Single Supervisory Mechanism is not conceived as a filter for the access to European jurisdiction with deflationary purposes. Instead, it can represent a first form of less costly protection for the subjects of ECB measures characterized by short-time decisions.

3 The Internal Character of the Review

The optional nature of the administrative remedy now examined constitutes an obligatory choice considering the fact that the Treaty envisages the Governing Council and the Executive Board as the only decision-making bodies of the ECB (Article 283 of the TFEU).

Without a modification of the TFEU, it would not have been possible with Regulation no. 1024/2013 to establish a new body with autonomous powers.

Moreover, the newly established Supervisory Board, which is responsible for banking supervision functions, is also defined as an internal body of the ECB (Article 26, para. 1). It is responsible for carrying out preparatory works regarding the supervisory tasks conferred on the ECB and proposing to the Governing Council "complete draft decisions" to be adopted by the latter (generally through a mechanism of silent consent) (para. 8). In substance, from a formal point of view, the provisions on banking supervision are imputed, not on the Supervisory Board, but on the Governing Council. This solution guarantees, as far as possible, the distinction between the new supervisory functions and those, more traditional, concerning monetary

policies. The Article 25 of Regulation no. 1024/2013 provides for a series of measures aimed to implement such division, establishing for example that the Governing Council operates with separate meetings and agendas.

According to the same logic, the Administrative Board of Review, as specified in para. 1 of Article 24 of the Regulation (EU) no. 1024/2013, is established for the purposes of carrying out "an internal administrative review of the decisions taken by the ECB in the exercise of the powers conferred on it by this Regulation".

The internal nature of the review necessarily implies that the decisions taken by the Administrative Board of Review in relation to the requests of re-examination submitted by natural or legal persons are not binding. In fact, they are defined by the Regulation as an "opinion" of which the ECB Supervisory Board must take into account by submitting to the Governing Council of the ECB a new draft decision (Article 24, para. 7).[3] Article 16(5) of the ECB Decision of 14 April 2014 clarifies that the opinion "does not bind the Supervisory Board, nor the Governing Council".

Once the opinion has been obtained, the Supervisory Board adopts a new draft decision that repeals the previous one and replaces it with a decision with identical content or with an amended one that is submitted to the Governing Council of the ECB for formalization through the silent assent mechanism (para. 7). Ultimately, the opinion, which must contain reasons,[4] to resume the traditional classifications in terms of advisory function, is not binding and takes the form of a request for re-examination by the institution that issued the provision.

Furthermore, neither Article 24 of the Regulations, nor Article 17 of the ECB Decision of 14 April 2014 implementing the aforementioned Regulation, expressly provides for a specific obligation to state reasons which may induce the Supervisory Board to confirm the draft decision by disregarding the opinion. In reality, such an obligation seems to be implicit in the duty to take into account and evaluate the opinion of the Administrative Board of Review provided for by the above provisions.

A detail which confirms the particular nature of the remedy consists in the fact that the Supervisory Board in assessing the opinion of the Board of Review is not limited to the examination of the grounds relied upon by the applicant as set forth in the notice of review. The proposal for a new draft decision to be

[3] Article 16(5) of the ECB Decision of 14 April 2014 clarifies that the opinion "does not bind the Supervisory Board, nor the Governing Council".

[4] See Article 16(4) of the ECB Decision of 14 April 2014.

sent to the Governing Council of the ECB "may also take other elements into account" (Article 17, para. 1, of the ECB Decision of 14 April 2014).

In conclusion, the administrative review is part of the decision-making process aimed at adopting the provisions on banking supervision in continuity with the functions assigned to the Supervisory Board, which, in considering the Board's opinion and submitting a new draft decision to the Governing Council, doesn't have any particular limitation in re-evaluating the case in question.

This means that the administrative review should be framed, rather than in the logic of the *adjudication* typical of alternative remedies to jurisdiction, in that of *implementation*, that is, the best application of sector regulations to specific concrete cases (see De Lucia 2013, p. 331).

This approach is confirmed by the first jurisprudential interpretations. In deciding an appeal for the annulment of an ECB decision on banking supervision, the Fourth Extended Chamber of the General Court considered that the opinion of the Administrative Board of the Review and the final decision of the ECB should be considered in a unitary way in order to identify the reasoning behind the latter (judgment of the General Court (Fourth Chamber, Extended Composition) of 16 May 2017 in Case T-122/15 on an action brought by the Landeskreditbank Baden-Wurttemberg—Forderbank against the European Central Bank). It would be suitable to focus more closely on the case.

