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and Single Resolution Board
Decisions: Critical Issues

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Abstract [En]: The European legislator intends to offer alternative solutions as fast and internal review proceedings in the banking and financial sectors. Special administrative appeal procedures may be provided for by the regulations establishing bodies and agencies of the Union for the appeal of their decisions by the addressees of the legal effects (art. 263.5 TFEU) and various cases can be identified in different matters. In particular, the administrative protection of the economic operator before a Board of Appeal provided for by the regulations that introduced the European Supervisory Authorities, the specific supervisory tasks of the ECB and the bank resolution bodies are highlighted. The aim of the study is to highlight some relevant problems of interpretation and application, which call for a broad reflection on the nature of the review solutions, their concrete usefulness, the scope of the syndication and the effectiveness of the protection.

Titolo: Riesame amministrativo e decisioni dell'ABE, della BCE e del Comitato di risoluzione unico: profili critici
Abstract [It]: Il legislatore europeo offre soluzioni di tutela alternativa alla sede giurisdizionale e ha così previsto procedure di ricorso rapide e interne al settore bancario e finanziario. Diversi regolamenti che hanno istituito gli organi e le agenzie dell'Unione, hanno anche introdotto speciali procedure di ricorso amministrativo per l'impugnazione delle decisioni da parte dei destinatari degli effetti giuridici (art. 263.5 TFUE). In particolare, è considerata la tutela in via amministrativa dell'operatore economico davanti a una Commissione di ricorso, disciplinata dai regolamenti che hanno istituito le Autorità di vigilanza europee, i compiti specifici di vigilanza della BCE e il Comitato di risoluzione unico delle crisi bancarie. L'obiettivo dello studio è quello di evidenziare alcuni rilevanti problemi interpretativi e applicativi con spunti di riflessione sulla natura delle decisioni di riesame e la loro concreta utilità, sull'ambito del sindacato e l'effettività di queste forme di tutela.

Keywords: EU, Decisions of the EBA, the ECB and the Single Resolution Board, Administrative Review, Critical Aspects

Parole chiave: UE, Decisioni dell'ABE, della BCE e del Comitato di risoluzione unico, Riesame amministrativo, Profili critici

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* Articolo sottoposto a referaggio.

1. Introduction: the legal framework

The articles 58-61 of the founding regulations of the two regulatory and supervisory authorities in the banking and financial sectors¹ - the European Banking Authority (EBA) and the European Securities and Markets Authority (ESMA) - provided for a single Commission that can scrutinise the decisions of these administrations with a specific procedure and particular legal effects, at the request of any natural or legal person, including the competent national authorities, as a protective body through administrative appeal. Subsequently, the EU Regulation n. 1024/2013, which transferred to the European Central Bank (ECB) specific tasks of supervision of systemically important credit institutions in the euro area through a new, original and innovative system², has provided, in art. 24, the establishment of an Administrative Commission for the review of the ECB's decisions; the jurisdiction of the European judge for the control of the legality of legal acts is obviously guaranteed, based on art. 263 TFEU, which in paragraph 5 allows for pre-judicial control mechanisms.

Also, the discipline on the Single Banking Resolution Mechanism³ has provided for the establishment of the Appeals Committee pursuant to Article 85 of the EU Regulation n. 806/2014 with uniform rules and procedure, for the appeal of specific decisions of the Single Resolution Committee specified in Article 10. For litigation, the right of direct action before the Court of Justice is always guaranteed for decisions of the Commission itself or of the Committee and where there is no possibility to refer to the Commission, if the decisions do not fall within the cases expressly provided for⁴.

