Between Added Value and Untapped Potential: The Boards of Appeal in the Field of EU Financial Regulation

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1. Introduction

In response to the Great Financial Crisis of 2008, the European System of Financial Supervision (ESFS) was established in 2010. Under this System, macro and micro prudential supervisory powers were conferred on European bodies for the first time. In line with Article 2(2) of the European Supervisory Authorities Regulations (ESAs Regulations),[1] the ESFS is composed of the European Systemic Risk Board (ESRB) in charge of macro financial supervision, the three European Supervisory Authorities (ESAs), the European Banking Authority (EBA), the European Securities and Markets Authority (ESMA) and the European Insurance and Occupational Pensions Authority (EIOPA) in charge of the micro prudential supervision of banks, markets and insurance, respectively, the ESAs Joint Committee which ensures the necessary coordination between the ESAs (and which is headed by the chairpersons of the ESAs), and the competent national authorities.[2]

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[1] Regulation (EU) 1093/2010 establishing the European Banking Authority [2010] OJ L331/12, Regulation (EU) 1094/2010 establishing the European Insurance and Occupational Pensions Authority [2010] OJ L331/48, and Regulation (EU) 1095/2010 establishing the European Securities and Markets Authority [2010] OJ L 331/84 (hereafter ESAs Regulations).

[2] For general information on the EFSF, ESRB and the ESAs, see Gianni Lo Schiavo & Alexander Türk, 'The Institutional Architecture of EU Financial Regulation: The Case of the European Supervisory Authorities in the Aftermath of the European Crisis' in Leila Simona Talani (ed), Europe in crisis: a structural analysis (Springer 2016) 89-121

Soon after its establishment, the ESFS demonstrated certain limitations prompting Euro area Member States to establish the European Banking Union (EBU) in 2012.[3] The EBU is composed of three pillars: the Single Supervisory Mechanism (SSM), within which, essentially, the European Central Bank (ECB) is in charge of the prudential supervision of credit institutions, the Single Resolution Mechanism (SRM) which consists of the establishment of a common mechanism for the orderly resolution of credit institutions and which is headed by an EU agency, the Single Resolution Board (SRB), and a European Deposit Insurance Scheme (EDIS) which has still to be established.[4] The creation of the ESFS and the EBU has thus brought about important changes to the institutional system of the EU. These have included the creation of new agencies, as well as a far-reaching reform of the ECB within which a 'Chinese wall' had to be erected to separate its organs in charge of conducting the monetary policy function of the European Union (EU) from those in charge of financial supervision.[5]

One of the features of this new institutional landscape is the possibility of internal review for the decisions adopted by the ECB and the agencies. While these review mechanisms will be studied in the present chapter to contribute to answering this overall research question of this volume, that ism to determine the nature of the Boards of Appeal (BoAs) and the type of review they offer, it should be noted that the Joint Board of Appeal (JBoA) of the ESAs and the Appeal Panel (AP) of the SRB on the one hand, and the Administrative Board of Review (ABoR) of the SSM on the other, operate rather differently. Among other things, the ABoR provides 'solely' the possibility for review, resulting in a non-binding opinion for the ECB. By contrast, the decisions of the JBoA and the AP are binding, and follow appeal procedures that need to be exhausted before going to the EU Courts.[6]

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[3] European Commission, Communication on Completing the Banking Union, COM(2017) 592 final, 3.

[4] For general information on the EBU, see, Giuseppe Boccuzzi, *The European Banking Union: Supervision and Resolution* (Palgrave 2016).

[5] See Article 25 of Regulation (EU) 1024/2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions [2013] OJ L287/63 (hereafter SSM Regulation). See on this separation, Matthias Goldmann, 'United in Diversity? The Relationship between Monetary Policy and Prudential Supervision in the Banking Union' (2018) 14 European Constitutional Law Review 2, 283-310.

[6] However, two parallel procedures may be launched where they do not overlap. See Case 21/18, par. 34 of the AP.

Owing to these differences and to the focus on EU agencies in this volume, this chapter will not consider the ABoR.[7] Instead, it will provide a comparative analysis of the JBoA and the AP with a view to assessing their suitability in providing effective and swift remedy to individuals, and with a view to identifying any potential need for reform.

This chapter first introduces main features of these bodies (II), before their corpus of decisions to date is examined (III). The conclusion offers an assessment, and discusses potential avenues for reform (IV).

2. The Joint Board of Appeal and the Appeal Panel: Main features

This sub-section presents the main features of these bodies by first comparing the provisions defining their establishment and composition (A). Second, their competences and the procedures before them are compared (B).

2.1. Establishment and composition

The establishment and functioning of the JBoA are laid down in Articles 58 to 61 of the ESAs Regulations, whilst the AP is defined in Article 85 of the SRM Regulation.[8] The differences and similarities in their composition and their functioning, as defined in the establishing regulations, are highlighted in Table 1 below.

Table 1: JBoA's and AP's main characteristics.

	JBoA	AP
Members	6 (+6 alternates)	5 (+2 alternates)
Members' qualities	Individuals of high repute Relevant knowledge of EU law	Individuals of high repute

[7] On the ABoR see for instance, William Blair, 'The ABoR and the role of independent panels of administrative review: an introduction' in ECB, *Building bridges: central banking law in an interconnected world. ECB legal conference 2019*, 333-334, Concetta Brescia Mora, 'Nature and role of the ABoR' in ECB, *Building bridges: central banking law in an interconnected world. ECB legal conference 2019*, 335-349, and Concetta Brescia Mora, René Smits & Andrea Magliari, 'The Administrative Board of Review of the European Central Bank: Experience after 2 Years', (2017) 18 European Business Organisation Law Review 3, 567-589.

[8] Regulation (EU) 806/2014 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 [2014] OJ L 225/1 (hereafter SRM Regulation).

	International professional experience at high level in area concerned EU citizens Knowledge of at least 2 EU languages	Relevant knowledge and professional experience at high level in area concerned
Incompatibilities	Current staff of ESAs Current staff of national and EU bodies involved with ESAs Members of Stakeholder Groups	Current staff of SRB Current staff of national and EU bodies involved with SRB
Term	5 years (extendable once)	5 years (extendable once)
Appointing authority	Management Board of the ESA (2 Members/ESA)	SRB
Appointment procedure	Public call in Official Journal, shortlist by Commission, consultation of Board of Supervisors Possible hearing of shortlisted candidates by the European Parliament	Public call in Official Journal
Independence	Members act independently and in the public interest	Members act independently and in the public interest
Conflicts of interest	A party may object to members *in limine litis* Annual public statement by members	A party may object by challenging the involvement of one member without undue delay[9] Public statement by members
Decision-making	Majority of 4/6 including at least 1 member appointed by the ESA whose decision is appealed	Majority of at least 3/5
Rules of Procedure	Adopted and publicised by JBoA	Adopted and publicised by AP
Registry	No registry – support by Joint Committee of the ESAs	No registry
Removal of members	If guilty of serious misconduct Decision by Management Board after consulting Board of Supervisors	N/A

[9] This is only foreseen by Article 3(7) of the Rules of Procedure of the AP in contrast to all the other features, which are contained in the ESAs and the SRM Regulations themselves.

Table 1 clearly shows that the provisions of the AP were very much inspired by those of the older JBoA.[10] At the same time, however, the provisions applicable to the JBoA are more elaborate than those of the AP, though this is partially the result of the reform of the ESAs Regulations conducted in 2019. Indeed, on that occasion, the following requirements were added: members' international experience and knowledge of EU law; nationality of the members and their knowledge of EU languages; involvement of the European Parliament in the appointment of the members. Unlike the BoAs of other agencies, the JBoA and AP may adopt their own rules of procedure, and no power is granted to the Commission to adopt tertiary law on the composition or functioning of the JBoA or AP. Whereas, for instance, the qualifications of the members of the BoA of the European Chemicals Agency (ECHA) and the European Union Aviation Safety Agency (EASA) are detailed in acts of the Commission,[11] the ESAs and the SRM Regulations only generally lay down that the members of the JBoA and those of the AP should have both legal and technical expertise. Some of the succinct provisions contained in the SRM Regulation are further fleshed out in the Rules of Procedure of the AP. As noted in Table 1, it is only in the Rules of Procedure of the AP, but not in the SRM Regulation, that the possibility is provided for parties to object to an AP member on the grounds of their lack of impartiality or independence.[12] While this lacuna in the SRM Regulation may be remedied in the Rules of Procedure, this is not the case for all the shortcomings that are present including the power of removal of AP members.