The applicant bank challenged an ECB's decision to subject it to its direct supervision as a significant entity within the meaning of the Regulation (EU) no. 1024/2013, requesting for this reason a re-examination of the decision by the Administrative Board of Review. The latter had issued an opinion which concluded for the legitimacy of the decision of the ECB. The ECB then issued a new substitutive decision of the previous one which confirmed however the qualification of the applicant as a significant entity. The appeal lodged at the Court of First Instance raised several grounds, among which the violation of the obligation to state reasons in relation to the withholding tax does not have any particular circumstances that could make the classification as significant entity to be subject to direct supervision by the ECB.

However, the Court firstly recalls the case law according to which the statement of reasons does not necessarily have to specify all the relevant elements of fact and law, having to refer not only to its content but also to its context and to the legal rules governing the matter in question (para. 124). Then, the Court notes that the contested ECB decision followed the proposal contained in the opinion of the Administrative Board of the Review and considers that "*the explanations contained therein may be taken into account for the purpose of determining whether the contested decision contains a sufficient statement of rea-*

sons" (para. 127). Basically, from "*a combined reading of the contested decision and the Administrative Board of Review's Opinion*" (Part 128) could be deduced the reasons why the ECB had considered that the particular circumstances that would have justified the maintenance of supervision by the national authority were not demonstrated by the applicant.

Lastly, despite the formal autonomy of the internal opinion of the Administrative Board of Review and of the ECB's decision, the two acts should be considered as steps in a unitary procedure for implementing European banking supervision legislation.

The internal non-binding review model for the deciding authority introduced by Regulation no. 1024/2013 is therefore a peculiarity that can't be found in other contexts.

Indeed, the degree of binding nature of decisions on administrative petitions is generally higher. For some remedies, the decision is extended to the merit of the issues and replaces the one under review. For example, in the case of Community trademarks, the Board of Appeal may "*exercise any power within the competence of the department which was responsible for the decision appealed*" (Article 64 (1) of Regulation (EC) 207/2009). Alternatively, the Board of Appeal may remit the case to the department whose decision was appealed which is however bound by the *ratio decidendi* of the Board of Appeal's decision (para. 2).

In the case of the Board of Appeal competent to examine appeals against the provisions of the European Banking Authority (and other financial authorities), the decision of merit taken at the end of the procedure, if it does not confirm the contested provision, is binding on the Authority to which case is remitted and which is required to adopt an amended decision (Article 60 (5)). The same model is established by Regulation (EU) 806/2014 on the resolution of credit institutions (Article 8, para. 8).

4 Other Procedural Profiles

Another feature of the administrative review of the ECB's decisions on banking supervision concerns the interim measures.

In fact, on the one hand, according to the general rule applied for this type of remedies, the request for re-examination has no suspensive effect; on the other hand, however, the Administrative Board of Review cannot directly grant any interim measures, but can only propose the Governing Council of the ECB to do so (Article 24, para. 8, of Regulation 1024/2013). The Governing Council takes a decision, after having heard the opinion of the

Supervisory Board as appropriate (Article 9 (2) of the ECB Decision of 14 April 2014).

As a general rule, for other types of non-jurisdictional remedies, the suspension of the measure under review is one of the powers of the quasi-judicial body. Thus, in particular the Boards of Appeal provided for by Regulation (EU) no. 1093/2010 and by the Regulation (EU) no. 806/2014 mentioned several times may suspend the execution of the contested decision (respectively, Article 60 (3) and Article 85 (6)).

The failure to assign this power to the Administrative Board of Review is justified once again in relation to the internal character of the remedy.

The same reason justifies the exception to the general principle concerning administrative remedies according to which the decisions of the deciding body are published. In particular, according to Regulation (EU) no. 1093/2010, the decisions taken by the Board of Appeal are published by the Authority (Article 60, para. 7).

On the contrary, according to Regulation (EU) no. 1024/2013, the opinions expressed by the Administrative Board, as well as the new draft decision presented by the Supervisory Board and the final decision adopted by the Governing Council of the ECB, are notified to the parties. Publication is therefore not foreseen. The same rule is also set by Article 85, par. 9, of the Regulation (EU) no. 806/2014 on the resolution of banking crises.

In the event of an appeal against the new ECB decision which is not in accordance with the Administrative Board's opinion, the appellant can certainly use the content of the opinion of the latter for its review in its favor and therefore the Court of Justice of the European Union can decide the case based on a variety of views and therefore more thoughtfully. However, the failure to publish the opinions prevents the establishment of a "jurisprudence" of the Administrative Board of Review aimed at guiding the behavior of operators in the sector.