The legal basis for the establishment of all these Boards of Appeal is art. 263.5 TFEU, according to which “[the] acts establishing the bodies, offices and agencies of the Union may lay down specific conditions and arrangements concerning actions brought by natural or legal persons against acts of these bodies, offices or agencies⁵ intended to produce legal effects in relation to them” by means of special rules and procedures for administrative appeal. However, the regulation of such administrative protection

¹ EU Regulations of the European Parliament and of the Council, 24 November 2010, n. 1093 and n. 1095; EU Reg. of the European Parliament and of the Council, 24 November 2010, n. 1094, established the European Insurance and Occupational Pensions Authority. This framework was amended and supplemented by EU Reg. of the European Parliament and of the Council, 18 December 2019, n. 2175. For the Joint Board of Appeal, see Artt. 1-3. The 2019 reform involved the three Supervisory Authorities and innovated in several respects, through complex rules, the competences, bodies, responsibilities and independence as well as the decision-making process, the definition of legal acts and the transparency of decisions.

² For this evolution see S. Cassese, *La nuova architettura europea*, in *Giornale di diritto amministrativo*, 2014, 79 ff. and L. Torchia, *Unione bancaria: un approccio continentale?*, *ivi*, 2015, 11 ff.

³ Dir. EU/59/2014 of the European Parliament and of the Council of 15 May 2014 and EU Reg. n. 806/2014 of 15 July 2014.

⁴ Art. 86 of EU Reg. no. 806/2014.

⁵ Agencies are also involved see Communication from the Commission The future of European agencies, COM (2008) 135 final. 5, in www.ec.europa.eu. For more details see E. Chiti, *An important part of the EU's institutional machinery. Features, Problems and Perspectives of European Agencies*, in *Common Market Law Review*, 2009, 1395 ff.; E. Chiti, *Agencies' Rulemaking: Powers, Procedures and Assessment*, in *European Law Journal*, 2013, 93 ff.

mechanisms raises several questions. What are the differences and similarities between these Boards in terms of the power of review and the criteria of legality and/or merit? What has been the contribution so far of the European Courts, which have adopted some significant judgments on the possible “quasi-judicial” or exclusively administrative character? and what is the nature of the legal acts?

2. The review of EBA and ESMA decisions by the Board of Appeal: activities, independence and impartiality

The art. 58 of the Regulations n. 1093/2010 and n. 1095/2010 provides for a Board of Appeal (BoA) as a joint body⁶, composed of six technical members⁷ who are “of recognised standing” because of their proven knowledge of Union law, their international professional experience in specific fields⁸, and their legal expertise necessary to provide adequate advice on the legality, including proportionality, of the exercise of the Authority’s powers.

Two members are appointed by the Management Board of the Authority from a short-list of candidates proposed by the European Commission following a call for expressions of interest published in the Official Journal of the European Union, after consultation with the Board of Supervisors⁹; the involvement of the European Parliament is also foreseen, which may invite candidates and full members to make a statement and answer questions for the general purpose of information and transparency of the Authority's work, excluding any issues related to appeals decided or pending¹⁰.

The technical nature of the administrative body is, therefore, extensively regulated and decisions are adopted with particular majorities and among the principles about the activity of the Commission stand out independence and impartiality, exercise in the exclusive public interest; moreover, in order to avoid conflicts of interest, the members of the Board of Appeal and the operational and administrative support staff of EBA or ESMA may not participate in the appeal procedure, if they have already intervened in the previous procedure for the adoption of the contested decision¹¹.

⁶ Artt. 58-60, relating to the Board of Appeal of the European Supervisory Authorities, were amended by art. 1-3 of EU Reg. n. 2175/2019 with identical additions in the Regulations establishing EBA, ESMA and the European Insurance and Occupational Pensions Authority.

⁷ In addition, there are six alternates, as provided for in Art. 58.2; the term of office of the members is five years (art. 58.4).

⁸ International professional experience must be “of a sufficiently high standard in the fields of banking, insurance, occupational pensions, corporate markets or other financial services, with the exception of current staff of the competent authorities or other national or Union bodies or institutions involved in the activities of the Authority and members of the Banking Stakeholder Group” (Art. 58.2).

⁹ Art. 58.3.

¹⁰ Art. 58.3 specifies the exception “unless the statements, questions or answers relate to individual cases decided by the Board of Appeal or pending before it”.