Another such lacuna is the lack of a proper registry. Although this is a feature shared by both the JBoA and the AP, the ESAs Regulations at least provide, in Article 58(8), that the ESAs Joint Committee "shall ensure adequate operational and secretarial support for the Board of Appeal."[13] In contrast, Article 4(1) of the Rules of Procedure of the AP states that: "Pursuant to Article 85(2) of [the SRM Regulation], the Board shall ensure adequate operational and secretarial support for

[10] As also noted by Lamandini and Ramos Muñoz, see Marco Lamandini & David Ramos Muñoz, 'Appeal bodies of EU financial regulatory agencies: are we where we should be?' in ECB, *Building bridges: central banking law in an interconnected world. ECB legal conference 2019*, 386 (hereafter Lamandini & Ramos Muñoz, 'Appeal bodies of EU financial regulatory agencies').
[11] See Commission Regulation 104/2004 laying down rules on the organisation and composition of the Board of Appeal of the EASA [2004] OJ L16/20 and Commission Regulation 1238/2007 on laying down rules on the qualifications of the members of the Board of Appeal of the ECHA [2007] OJ L280/10.
[12] See Articles 3(2) and 3(7) of the Rules of Procedure of the AP.
[13] See Article 58(8) of the ESAs regulations.

the Appeal Panel, with appropriate segregation of duties, functional and technical support, including means of communication, from all other activities of the Board". This is remarkable since such support is not provided for under Article 85(2) of the SRM Regulation. In thus interpretating the SRM regulation, the AP has imposed, through its Rules of Procedure, organisational measures on the SRB. A provision similar to the one adopted by the AP may be found in Article 4(5) of the Rules of Procedure of the JBoA, which provides: "The ESA shall ensure that there is an adequate procedure in place so that from the outset of the appeal, no information passes from the Secretariat to the respondent ESA or any of the ESAs except as specified by the Rules of Procedure." Unlike the AP, however, it can be argued that this is covered by Article 58(8) of the ESAs Regulations. However, it still leads to a very contorted way of providing the JBoA with the necessary support, and begs the question why both the JBoA and the AP were not simply established with a dedicated registry from the outset, as the BoAs of other agencies have been. A further complicating factor for the JBoA is that the secretariat rotates between the three ESAs, which means that special rules are in place whenever an appeal is lodged against the ESA which at that time happens to have assumed the rotating secretariat.[14]

An assessment of the independence of the JBoA and the AP as it results from these provisions against the standard for judicial independence as it has been developed by the Court of Justice, confirms the (merely) administrative nature of the JBoA and AP. If these were assessed as judicial bodies, both would be found to be lacking in their internal and external independence.[15] Indeed, the absence of a dedicated registry undermines these bodies' external independence. External independence is also insufficient considering the requirement of 'irremovability' required for independence to be sufficiently guaranteed: the lack of any protection against removal for the AP members, and the lightweight procedure for the removal of the members of the JBoA, do not amount to the necessary irremovability. While JBoA members may only be removed 'for cause' (i.e. serious misconduct), this may still be done by the Management Board acting on a simple majority, a procedure which would not qualify as 'appropriate' (for removing judges) in the case law of the Court, which, for instance, requires an independent body to decide on dismissal.[16] The

[14] See Article 4(3) of the JBoA's Rules of Procedure.
[15] See Case C-274/14, *Banco de Santander SA*, ECLI:EU:C:2020:17, paras 57-63. On these dimension see also section x of the Chapter by Alberti and section x in the Chapter by Oosterhuis and Widdershoven in this Volume.
[16] See Case C-619/18, *Commission v. Poland*, ECLI:EU:C:2019:531, para. 77.

members of the JBoA and the AP furthermore do not seem sufficiently "protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions"[17] to be equated to judges. Lamandini and Ramos Muñoz, too, seem to suggest that this is the case: while, on the one hand, they argue that the JBoA (and perhaps also the AP) meet the *Vaassen* criteria for bodies that may refer preliminary questions to the Court of Justice,[18] they also recognise that the appointment procedure of JBoA and AP members is problematic, as is the lack of financial autonomy for the internal structures offering administrative support to the JBoA and AP members.[19]

In summary, the features relating to the establishment and composition of the JBoA and the AP point to their being bodies of administrative rather than judicial review.

2.2. Competences of and procedures before the JBoA and the AP

As a next step in trying to define the nature of those BoAs, this sub-section examines their competences and the procedures applicable before them.[20] As Table 2 below shows, they are defined in roughly the same way, although there are some notable differences.

Table 2. The competences of and procedures before the JBoA and the AP

[17] See Case C-274/14, *Banco de Santander SA*, ECLI:EU:C:2020:17, para. 57.
[18] That is: they are '(a) established by law; (b) permanent; (c) have compulsory jurisdiction (within the limits of their respective remits); (d) apply rules of law; and (e) act as independent bodies', see Marco Lamandini & David Ramos Muñoz, 'Law and Practice of Financial Appeal Bodies (ESAS' Board of Appeal, SRB Appeal Panel): A View from the Inside', (2020) 57 Common Market Law Review 1, 148-149 (hereafter Lamandini & Ramos Muñoz, 'Law and Practice of Financial Appeal Bodies').
[19] Ibid., 152-153. It should be noted that Lamandini and Ramos Muñoz do not refer to the rules on dismissal of JBoA and AP members, although these seem even more problematic.
[20] For more on the procedure before the JBoA, see also Andreas Witte, 'Standing and Judicial Review in the New EU Financial Markets Architecture' (2015) 1 Journal of Financial Regulation 2, 240-242 (hereafter Witte, 'Standing and Judicial Review'). William Blair & Grace Cheng, 'The role of judicial review in the EU's financial architecture and the development of alternative remedies: The experience of the Board of Appeal of the European Supervisory Authorities', [2018] *Quaderni di Ricerca Giuridica* 84, 24-27 (hereafter Blair & Cheng, 'The role of judicial review in the EU's financial architecture').

	JBoA	AP
Challengeable acts	Decisions referred to in Articles 17, 18, 19 and 72(3) of the ESAs regulations[21] Decisions referred to in accordance with the Union acts referred to in Article 1(2) of the ESAs regulations Decisions on access to documents	Decision of the Board referred to in Articles 10(10), 11, 12(1), 38 to 41, 65(3), 71 and 90(3) of the SRM regulation[22]
Active *locus standi*	Natural or legal persons that are addressees of the decision, or directly and individually concerned	Natural or legal persons that are addressees of the decision, or directly and individually concerned
Time limits	3 months to file for applicant 3 months to decide for JBoA	6 weeks to file for applicant 1 month to decide for AP
Suspension	No automatic suspension JBoA may suspend if circumstances so require	No automatic suspension AP may suspend if circumstances so require
Intervention	Not possible	Not possible
Oral representations	Parties are entitled to present oral arguments	Parties are entitled to present oral arguments
Remedy offered	JBoA may confirm contested decision or remit ESA is bound by and shall adopt amended decision	AP may confirm contested decision or remit SRB is bound by and shall adopt amended decision
Publication of decisions	JBoA decisions shall be reasoned and be made public Confidential version may be published	AP decisions shall be reasoned and be notified to the parties Confidential version published unless overriding exceptional reasons prevent this from happening[23]

[21] Article 17 allows the ESAs to determine that a national authority has breached EU law; Article 18 allows the ESAs (following a decision of the Council confirming the existence of an 'emergency situation', to give directions to national authorities; Article 19 allows the ESAs to settle disputes between national authorities if these fail to come to an agreement themselves; Article 72(3) allows appeals to be made to the JBoA on refusals for access to documents. So far, the ESAs have not yet adopted decisions pursuant to Articles 18.