It is not relevant at this point to give a detailed account of all the procedural rules contained specifically in the ECB Decision of 14 April 2014.

However, it should be noted that Regulation (EU) no. 1024/2013 provides a very tight time scan, and this is in line with the requirement, typical of non-jurisdictional remedies, that the administrative review phase will run out quickly. The review request must be submitted within one month of the date of notification of the contested decision, and the Administrative Board of Review shall express the opinion within two months (Article 24, paras. 6 and 7). The ECB Decision of 14 April 2014 provides for short deadlines for the adoption of a new draft decision by the ECB Supervisory Board. The deadline is 10 days in the case of a new draft decision of identical content and 20 days in the case

of a new draft decision abrogating or amending the initial decision (Article 17 (2) of the ECB Decision of 14 April 2014).

The two-month time limit for issuing the opinion may appear to be very tight, especially in the more complex cases in relation to which the Administrative Board may perhaps authorize to call a witness or an expert to give oral evidence at the hearing (Article 15 of the ECB Decision of 14 April 2014).

The judicial nature of the remedy emerges from a few normative provisions.

Firstly, the Administrative Board's review shall be limited to examination of the grounds relied on by the applicant as set out in the notice of review, in application of the principle of demand (Article 10 (2) of the ECB Decision of 14 April 2014). Such a provision would not be justified if the remedy, on the other hand, was considered to be a more direct involvement of the Administrative Board in the function of active administration.

Secondly, the applicant may at any time withdraw the review request (Article 7 (6) of the ECB Decision of 14 April 2014).

Thirdly, at the hearing for discussion, both the applicant and the ECB are required to make oral representations (Article 14 (1) of the ECB Decision of 14 April 2014). Such prevision leads into the proceedings a moment of direct debate between the "parties concerned".

The scope of review, according to Regulations (EU) no. 1024/2013, concerns "the procedural and substantive conformity with this Regulation of such decisions" (Article 24, para. 1, and Article 10, para. 1, of the ECB Decision of 14 April).

A narrow interpretation of the two articles could be that the Administrative Board of Review cannot apply general principles and other relevant provisions not expressly referred to in the Regulation and must take as a normative parameter for its decisions only express provisions of this normative text.

According to the ECB Decision of 14 April 2014, the petition can be filed by any natural or legal person in respect of a decision of the ECB to which it "is addressed, or to whom such decision is of direct and individual concern" (Article 7 (1)).

This requirement is assessed by the Administrative Board of Review before examining whether the review request is legally founded. In the absence, the request for review is declared inadmissible. However, a request submitted in relation to the decision of the Governing Council of the ECB taken on the new draft decision prepared by the Supervisory Board (Article 11 of the ECB Decision of 14 April 2014) is inadmissible. Against this last one, however, the way of the appeal to the Court of Justice of the European Union according to the Treaties remains open.

The right of defense is guaranteed by the fact that the applicant has the right to access the ECB file, within the limits of protection of business secrets and confidential information (Article 20 of the ECB Decision of 14 April 2014).

5 Concluding Remarks

As highlighted in the previous paragraphs, the administrative review of the ECB's decisions regarding banking supervision presents various elements of specificity compared to the models usually established by other sector disciplines. Moreover, given the first case law indications mentioned above, the opinion issued by the Administrative Board of Review is to be integrated in some way in the final decision of the ECB and therefore fits into a unitary process of implementation of the European legislation on banking supervision.

The main reason for the specificities of the administrative review is linked, as we have seen, to the fact that the ECB is an institution governed directly by the Treaty which defines the two fundamental organs (the Governing Council and the Executive Board). The Regulation (EU) no. 1024/2013 could therefore establish only internal bodies.

Furthermore, the whole operation of granting supervisory powers to the ECBs took place under the pressure of a financial crisis exacerbated by the risk of insolvency of some Member States whose effects would have spread to the balance sheets of the credit holders of high shares of public securities. This implied that the way of a modification of the TFEU was not feasible. Moreover, the recital no. 85 of the Regulation (EU) no. 1024/2013 seems to assume the chance to "go even further in the internal separation of decision-making on monetary policy and on supervision". Instead, the Regulation is based on the "enabling clause" established by Article 127, para. 6, of the TFEU. The latter provides the possibility to confer specific tasks upon the ECB, whose primary functions are those, as is known, of the central bank which guarantees the monetary stability and to carry out specific supervisory tasks. Indeed, in the new regulatory framework, the powers of the ECB in this matter are so pervasive that legitimate the question whether the principle set by the Article now cited is fully respected.