¹¹ Art. 59.2.

The appeal, which has an optional character, can be brought by any natural or legal person, including the competent authorities, as an appeal against decisions of the Supervisory Authorities identified by the legal framework¹² and any other decision adopted in accordance with EU acts, addressed to the same subjects, or of a decision which is adopted with respect to another subject, but with legal effects in the legal sphere of different subjects and, therefore, if it “affects that person directly and individually” and as such is entitled to activate the protection¹³. These features are also present in the legal framework of the other forms of redress that will be examined.

After the verification of the prerequisites of legitimacy and appeal of the measure, the contradictory debate between the parties, who may submit comments (also in oral form), based on the preliminary investigation, the Commission examines the merits of the appeal and adopts a reasoned decision¹⁴, confirming the contested decision or referring the case to the Regulatory Authority for a new amended decision based on the review, which has a binding content¹⁵.

In the 2010 legal framework, the EU Regulation n. 2175/2019 introduced art. 60*bis* and a new task for the European Commission similar to the review function, but as a more penetrating control than that of the BoA: a directly and individually concerned person may send “a detailed notice” to the institution, if the EBA has exceeded its competence under art. 1.5 in the exercise of its tasks under art. 16 and 16*ter* “Questions and Answers” of a new and complex dialogue between the subjects, the Competent Authorities and the EU bodies¹⁶ and for the violation of the principle of proportionality¹⁷. The competence involved concerns the adoption of guidelines and recommendations, addressed to national authorities or financial institutions, which must be in accordance with powers and tasks provided for in legislative acts and based on public consultations and the analysis of “potential costs and benefits”,

¹² Artt. 1.2, 17, 18 and 19.

¹³ Art. 60.1.

¹⁴ Art. 60.2 was amended by EU Reg. n. 2175/2019 for the peremptory time limit to appeal decisions within three months and the Commission must decide “on the appeal within three months” of submission. For the procedure see Decision BoA 2020 01, 25 February 2020 (Reference BoA/2019/04), *Rules of Procedure for the Board of Appeal*; see also Decision BoA 2020 02 (Reference BoA/2019/05), *Guidelines to the Parties to Appeal Proceedings before the Joint Board of Appeal of the European Supervisory Authorities*, available in the section “Joint Board of Appeal”, at www.eba.europa.eu.

¹⁵ Art. 60, par. 2-7.

¹⁶ Art. 16 concerns guidelines and recommendations, which should be in accordance with the powers and responsibilities provided for in legislative acts and addressed to competent authorities and financial institutions; it regulates their implementation and public consultation procedures. The Authority may also analyse “potential costs and benefits” through assessments proportionate to the scope of application. The art. 16*ter* “Questions and Answers” introduces a new dialogue between the Authority, any natural or legal person including competent authorities, EU institutions and bodies, who may ask questions about the practical application or implementation of legal acts, in a particularly complex manner.

¹⁷ The principle of proportionality must be respected by the Authority, when it is applicable in the performance of the tasks for which it acts “in an independent, objective, non-discriminatory and transparent manner in the interest of the entire Union”; furthermore, the actions and measures adopted must take into account, in accordance with the principle of proportionality, the nature, extent and complexity of the risks which may arise in the activity carried out by a financial institution or an enterprise.

according to assessments proportionate to the scope; even if the rule does not clearly illustrate the legal consequences, a finding of legitimacy extending to the possible non-proportionality of the decision adopted by the Supervisory Authority cannot derive from this “information”.

The administrative review scheme easily fits into the dispute resolution measures alternative to judicial protection; in fact, the content of the decision on the appeal proposed extends to the merits of the choices falling within the competence of EBA or ESMA and, considering also the binding nature, the power exercisable is very close to judicial review, which, however, consists in the exclusive “review of the legality of the acts of the bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties” (art. 263.1 TFEU). Thus, the administrative appeal would allow a more extensive review. Moreover, the English definition of the Board of Appeal for the banking and financial services sector¹⁸, further supports the quasi-judicial nature as the only technical body to which requests for review of the Authorities’ decisions are addressed.