[22] Article 10(10) regards alternative measures to remove impediments to resolvability proposed by the SRB, Article 11 concerns simplified obligations in the drafting of their resolution plans for certain entities, Article 12(1) focuses on the determination of minimum requirement for own funds and eligible liabilities, Articles 38 to 41 address penalties, Article 65(3) is about the contributions to the administrative expenditures of the SRB, Article 71 extraordinary ex post contributions to the Single Resolution Fund, and Article 90(3) access to documents.

[23] See Article 24 of the AP's Rules of Procedure.

As is the case for the BoAs of all agencies, except the EUIPO, the jurisdiction of both the JBoA and the AP is defined substantively:[24] challengeable decisions are identified by reference to their legal basis, i.e. a decision that is not based on one of the identified provisions cannot be challenged before the JBoA or the AP, and must instead be challenged directly before the EU Courts. For instance, the SRB decides on the *ex ante* contributions which credit institutions have to pay to the SRB in order to fund the Single Resolution Fund (SRF) pursuant to Articles 54(1)(b) and 70(2) of the SRM Regulation. Since these Articles are not mentioned in the definition of the scope of the jurisdiction of the AP however, they are not challengeable before it, and parties must seise the General Court.[25]

The scope of the jurisdiction of he JBoA is enlarged, but also obscured, by the cross-reference to Article 1(2) of the ESA Regulations contained in Article 60(1), which otherwise defines the scope of its jurisdiction. Indeed, Article 1(2) explicitly identifies a number of legislative acts,[26] but also refers to "any further legally binding Union act which confers tasks on the Authority". The latter captures any act adopted pursuant to the ESAs Regulations, giving the JBoA a very broad jurisdiction (of course, depending on whether the ESAs are empowered to adopt 'decisions' under those acts as only decisions addressed to or of direct and individual concern to individuals may be challenged before the JBoA). Despite this potential broad jurisdiction and while the Court in *SV Capitol OÜ v. EBA* (see below) did not rule so explicitly, the JBoA has still presented that ruling of the Court as requiring it to construe the scope of Article 60 narrowly.[27] Finally, a *curiosum* of both the JBoA and AP is that, contrary to the BoAs of all other agencies, they have been empowered to review refusals of requests for access to documents.

As Table 2 highlights, the appeal procedures before the JBoA and the AP share numerous similarities with the action for annulment before the Court of Justice (Article 263 TFEU). This applies, for instance, to the type of acts that are challengeable, the parties that may launch an appeal,

[24] Sabino Cassese, 'A European administrative justice?', [2018] *Quaderni di Ricerca Giuridica* 84, 11 (hereafter Cassese, 'A European administrative justice?').
[25] See e.g. Case T-411/17, *Landesbank Baden-Württemberg v. SRB*, ECLI:EU:T:2020:435.
[26] For the EBA, this i.a. includes the deposit guarantee schemes directive; for the EIOPA, reference is i.a. made to the money laundering directive; for the ESMA i.a. the securities prospectus regulation is mentioned.
[27] Decision 2021 03, *Societatea de Asigurare-Reasigurare City Insurance SA/EIOPA*, para. 63.

as well as the conditions for suspension. In addition, the JBoA, which was established in 2010, was the first BoA of an EU agency that was not empowered to reform contested decisions as part of the remedies it may offer to the parties before it: those established prior to that date had indeed been granted this prerogative, whilst those created later, such as the AP, were not.[28] As a consequence of this, both the JBoA and the AP only have the power to confirm or remit a contested decision to the agency that has adopted it. As examined below, however, the extent to which they may guide the review of the agency when they remit a decision had to be clarified by the JBoA. Despite their not having the power to quash or annul contested decisions, the legal effects of the decisions of the BoA may be similar to this, since the agencies have to amend their decisions if these are remitted to them (in a way similar to the requirement set by Article 266 TFEU following which an EU institution whose act has been declared void or whose failure to act has been determined by the Court of Justice must take the necessary measures to comply with the Court's decision). While as a body neither the JBoA nor the AP meet the requirements of a judicial body according to the criteria set in the case law of the Court as underlined earlier, the review procedure established before them is very much a judicial one, at least formally. To shed more light on the nature, scope and intensity of the review the JBoA and the AP to date, the following section examines the corpus of decisions adopted by those bodies.

3. The body of decisions adopted by the JBoA and AP

The next sections first offer some general information on the corpus of decisions of the JBoA and the AP (A), before outlining the clarifications they have provided in terms of the interpretation to be made of the appeal presented before them, what constitutes a challengeable act, how to interpret the requirement of direct and individual concern, what the conditions for suspension are, what the intensity of their review is, and the possibility of a second appeal (B).

3.1. General information

Thus far, the JBoA has adopted 14 decisions, and the AP 103.[29] For the JBoA, this is a rather limited number, given that it has been functioning for around ten years. In addition, of these 14

[28] As noted in the Chapters by Tovo and Simoncini and Verissimo, the BoAs of the ACER and EASA were originally vested with the power to reform decisions, but this power was later taken away from them.
[29] This data is updated until December 2020 on the basis of the information available on the SRB and ESAs websites, respectively.

cases, only three hinged on issues of substance; the others had to do with questions of admissibility, notably whether the ESAs under Article 17 of the ESAs Regulations have to look into an alleged breach of EU law signalled by a private party and whether that private party then has a right to challenge the decisions of the ESA.[30] This figure in itself appears problematic: as noted in the introductory chapter, the real benefit of a body like a BoA lies in the ease with which appeals can be lodged, the speediness of the procedure, and the more thorough and expertise-based review it can offer of the internal legality of contested measures.[31] As also confirmed by the GC in *Aquind v. ACER*, "the case-law according to which complex technical, scientific and economic assessments are subject to limited review by the EU judicature does not apply to the review carried out by the appellate bodies of the agencies of the European Union."[32] However, in those cases where the JBoA does not even arrive at the stage of assessing the legality, its added value is limited to the timely review and procedural ease of the appeal since the EU Courts are just as well equipped, if not better, to assess issues of external legality or compliance with procedural requirements. That said, the JBoA clearly delivers in terms of speed, since the average length of the procedures before it is only 4 months;[33] this speediness is achieved thanks to the very tight deadlines under which the JBoA has to operate.[34]

The higher number of cases examined by the AP may be explained by the wide-ranging consequences of the resolution decisions made by the SRB for individuals or shareholders, as opposed to the decisions generally made by the ESAs. This number of cases, however, conceals variations over time, in terms of the yearly average number of cases, the number of inadmissible cases, the type of decisions appealed, and their object. Of the 103 decisions adopted to date by the

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[30] The JBoA first held that private parties could challenge such decisions of the ESAs but the General Court held that private parties had no such right of appeal before the JBoA. See Case T-660/14, *SV Capital OÜ v. EBA*, ECLI: EU:T:2015:608 (confirmed by Case C-577/15 P, *SV Capitol OÜ v. EBA*, ECLI:EU:C:2016:947). The three *Howerton* cases (2020 01; 2020 02 and 2021 02) were manifestly inadmissible and not even interesting from a procedural perspective. For a more extensive discussion of the other cases that largely turned on points of admissibility, see Lamandini & Ramos Muñoz, 'Law and Practice of Financial Appeal Bodies' (n 18) 128-131; Marta Simoncini, *Administrative regulation beyond the non-delegation doctrine: a study on EU agencies* (Hart Publishing 2018) 161-162.

[31] As is also noted by Lamandini & Ramos Muñoz, 'Law and Practice of Financial Appeal Bodies' (n 18) 131.

[32] Case T-735/18, *Aquind v. ACER*, ECLI:EU:T:2020:542, para. 61. The reasoning which the GC developed was of course based on the framework governing the ACER BoA but apart from the argument on the ACER BoA's power to substitute decisions of the agency, they all seem transposable to the JBoA and AP. For a more in-depth discussion of the Aquind case, see section x of the Chapter by Tovo in this Volume.