A second reason could be, but caution is a must, given that the ECB enjoys of a status guaranteed by the Treaty and cannot be fully assimilated to the several European agencies established above all in the last decades. In this regard, it is worth pointing out that, at a national level, the Bank of Italy has always had a legal position distinct from the other independent authorities.

Moreover, non-jurisdictional remedies have not been envisaged for central bank functions, even in cases where the operations of the central bank are substantiated, rather than in market transactions, by administrative measures in the strict sense. It must be considered not accidental that Council Regulation (EC) no. 2532/98 of 23 November 1998 concerning the sanctioning powers of the ECB provides for the sole remedy to appeal to the Court of Justice of the European Union according to the terms of the Treaty.

It is also true that the banking supervision function differs from the monetary functions precisely because it is largely expressed in regulatory acts and in specific administrative measures intended to produce significant effects on supervised banks (as in the case, e.g., withdrawal of authorization). In the exercise of the central bank function, on the other hand, the ECB gets much more rarely in touch with the legal sphere of individual recipients.

In conclusion, the provision of non-jurisdictional remedies is justified the most in the first area. In this sense, the discipline introduced by Regulation (EU) no. 1024/2013 is an important innovation. It may be redesigned and refined on the occasion of a comprehensive review of the current legislation.

It will be important to see how the Administrative Board of Review will be able to interpret its role, although early commentators have stressed how it struggles to live up to the expectations of a fully independent appeal procedure (Lackhoff and Meissner 2015). In these first years of activity, the Board has examined a limited number of appeals (4 in 2014, 8 in 2105, 8 in 2016, 5 in 2017) involving mainly cases concerning *corporate governance* issues, revocation of the banking license, regulatory compliance and administrative sanctions (ECB Annual Report on supervisory activities 2017). As opinions are not published, it is not possible to offer a full evaluation of the work of the Administrative Board of Review. In the report on the Single Supervisory Mechanism published in application to Article 32 of the Regulation (EU) no. 1024/2013, the European Commission only reports that, according to the ECB, the opinions issued at the end of the review process have influenced the operational practice of the ECB even beyond the individual cases handled and advocates greater transparency on the activity carried out by the Commission, for instance through the publication on the website of the summaries of their decisions, with due observance of confidentiality rules (COM (2017) 591 final 11 October 2017).

References

Barucci E. and Messori M. (2014), *Towards the European Banking Union, Achievements and Open Problems*

Blair W. (2016), *Board of Appeal of the European Supervisory Authorities, University of Oslo Faculty of Law 2012–30*, at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2159206

Brescia Morra C., Smits R., and Magliari A. (2017), *The Administrative Board of Review of the European Central Bank: Experience After 2 Years', the European Business Organization Law Review*, 18 (3), pp 567–589, at https://link.springer.com/article/10.1007/s40804-017-0081-3

Brescia Morra C. (2018), *The Administrative Review of Decisions of the ECB in the supervisory field, Studies on European Integration*, XIII (2018), pp. 63–78

Chiti M. and Santoro V. (2016), *The European Banking Union*

Chiti M.P (2013), *Jurisdictional Protection, European Administrative Law*

Clarich M. (2014), *Administrative banking sanctions in the single supervisory mechanism, Banca Impresa Società*, 2, pp. 333–348, at https://www.rivisteweb.it/doi/10.1435/78546

De Lucia L. (2013), *Administrative appeals in the European Union after the Treaty of Lisbon*, in *Riv. Trim. Dir. Pubbl.*, 2, pp. 323 ff.

ECB Annual Report on supervisory activities, 2017, at https://www.bankingsupervision.europa.eu/press/publications/annual-report/pdf/ssm.ar2017.en.pdf?63a120afab30be18171c08308970922 9

Lackhoff K. and Meissner M. (2015), *Contesting decisions in the Single Supervisory Mechanism, Journal of International Banking Law and Regulation*

Lamandini M. (2014), *The ESA's Board of Appeal as a blueprint for the quasi-judicial review of the European financial supervision, The European Company Law*, p. 293, at https://www.kluwerlawonline.com/abstract.php?area=Journals&id=EUCL2014055

REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL on the Single Supervisory Mechanism established pursuant to Regulation (EU) No 1024/2013, Brussels, 11.10.2017, at https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52017DC0591&from=EN