This is confirmed by the content of the decisions taken, as in several cases complex interpretative issues relevant to the application of EU law and intricate issues outside the scope of the review body were addressed. Among the disputes submitted to the Board, there are issues related to the eligibility requirements for managers of credit institutions with significant decision-making functions. The EBA clarified in a decision that the requirements under EU law apply only to persons who effectively direct the business of the institution and the Board of Appeal subsequently clarified more narrowly that, while there is a discretionary element in the assessment of suitability by national competent authorities, this is not exclusively a matter for national law and referred the case back to the EBA for a new substantive decision¹⁹. The entire dispute was brought before the European Court of First Instance²⁰, which annulled the decision of the review body for lack of jurisdiction and the judgment was upheld by the Court of Justice²¹.

The other decisions²² mainly concerned the delimitation of the scope of review of ESMA’s acts; Nordic banks’ appeal involved a complex review by the Board of Appeal, which found no illegality in ESMA’s

¹⁸ For more on the experience of financial sector review bodies see M. Lamandini - D. Ramos Muñoz, *Appeal bodies of EU financial regulatory agencies: are we where we should be?*, in *ECB Legal Conference 2019, Building bridges: central banking law in an interconnected world*, Frankfurt, 2019, 384 ff.

¹⁹ BoA 2013-008, available in the “Joint Board of Appeal” section, at www.eba.europa.eu, like all decisions referred to below.

²⁰ EU Tribunal 9 September 2015, Case T-660/2014.

²¹ Court of Justice, Sec. I, 14 December 2016, Case C-577/2015 P, at www.curia.europa.eu, as all the judgments cited in this paper.

²² BoA/2018/02, BoA 2015/001. See decision 28 December 2020 (2020-D-03) that regards a very complex issue of application of the mitigation adjustment coefficient under the CRA Regulation. The Board examines the merits of the matter submitted: “ESMA was correct in law, and on the application of the facts, in finding that there was not sufficient evidence to establish mitigation as regards the adoption of measures to ensure the infringements under points 3a and eb of Section II of Annex III and points 4a of Section III of Annex III cannot be committed in the future”. In

decisions based on the principles of legal certainty and due process²³. In the *Creditreform* case, the decision²⁴ re-opened the appeal filed by a credit rating agency challenging the adoption by the Committee of European Supervisory Authorities of some draft implementing technical standards, with a request for suspension.

The decisions of 2021 concern complex issues and the first appeal, which was declared inadmissible, was lodged against the EBA for an alleged failure to carry out investigations concerning facts which the EBA itself had found, as they were described in the request, outside its scope, because they did not fall under any of the Union acts referred to in art. 1.2 of Regulation (EU) n. 1093/2010. The BoA considers the appeal “merely reiterates, albeit vis-à-vis a different authority (EBA instead of ESMA and EIOPA), the same complaints which have been almost identically raised in the past by appellant with respect to ESMA and EIOPA and which lead to two appeals which the Board of Appeal has determined to be inadmissibility”. The BoA recalls the reasons widely expressed in those decisions, including the clear reference to settled case-law of the Court of Justice²⁵.

A second complaint against ESMA was also declared inadmissible after a thorough examination of the issues presented, which stemmed from an initial request to ESMA to investigate the approach taken by the Member State’s competent national authority regarding the assessment of structured retail products and the identification of several provisions of EU law which, according to the complainant, were not correctly applied by the competent national authority. The BoA decided the appeal is inadmissible considering that, after 2019 amendments to the ESMA Regulation, the determination not to open an investigation might be challenged by the natural or legal person having given “well substantiated information” to ESMA claiming that the determination did not state reasons; in the instant case the appellant made an appeal for grounds which are by far exceeding the lack of reasons²⁶.