[33] Own calculations based on the 15 final decisions adopted by the JBoA.

[34] See *supra* Table 2.

AP, 25 were remitted to the SRB, 15 dismissed on appeal, 2 were withdrawn and 57 were deemed inadmissible. Of the 40 decisions on substance, a majority of them concerned access to document requests, whilst some involved the contribution to the administrative costs of the SRB, contributions to the SRF (inadmissible) and Minimum Requirements for Own Funds and Eligible Liabilities. In the early years of the functioning of the AP, numerous cases before it were inadmissible (13 and 37 in 2016 and 2017 as opposed to 1 and 16 admissible cases in the same years). In 2017, the appeals were deemed inadmissible because they regarded the resolution of Banco Popular. In fact, the larger part of the AP's case law to date has concerned Banco Popular (both the resolution and access to document requests). This also explains why the number of cases were much higher in 2017 and 2018 than they have been since (Banco Popular was resolved in June 2017). Another explanation may perhaps be that those eligible to present an appeal before the AP have better understood what the limits of its mandate are as time has passed, even if it would arguably be acceptable for banks to try to obtain remedy in all possible ways and thus to 'try their luck' before the AP, regardless. In any event, in 2019 and 2020 the numbers of decided cases were fairly low (5 and 3, respectively).

3.2. The incremental clarification of the scope and intensity of the reviews of the JBoA and AP

In the following subsections, we note and discuss the most important clarifications which the JBoA and AP have made through their decisions. These clarifications relate to the interpretation of the appeal presented before them, the notion of challengeable act, the definition of the requirement of direct and individual concern, the conditions for suspension, the intensity of the review provided, as well as the possibility for a second appeal.

It may be noted at the outset that while both BoAs refer extensively to the case law of the EU Courts, they do not refer to the decisions of the other BoAs or to each other's decisions (despite the JBoA and AP resembling each other the most of all the BoAs and despite their dealing with substantially similar issues). The references to the case law of the Courts are noteworthy insofar as the JBoA and AP do so in order to interpret the relevant provisions defining the appeal procedure before them. While these provisions borrow some of the same language of the provisions in primary law setting out the procedures before the EU Courts, it cannot *a priori* be assumed that the case law of the Courts on those provisions, defining a judicial procedure, are also relevant and

transposable to the administrative review procedures before the JBoA or AP even when these provisions are drafted in identical terms. Nonetheless, considering that the added value of the JBoA and the AP is dependent on the trust vested in them by affected individuals, and considering that their intervention is a first mandatory step before redress may be sought before the Court of Justice, it appears sensible for them to follow the interpretation made by the Court. This also contributes to the coherence of the EU system of remedies. On the contrary, if the BoAs were to adopt a different, more generous, approach, they could also contribute to provide remedy where individuals would otherwise not have standing before EU Courts, thereby enhancing the protection of individuals.

3.2.1. The interpretation of the appeals presented before them

With a view to evaluating the function played by the two BoAs in the system of remedies available to individuals, it is relevant to examine the kind of interpretation they make of the appeals presented before them. Indeed, the AP has, for instance, always adopted a generous interpretation where the claim made by the appellant was not immediately clear. In its very first case it found that 'claims, if and to the extent they are ambiguous in their literal expression, should be read according to their finality and in a way to ensure to the appellant the maximum degree of administrative review that is compatible with the reasonable content and finality of the appeal. [It further noted that t]his is consistent with the scope of [its] jurisdiction and with the tasks of general interest conferred to [it] under the SRM Regulation and is instrumental to the proper enforcement of the fundamental right of good administration under the Charter'.[35] This generous interpretation is most certainly welcome and in line with the purpose of the existence of the AP which includes, as mentioned, the possibility for individuals to obtain remedy swiftly and easily. In fact, the adoption of such generous interpretation by the AP is perhaps even more necessary than it would be for other BoAs. The SRM establishing regulation is indeed the only one that specifically refers to its respect of 'the right to an effective remedy and to a fair trial and the right of defence […and to its implementation] in accordance with those rights and principles'.[36]

3.2.2. The notion of challengeable act

[35] Decision in Case 1/2016, para. 18.
[36] Recitals 121 SRM R. See further on this Alberti in this volume.

As to how to interpret the term "decision" used in Article 60(1) of the ESAs Regulations, there is, of course, the settled case law of the Court in relation to Article 263 TFEU from which it follows that only binding acts can be challenged. But are the challengeable acts under Article 60(1) to be interpreted as analogous to the challengeable acts under Article 263 TFEU? As noted above, in principle, nothing would prevent the EU legislator from opting for a wider category of acts being open to challenge before a BoA: the review exercised by the latter is not a judicial review of first instance, and the EU legislator could, in principle, allow the JBoA to review acts which are not reviewable by the Courts under Article 263 TFEU. While the ruling of the General Court in *E-control v. ACER*,[37] confirming that opinions of the Agency for the Cooperation of Energy Regulators (ACER) cannot be reviewed by its BoA may be applied by analogy to the JBoA, the General Court explicitly refrained from confirming that decisions challengeable before the ACER BoA should be interpreted in accordance with the same criteria as the concept of a challengeable act for the purposes of the fourth paragraph of Article 263 TFEU,[38] let alone that the General Court would have precluded the discretion of the legislature in allowing for a more general administrative appeal, should it wish to do so.

Still, the JBoA has indeed ruled that affirmative and preparatory acts, in the sense of the established case law of the Courts pursuant to the action for annulment under Article 263 TFEU, may not be challenged before it.[39] In *Creditreform Rating AG / EBA*, the JBoA declared inadmissible an appeal against a draft implementing technical standard by the EBA. While this was wholly sound in light of Article 60 of the ESAs regulations, the reasoning developed by the JBoA fails to convince. The JBoA noted: "the appealed act is not a decision under Article 60 of the ESAs Regulation because it is merely a preparatory act without immediate legal effects vis-à-vis the appellant."[40] Recalling the EU Courts' established jurisprudence on challenging preparatory acts, the JBoA continued: "in accordance with the settled case law of the CJEU that the Board of Appeal must follow also in its interpretation of Article 60 of the ESAs Regulations, acts having a preparatory nature adopted by a European agency […] are not subject to an autonomous judicial review."[41] The Board's finding

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[37] See also section x the Chapter of Tovo in this Volume; Merijn Chamon, 'General court confirms that the ACER's board of appeal cannot review non-binding opinions', [2018] *Revue du droit des industries de réseau*, 218-223.
[38] Case T-63/16, *E-Control v. ACER*, EU:T:2017:456, para. 51.
[39] Decision 2015 01, *Onix Asigurări SA/EIOPA*, para. 54; Decision 2019 05, *Creditreform Rating AG/EBA*.
[40] Decision 2019 05, *Creditreform Rating AG/EBA*, para. 60
[41] Ibid., para. 64.

that the General Court would find such a challenge under Article 263 TFEU inadmissible is entirely correct, but it does not clearly reason why it "considers that this conclusion is also valid to exclude the admissibility of an appeal to the Board of Appeal against the draft implementing technical standard, because so long as the draft is not endorsed by the European Commission and therefore adopted in its final form via a decision of the European Commission, the draft developed and proposed by the ESAs, despite the negative factual consequences that can be reasonably expected by its public disclosure (as noted by the appellant), has no legal effects vis-à-vis the appellant."[42] Even though the conclusion itself is entirely defensible, the problem in this reasoning is clear: the Board does not set out why its interpretation of an administrative remedy in Article 60 of the ESAs regulation should follow the interpretation of the judicial remedy under Article 263 TFEU. It may be inferred from this decision that the soft law of the ESAs will not be challengeable before the JBoA. While the European Parliament during the 2017 revision of the ESAs regulations had proposed to allow the JBoA to review the ESAs guidelines and recommendations,[43] this suggestion did not make it to the final legislative acts (cf. *infra*).

3.2.3. The requirements of direct and individual concern

The parties that have standing to bring proceedings before the JBoA are identified by the ESAs Regulations as any "natural or legal person, including a competent authority" insofar as they challenge decisions "addressed to that person, or against a decision of direct and individual interest for that person, even if it is addressed to another person. " Read together with Article 263(5) TFEU this means that, under Article 263 TFEU, the non-privileged applicants must first exhaust the appeal procedures before the JBoA before they can bring an admissible appeal before the General Court against decisions of *de facto* individual application. A similar conclusion may be drawn with regard to the AP as "[a]ny natural or legal person, including resolution authorities may appeal against a decision of the Board […] which is addressed to that person, or which is of direct and individual concern to that person."[44]

Although the concepts of "direct and individual interest" as used in the ESAs Regulations is again reminiscent of the concepts of direct and individual concern in Article 263 TFEU, it does not

[42] Ibid., para. 69.
[43] See the four column document for (COD) 2017-0230 of 18 March 2019, p. 215 (on file with the authors).
[44] Article 85(3) of the SRB Regulation.

necessarily have to be interpreted strictly in the same way (cf. *supra*).[45] In principle, the JBoA also recognised this in *Investor Protection Europe / ESMA*:

> [W]hereas Article 263 of the TFEU provides for proceedings for a review by the Court, Article 60 of the ESMA Regulation provides for "an appeal" to the Board of Appeal. In the Board's experience, the distinction between a judicial review by a court, and an appeal to a specialist body or tribunal, is well understood in the field of financial regulation and supervision. […] Accordingly, the Board does not agree with the respondent's analysis in this respect. The automatic application of limitations applicable to proceedings under Articles 263 and 265 TFEU […] is, in the Board's opinion, inappropriate in the case of a right of appeal under Article 60 of the ESMA Regulation.[46]

At the same time, it ruled in the earlier *SV Capital OÜ / EBA* case that the reference in the EBA Regulation to natural or legal persons who have a direct and individual interest reflects the (similar) provision contained in Article 263 TFEU.[47] This effectively means that the JBoA will generally not fulfil a function in reviewing acts of general application despite the fact that the ESAs have been empowered to adopt regulatory acts (in the sense of Article 263 TFEU).[48] The JBoA also recognised this in *Creditreform Rating AG / EBA* where it concluded from the textual difference between Articles 263 TFEU and 60 of the ESAs Regulations (where the latter, unlike the former, does not refer to regulatory acts), that it cannot review regulatory acts in the sense of Article 263 TFEU either.[49] While the JBoA noted in the same way that there remains a possibility to review acts of general application under the 'direct and individual interest' test, this possibility will materialise only very exceptionally. Indeed, since the JBoA is applying the established case law of the Courts, it could be expected to also apply the restrictive *Plaumann* criterion to test 'individual' interest.[50] By way of illustration, the temporary intervention powers, which Articles 40 and 41 of MiFIR[51] grant to the ESMA and the EBA, allow those ESAs to subject to certain conditions the

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[45] Contra, see Witte, 'Standing and Judicial Review' (n 20) 243.
[46] Decision 2014 05, *Investor Protection Europe /ESMA*, paras 37-38.
[47] Decision 2014 C1 02, *SV Capital OÜ/EBA*, para. 27.
[48] On the definition of the regulatory act, see C-583/11 P, *Inuit Tapiriit Kanatami e.a. v. Parliament & Council*, ECLI:EU:C:2013:625, paras 45-61.
[49] Decision 2019 05, *Creditreform Rating AG/EBA*, para. 59.
[50] Ibid., para. 55.
[51] See Regulation (EU) 600/2014 on markets in financial instruments [2014] OJ L173/84.

marketing, distribution or sale of financial instruments or structured deposits. These acts that are of direct concern to investment firms or credit institutions will typically be of general application and might not require implementing measures. At the same time, one credit institution or investment firm will typically not be individually concerned in the *Plaumann* sense. As a result, the JBoA will not be competent to review these acts, and parties will have to seise the General Court directly.

Regarding the AP, it should be noted that, even if the *locus standi* is not fundamentally different and encompasses "[a]ny natural or legal person, including resolution authorities may appeal against a decision of the Board […] which is addressed to that person, or which is of direct and individual concern to that person",[52] it also includes shareholders[53] and creditors of a credit institution[54] owing to the type of decisions adopted by the SRB.

3.2.4. The threshold for suspension

Article 60(3) of the ESAs Regulations allows the JBoA to suspend the application of an act challenged before it "if it considers that circumstances so require". This language is analogous to Article 278 TFEU governing the suspension of contested acts by the EU Courts.[55] However, differently from its interpretation of the notion of challengeable act and 'direct and individual concern' (cf. *supra*), the JBoA has opened the door to a more generous test for ordering the suspension of a challenged act compared to the test of the Courts. In this regard, it may be recalled that for the EU Courts to adopt interim measures, three conditions have to be met: *fumus boni juris*, urgency and a balancing of interests in favour of the applicant.[56] While recently the Courts seem to have become more generous in assessing these three elements, the threshold they set is still high.[57] In *Nordic Banks / ESMA*, the JBoA was asked for the first time to suspend a contested

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[52] See on the specific case of the national resolution authorities: Dominik Skauradszun, 'Legal Protection against Decisions of the Single Resolution Board pursuant to Article 85 Single Resolution Mechanism Regulation', (2018) 15 European Company and Financial Law Review 1, 133f (hereafter Skauradszun, 'Legal Protection').
[53] See Decision in Case 36/2017 which was deemed inadmissible, but because the issue addressed was beyond the remit of the AP.
[54] On the specific case of creditors, see Skauradszun, 'Legal Protection' (n 52) 135.
[55] Suggesting that the test of the JBoA could therefore be the same as that of the Courts, see Witte, 'Standing and Judicial Review' (n 20) 241.
[56] See e.g. Case C-619/18 R, *Commission v. Poland*, ECLI:EU:C:2018:1021, para. 29.
[57] See Eric Barbier de la Serre & Claire Lavin, 'Le droit du référé européen depuis 2007 : entre prudence et coups d'audace', (2019) 55 Cahiers de droit européen 2, 613-679.

decision. In this case a group of Scandinavian banks had violated the Credit Rating Agencies Regulation (CRAR) by offering 'shadow ratings' in the form of investor information, without being registered as credit rating agencies. ESMA had taken this view and had, therefore, fined the banks in question as well as prohibited them from further offering the information concerned. The respondent ESA argued that the JBoA should apply the established case law of the EU Courts on interim measures.[58] The JBoA, however, noted that "it does not […] follow that such an approach is necessarily applicable in the case of a suspension decision under Article 60(3). The Board of Appeal is not a court, but an integral part of ESMA […]. It is part of the system of checks and balances contained in the ESMA founding regulation […] providing participants in the financial markets with an avenue for the review of a supervisory decision, which is itself subject to appeal to the General Court of the European Union."[59] The JBoA then suggested that the decisive criterion for arriving at a suspension would be the balancing of interests,[60] although it immediately added that this was not its final view on the matter since in any event the weighing of interests was not in favour of the applicant *in casu*.[61] Still, in *Creditreform AG*, the JBoA again confirmed this approach,[62] without suspending the contested decision in that case either. Further decisions of the JBoA are thus required to confirm that it will grant suspension of application more readily than the EU Courts, as would be logical given its task to provide swifter and more easily accessible remedy to individuals.

3.2.5. The intensity of review exercised by the JBoA and AP

Apart from the requirement to exhaust the appeal before the JBoA or the AP resulting from Article 263(5) TFEU, the JBoA and the AP are also potentially interesting mechanisms for applicants because of the technical expertise they possess. As a result, in theory, the JBoA and the AP should be expected to conduct a more thorough review of the substantive soundness or appropriateness of the contested measures. The 2019 revision of the ESAs Regulations underlines this aspect by

[58] See Decision of 30 November 2018, *SEB/ESMA*, paras 88-91.
[59] Ibid., para. 92.
[60] Ibid., para. 96
[61] Ibid., para. 97.
[62] See Decision 2019 05, *Creditreform Rating AG/EBA*, para. 54.

emphasising the reviewing of the JBoA, especially as regards the proportionality of contested measures.[63]

Concretely, in *FinancialCraft Analytics / ESMA*, the JBoA held that it cannot perform a *de novo* assessment,[64] but instead can only review the legality of contested measures, and that "[i]n respect of technical matters about credit rating such as methodologies, the Board thinks that the decision of the respondent acting as a specialist regulator is entitled to some margin of appreciation."[65] In *SV Capital OÜ / EBA II*, the applicant claimed that the EBA had incorrectly exercised its discretion in light of its own Internal Processing Rules on Investigation. The EBA argued that it had not adopted a 'manifestly wrong decision', but the JBoA left open the question of what the precise standard of review was by noting that it "*agree[d] that there is a high threshold, but it need not decide this issue definitively, because on no view is the material adduced by the appellant sufficient to show that the EBA exercised its discretion wrongly.*"[66]

The JBoA leaving this question open was of crucial importance, since its review should, in principle, be more in-depth than the external, procedural, review, which the General Court typically conducts. If the JBoA exercised a review that were substitutable with that of the General Court, the added value of the BoA would be reduced to its timely review and procedural ease of the appeal (an appeal may be launched by sending a simple email and no legal representation is required). In *Nordic Banks / ESMA*, also noted that "[i]t is no part of the Board of Appeal's function to decide policy, which is a matter for the Board of Supervisors"[67] without making clear to what extent this played a role in its decision. Although this is undoubtedly correct, this type of reasoning should not be used (in the future) to justify a merely marginal review by the JBoA. After all, the latter may review complex legal and technically factual assessments without (re-)defining the agency's policy. In its most recent decision in the *Scope Rating / ESMA* case, the JBoA clarified its standard of review fully for the first time. In examining whether Scope Rating could invoke an objective reason (in the sense of Article 5 of Delegated Regulation 447/2012) not to apply its pre-defined methodology for devising credit ratings, the JBoA noted, referring to *FinancialCraft Analytics /*

[63] See Article 58(2) ESAs regulation.
[64] Decision 2017 01, *FinancialCraft Analytics/ESMA*, para. 61.
[65] Ibid., para. 45.
[66] Decision 2014 C1 02, *SV Capital OÜ/EBA II*, para. 53.
[67] Decisions 2019 01-04, *Skandinaviska Enskilda Banken AB e.a./ESMA*, paras 12 & 194.

ESMA, that this is a supervisory decision for which the ESMA is "entitled to some margin of appreciation".[68] This was corroborated, according to the JBoA, by the fact that, differently from the BoAs of other agencies, the JBoA did not stand in functional continuity with the ESAs.[69] This was the first time that the JBoA expressed itself on (its lack of) functional continuity,[70] thereby using it as an argument against a thorough review. The JBoA then confirmed that it will only exercise a limited review, referring to the standard that the General Court applies when it reviews decisions of the ECB where it refuses to give access to documents for reasons related to the public interest: "the Board of Appeal's review is then limited to verifying whether ESMA, in adopting its determination on this, (i) complied with all applicable procedural rules, (ii) duly stated its reasons, (iii) accurately stated the facts or (iv) committed a manifest error of assessment or a misuse of powers."[71]

Similar deference has been shown by the AP. Indeed it stated early on that '[i]t is not the Appeal Panel's role to precisely identify the non-confidential content of the Valuation Report to be disclosed (and for this reason the Appeal Panel, despite having carefully examined any document in light of the relevant exceptions raised by the Board, finds that it is not appropriate to comment through a section-by-section analysis, which to some extent could also undermine the degree of, albeit more limited, confidentiality considered justified by this decision). According to Article 85(8) SRMR the Appeal Panel "may confirm the decision taken by the Board or remit the case to the latter. The Board shall be bound by the decision of the Appeal Panel and it shall adopt an amended decision regarding the case concerned". Accordingly, the Appeal Panel determines that the Appellant has a right to access, under Regulation 1049/2001 and under the Public Access Decision, to a nonconfidential redacted version of the Valuation Report and remits the case to the Board for the preparation by the Board itself and for the disclosure to the Appellant of said non-

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[68] Decision 2020 03, *Scope Ratings/ESMA*, para. 140.
[69] Ibid., para. 141.
[70] Earlier, Herinckx had noted that the JBoA and AP are not characterised by functional continuity while Cassese, without referring to functional continuity, stressed that the JBoA (and AP) are an extension of the authorities which they supervise. See Yves Herinckx, 'Judicial Protection in the Single Resolution Mechanism' in Robby Houben and Werner Vandenbruwaene (eds), *The Single Resolution Mechanism* (Intersentia, 2017) 80. Cassese, 'A European administrative justice?' (n 24) 11. Criticising the JBoA on this point, see section x of the Chapter by Alberti in this Volume.
[71] Decision 2020 03, *Scope Ratings/ESMA*, para. 141. Compare this to Decision 2014 C1 02, *SV Capital OÜ/EBA II*, para. 53, where the JBoA still referred to a 'wrong exercise of discretion', not to a 'manifestly wrong exercise of discretion'.

confidential redacted version of the Valuation Report, taking into account the principles set out in this decision.'[72] It also found more recently that 'the Appeal Panel has constantly acknowledged in its past decisions concerning access to documents related to the Banco Popular resolution that in its assessment – to ensure the functionality of the Board and to respect the role and division of tasks provided for by the SRMR and Regulation 1049/2001 – the Appeal Panel must certainly verify if the Board complied with all relevant substantive and procedural rules, properly stated its reasons and did not commit any manifest error, but cannot substitute its opinion for that of the Board where the applicable legal provisions grant a margin of appreciation to the Board, which means that, on issues where the assessment of the facts may lead to different interpretations, e.g. the impact of certain disclosures on decision-making or legal proceedings to the effect of the exceptions to access to documents under Regulation 1049/2001, the margin of appreciation of the Board must be also be respected by the Appeal Panel, unless there is a specific reason not to do so'.[73] Interestingly, on that occasion, in determining whether a right of access to documents existed, the AP reasoned on the application of the *Meroni* doctrine[74] and the requirement for the decision of agencies to be subject to endorsement by the European Commission. Indeed, the appellant requested access to the independent expert's economic assessments for a definitive *ex post* valuation. The question that arose was thus that, if that document did not exist, the *Meroni* doctrine could have been breached because the freedom about whether to conduct a valuation at all would be left to the SRB. Were the Commission not to be under the obligation to endorse this decision, the rules of the *Meroni* doctrine would be violated. The added value of the existence of the AP may also be inferred from the fact that the SRB's response to access-to-documents requests improved after it had been critical of it: 'the AP's first answer was "not nearly enough"; and […] the answer became more refined and nuanced.'[75] as the SRB more easily granted disclosure. In its first case, the AP furthermore clarified that, although it is only for the Court of Justice to rule on the legality of EU law, if two

[72] Case 38/2017, par. 40-41.
[73] Case 21/18, par. 39.
[74] See Case 9/56, *Meroni v. High Authority*, ECLI:EU:C:1958:7. See further on this point: Marco Lamandini & David Ramos Muñoz, 'Administrative pre-litigation review mechanism in the SRM: The SRM Appeal Panel' in Chiara Zilioli and Karl-Philipp Wojcik (eds), *Judicial review in the European Banking Union* (Edward Elgar 2021) 55.
[75] Lamandini & Ramos Muñoz, 'Appeal bodies of EU financial regulatory agencies' (no. 10) 393.

interpretations of the provision of a delegated provision are possible and one of them would preserve the legality of the delegating provision, it should be preferred.[76]

Of the three JBoA cases hinging on substantive issues, the most important were the *Nordic Banks / ESMA* and *Scope Rating / ESMA* cases. In the first case, the JBoA tried to construe the proper meaning of the exception of CRAR to the benefit of 'investor information', but could not arrive at a conclusion following either a literal interpretation of the CRAR, or by looking into the *travaux préparatoires* of that regulation.[77] It subsequently followed the consequentialist reasoning of the ESMA,[78] agreeing with the agency that allowing banks to provide 'shadow ratings' through their investment information would allow market participants to simply avoid the application of the CRAR.[79] To assess whether there would indeed be such a risk, the members of the JBoA are arguably better placed than judges in the Court given their more profound knowledge of, and familiarity with the way in which these products are viewed by the financial markets. This applies equally to the question of whether the banks concerned had disclosed their 'shadow ratings' to the public by making the investment reports available to 1,147 recipients.[80]

The *Scope Rating / ESMA* case also dealt with the CRAR and offers even more insightful into how the JBoA perceives its own role. In this case, the JBoA had to review different questions since ESMA had fined Scope Rating for failing to systematically apply its credit-rating methodology. In logical order, the issues that needed addressing were whether Article 8(3) of the CRAR requires only the methodology to be systematic, or also its actual application; whether Scope Rating had invoked an objective reason to deviate from its methodology, in the sense of Article 5 of Commission Delegated Regulation 447/2012; whether, if no such objective reason could be invoked, Scope Rating had acted negligently. It is clear that some of these questions were legal in nature, while others were factual. On the interpretation of Article 8(3) CRAR, the JBoA correctly relied on the Court's interpretative techniques without leaving the ESMA any discretion. On the

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[76] Case 1/2016.
[77] Decisions 2019 01-04, *Skandinaviska Enskilda Banken AB e.a./ESMA*, paras 236-249.
[78] Conway defines this as "determining the meaning and effect of a law in light of the consequences the various possible meanings or interpretations could or would have." See Gerard Conway, *The Limits of Legal Reasoning and the European Court of Justice* (CUP 2012) 20. *In casu*, treating the information as falling within the exception would have had the consequence of market participants undermining the CRAR's provisions.
[79] Decisions 2019 01-04, *Skandinaviska Enskilda Banken AB e.a./ESMA*, para. 262.
[80] Ibid., paras 270-276.

issue of Article 5 of the delegated regulation however, the JBoA applied the same standard as the Court, both on the *interpretation* and *application* of ESMA of the provision,[81] where arguably the *interpretation* is a purely legal question, and discretion should at the most be afforded to the *application* of ESMA of the 'objective reason' exception. A further puzzling aspect of the JBoA's decision is its explicit qualification of some of the issues at play as 'questions of fact'.[82] It has already been noted above that the JBoA clarified in this case that it will leave the ESMA a margin of appreciation, but here it tied this margin of appreciation not to the assessment of 'complex or technical facts', as it still hinted at in *FinancialCraft Analytics / ESMA*, but simply to the appreciation of facts. It would have been desirable, however, for the JBoA to be more explicit on, on the one hand, the distinction between the determination of the facts which are subject to a comprehensive review even by the General Court[83] and thus *a fortiori* also by the JBoA, and, on the other, on the assessment of complex and technical facts in the light of regulatory provisions, where the JBoA leaves the ESMA with some discretion.

As noted, in its ten years of existence, this was only the third case in which the JBoA could exploit the added value which its expertise provides, and the first in which it clearly confirmed that it will leave discretion to the ESAs when reviewing their decisions. As follows from the above, it will be key for the JBoA to refine its findings in *Scope Ratings/ESMA* and to arrive at a standard that is more demanding than the standard applied by the General Court while at the same time leaving a margin of discretion to the ESAs.

The case of the AP, which, as noted, has reviewed many requests for access to documents, clearly displays its added value as an effective review mechanism available to individuals. Indeed, it may for example be argued that only a body composed of experts (as opposed to ordinary judges) is in a position to decide whether the SRB has deleted more information than would have been necessary to preserve confidentiality and avoid negative effects when it anonymised its decision,[84] or was right in denying access to certain documents altogether.[85] This is also most certainly true of the

[81] Decision 2020 03, *Scope Ratings/ESMA*, paras 139-146.
[82] Decision 2020 03, *Scope Ratings/ESMA*, paras 159 & 191
[83] See e.g. Case T-472/13, *Lundbeck v. Commission*, ECLI:EU:T:2016:449, para. 258; T-416/04, *Kontouli v. Council*, ECLI:EU:T:2006:281, para. 75.
[84] See Decision in Case 38/2017.
[85] See, for instance Decision in Case 39/2017.

assessment of the correct application of rules regarding Minimum Requirements for Own Funds and Eligible Liabilities.[86]

3.2.6. The power of the JBoA and AP to remit cases

Given the limited number of cases decided and given that most of them have been dismissed as inadmissible thus far, the JBoA has only had a limited opportunity to clarify the remedy that it offers. In *Nordic banks / ESMA*, it found that the ESMA had erroneously imposed fines on the applicants and remitted the case to the ESMA Board of Supervisors. Importantly, it added that it did "not propose to specify or give detailed instructions as to the amendment/s and leaves it to the Board of Supervisors to adopt such decisions based on the findings of the Board of Appeal." This might suggest that the JBoA does not exclude that it *could* give such detailed instructions and exercise this power. This would set the JBoA apart from the EU Courts, since under well-established case law, the Courts indeed have "no jurisdiction to issue directions to the [Union] institutions […]. Under Article 264 TFEU, the Court[s] may only declare the contested act to be void. It is then for the institution concerned, pursuant to Article 266 TFEU, to take the measures needed to comply with the Court's judgment."[87] In the case law of the Court, this links to the lack of competence of the Courts "to substitute another decision for the contested decision or to amend that decision."[88] However, the JBoA and AP, unlike some other BoAs and just like the Courts, lack the competence to reform any contested decision. Should the JBoA in the future indeed issue directives to an ESA, the question would arise whether the JBoA does have the competence to do so, and under which circumstances the limits to such a competence would be exceeded by the JBoA. After all, if it is the EU legislature's clear intent not to allow the JBoA to reform decisions, the JBoA may not have the competence to give instructions to the ESA that are so detailed that the relevant ESA body has no discretion left in amending the contested decision after it is remitted to it by the JBoA. Nonetheless, its hinting at possible lawful revisions would enhance efficiency, and reduce the likelihood of second appeals, which have occurred before the AP.

Indeed, an interesting characteristic of the review offered by the AP is that it provides for the possibility of a second review before it where the applicant considers that the SRB has not amended

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[86] Decision in Case 8/2018.
[87] See Case T-449/10, *Clientearth e.a. v. Commission*, ECLI:EU:T:2011:647, para. 26.
[88] See Case T-189/08, *Forum 187 v. Commission*, ECLI:EU:T:2010:99, para. 82.

a decision remitted to it in a correct manner.[89] This procedure, whilst stressing the importance of the AP, is fully justified for it is best placed to determine whether its decision has been followed adequately or not.

4. The way forward

Especially the above section on the power of the JBoA and AP power to remit cases to their respective agencies begs the question as to how the AP and the JBoA compare to the BoAs of other agencies that hold (or have held) more extensive powers. Comparing the JBoA and AP with those other BoAs then also allows a way forward to be sketched out for the JBoA and the AP.

First, the fact that the JBoA and AP are not submitted to the new regime that exists following the amendment of the Court of Justice's statute by Regulation No 2019/629 whereby BoAs might have become de facto 'first instance of judicial model of scrutiny'[90] deserves attention and, arguably, re-assessment. The JBoA and the AP are deemed to not have been included in this list in view of their recent establishment at the time of the reform, and the ensuing impossibility of determining whether they would be able to gain the trust of those able to present an appeal before them.[91] Nonetheless, after these bodies have been functioning effectively for some time, a reform that would allow the establishment of a unitary regime encompassing all BoAs may appear more desirable. This is even more the case given that the BoAs of any new agency would automatically fall under the new regime as long as it qualifies as independent.[92]

Especially for the JBoA, one way of allowing it to gain the trust of litigants would be for the legislator to broaden its mandate. That would also allow the JBoA to fully fulfil the potential it has as a review mechanism and do justice to the reasons invoked by Blair & Cheng in favour

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[89] See for example Decision in Case 2/2018 para. 9f. See further on this, Lamandini & Ramos Muñoz, 'Law and Practice of Financial Appeal Bodies' (n 18) 140.

[90] Jacopo Alberti, 'The draft amendments to CJEU's Stature and the future challenges of administrative adjudication in the EU', federalism.it, 6 February 2019, 4 (hereafter Alberti, 'The draft amendments'). See also the Chapter by Luca de Lucia Chapter in this Volume and Luca de Lucia, 'The shifting state of rights protection vis-à-vis EU agencies: a look at article 58a of the Statute of the Court of Justice of the European Union', (2019) 44 European Law Review 6, 809-823.

[91] Lamandini & Ramos Muñoz, 'Appeal bodies of EU financial regulatory agencies' (n 10) 385. Another narrative argues that this choice was made by the European Parliament based on the Boards of Appeals functional/institutional independence, see Alberti, 'The draft amendments' (n 90) 5.

[92] See on this the Chapter by De Lucia in this Volume.

of a specific appeal mechanism for the ESAs.[93] This could especially be done by (i) allowing the Board of Appeal to review all binding measures, including general binding measures, (ii) allowing the Board to review non-binding measures, and (iii) granting more hard law powers to the ESAs.

In 2017, the Commission presented a proposal to reform the ESAs Regulations, which resulted in Regulation 2019/2175. Remarkably, a revision of the jurisdiction of the JBoA never seems to have been on the table. While a new remedy before the Commission has been introduced, it does not involve the JBoA. Instead, the new Article 60a provides:

Exceeding of competence by the Authority

Any natural or legal person may send reasoned advice to the Commission if that person is of the opinion that the Authority has exceeded its competence, including by failing to respect the principle of proportionality referred to in Article 1(5), when acting under Articles 16 and 16b, and that is of direct and individual concern to that person.

This provision itself is oddly drafted and begs the question as to when a private party might be directly concerned by soft law (assuming direct concern under Article 60a of the ESA Regulations is to be interpreted as 'direct concern' under Article 263 TFEU).[94] The provision further confuses competence and proportionality, but in any event is indicative of the legitimate concern over the soft law adopted by the ESAs. After all, the guidelines, recommendations and Q&As adopted by the ESAs are *de iure* non-binding, raising the question as to why any special review procedure should be in place to begin with. Given the *de facto* importance of this soft law, however, there is an interest in providing for its review. The Commission has arguably been chosen over the JBoA as the most appropriate forum to carry out this review, given the regulatory implications of the guidelines, recommendations and Q&As of the ESAs. These acts are qualitatively different from the individual decisions, which typically come under the jurisdiction of the JBoA. Yet, the JBoA still has expert knowledge at its disposal and enlarging its jurisdiction could have resulted in helping the JBoA to acquire greater critical mass.

[93] In essence and notably the right to an effective remedy, ensuring good governance, ensuring output legitimacy. See Blair & Cheng, 'The role of judicial review in the EU's financial architecture' (n 20) 23. Ferran also refers to internal appeals mechanisms to ensure good governance. See Eilís Ferran, 'Institutional Design: The Choices for National Systems' in Niamh Moloney, Ellis Ferran & Jennifer Payne (eds), *The Oxford Handbook of Financial Regulation* (OUP 2015) 119 et seq.

[94] At the time of finalising this Chapter (in February 2021), no reasoned advice had yet been sent to the Commission under this procedure.

This is especially because the parties granted access to the new review mechanism are the same as those having standing before the JBoA, and because Article 60a explicitly refers to the proportionality of the contested soft law, whereby it is precisely in the assessment of the proportionality that the JBoA's expert knowledge could be put to full effect. The scope of the AP's remit could be re-assessed too as it has been deemed to not 'follow clear, coherent criteria'.[95]

A further desirable reform would consist of merging the JBoA and the AP.[96] Even if the EBA and the SRB are agencies that operate under systems (the EFSF and the EBU, respectively) in which the level of integration differs significantly, it remains the case that they deal with issues that are strongly intertwined substantively since they belong to the field of EU financial regulation. Furthermore, as the ESAs continue to assume new prerogatives, their areas of intervention are getting closer to those of the SRB, in the resolution domain for example. This convergence speaks in favour of having a BoA common to these four agencies, especially where the JBoA is already common to the three ESAs. Merging the two bodies would have a number of advantages. For instance, it would allow for the better circulation of information which, at present, is eased through personal contacts and the dual membership of one of the members. Even if this may change as the ESAs assume a larger number of tasks, so far, the workload of the JBoA could have easily been borne by a body that would have also dealt with the cases examined by the AP. Were such a reform to be implemented, the opportunity to transform these part-time bodies into permanent ones may, however, have to be examined. In any event, a permanent and appropriately staffed secretariat could be established, which would relieve the ESAs from the burden of having to assume this function in turn every two years. A proper registry could also be created, in particular if this new body were to become a de facto court of first instance.

Another reform should arguably regard the existing safeguards to guarantee the independence of the members of the AP and the JBoA. The BoAs have managed to establish themselves as bodies perceived to be independent, efficient and offering high-level review of technical issues in a speedy manner, which the financial institutions affected especially may find particularly valuable.

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[95] David Ramos Muñoz & Marco Lamandini, 'Banking Union's Accountability System in Practice. A Health Check-Up to Europe's Financial Heart', 2020, 32 available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3701117.
[96] Lamandini & Ramos Muñoz, 'Law and Practice of Financial Appeal Bodies' (n 18) 158.

However, this *de facto* independence is, by no means, sufficient, not least because it depends on the identity and integrity of the BoAs members. The latest reform of the ESAs regulations led to some improvement in this respect by providing for the involvement of the European Parliament, but no similar procedure exists with respect to the appointment of the members of the AP, who are appointed by the very organ whose decisions they are expected to review. Independence would be, in fact, best guaranteed if the members where designated by a variety of institutions that could include the agency (or agencies) whose act they review, the European Parliament, Member States and the European Central Bank (owing to its technical expertise). While currently the level of independence of the members of the JBoA and AP appears sufficient, strengthening the external independence of the JBoA and AP is critical if they were to become de facto courts of first instance (e.g. by being brought under Article 58a of the Court's statute) rather than remaining internal administrative review bodies.

5. Conclusion

The preceding analysis has shown that if the JBoA and AP still suffer from some weaknesses in their functioning, these mainly stem from the constraints under which they operate and are beyond the control of either the agencies or the BoAs themselves. These constraints relate to the existing legal framework as defined by the EU legislature, and to the limited and not fully defined scope and intensity of their review; the limited resources (administrative and otherwise) they have at their disposal; their insufficient independence; and the fact that the Court of Justice has constrained their freedom of action in its case law.

This chapter has, additionally, sought to determine whether the JBoA and the AP should be qualified as bodies offering administrative or judicial review. To this end, it presented and examined the main features of those bodies, as well as the corpus of their decisions to date. Based on this analysis, it may be inferred that both the JBoA and the AP are indeed internal administrative review bodies. Furthermore, the study of the first years of their functioning point to the JBoA and AP fulfilling their function appropriately. They offer speedy review in a procedurally flexible appeal procedure, which is easily accessible to individuals. The JBoA, especially semantically, mimics the review offered by the General Court, but it retains the potential to offer more thorough scrutiny. Notwithstanding this, the JBoA appears to still be searching for its exact role between the

ESAs and the Courts, a search that may well not end any time soon in view of the limited number of cases it is led to examine.

Still this chapter has also shown that there is a clear potential in upgrading both the JBoA and the AP, which could, for instance, take the form of their merger, the enlargement of their jurisdiction, or their transformation into quasi-courts of first instance if they were to fall under the provision of Article 58a of the Statute of the CJEU. In our view, the need for such a formal upgrade will accrue the more the JBoA and the AP in their practice move towards being de facto courts of first instance. The priorities in terms of reform would then be to solidify the guarantees applicable to the independence of the members of the JBoA and AP and to improve the support structures provided to the JBoA and AP.