Therefore, even recently, there are problems of interpretation of the discipline on contested acts or activity and some significant uncertainties, since appellants adopt initiatives that are often then declared

conclusion, according the BoA “the evidence that the appellant has not accepted that its interpretation of a material change as requiring actual impact on a rating is not in accordance with the correct interpretation (in the view of the Board of Appeal) of this term under the CRA [*Credit Rating Agencies*] Regulation, specifically Article 8 (5a)” and “the amount of the fine for the relevant infringements under points 3a and 3b of Section II of Annex III and points 4a of Section III of Annex was correctly calculated”.

²³ BoA 2019/01-02-03-04.

²⁴ BoA 2019/05.

²⁵ See the BoA decisions 7 January 2021 (D 2021 01) about a case relating the EBA. While the decision 14 April 2021 (D 2021 03) relates to the EIOPA acts. For the case law referred to by the BoA: Trib. UE 9 September 2015, T-660/14 *SV Capital OU v. EBA*, and on appeal, Court of Justice, 14 December 2016, *SV Capital OU v. EBA*, C-577/15 P.

²⁶ BoA decision 12 March 2021 (D 2021 02) that concerns the ESMA activity. According to the Board the appeal would be inadmissible even if one would accept that the BoA could review under art. 60 a decision adopted under art. 17 of the ESMA Regulation not to initiate an investigation on foot of a request by a party not specified in art. 17.2. While the third BoA decision 14 April 2021 (D 2021 03) relates to the EIOPA acts.

inadmissible or at least appeals “are attempted” before going to the European Court, even if the number of administrative protection actions remains very limited.

3.1. The Administrative Board of Review for ECB supervisory decisions: the nature of an internal body, the opinion as a decision and doubts about its actual independence

The art. 24 of the EU Regulation n. 1024/2013 defines the characteristics of the Administrative Board of Review (ABoR) established by the ECB for the internal re-evaluation²⁷ of supervisory decisions through a procedure that ends with the adoption of an opinion.

The appeal must be submitted according to particular procedures and sets out the reasons of the absence of “the procedural and substantive conformity of such decisions with this Regulation”, which appears to be the only certain parameter of reference for the legitimacy of the acts, even considering the wide margin of discretion of the ECB for the evaluations of merit and the nature, also political, of the tasks of prudential supervision²⁸, as emerges from art. 127.6 TFEU; hence a certain difficulty in identifying the decisional scope of the opinion.

Since the Commission’s control is not limited to ascertaining compliance with procedural rules²⁹ (rights to be heard, rights of defense, the duty to state reasons for the decision), substantive compliance consists in verifying that the decision is legitimate under the law applied and the prudential supervisory rules. The critical issue is to establish a clear distinction between a review assessing the merits of a discretionary decision and a re-examination of the legality of a decision, in the sense that it must not violate legal rules and be based on a careful and impartial assessment. These aspects are still debated, even considering some recent clarifications by case law and the decision-making bodies involved.

The provision of Art. 24 also defines the internal review procedure of the Commission, the composition and the requirements of the members; the same criteria of reputation and professional experience are

²⁷ See C. Brescia Morra, *The administrative and judicial review of decisions of the ECB in the supervisory field*, in VV. AA., *Scritti sull’Unione Bancaria*, in Quaderni di Ricerca Giuridica della Banca d’Italia, Roma, 2016, 105 ss; C. Brescia Morra - R. Smits - A. Magliari, *The Administrative Board of Review of the European Central Bank: Experience After 2 Years*, in *European Business Organization Law Review*, 2017, 18, 567 ss; C. Brescia Morra, *The Administrative Review of Decisions of the ECB in the Supervisory Field*, in *Studi sull’Integrazione Europea*, 2018, 1, 63 ss; M. Clarich, *The System of Administrative and Jurisdictional Guarantees Concerning the Decisions of the European Central Bank*, in M. P. Chiti - V. Santoro (eds.), *The Palgrave Handbook of European Banking Union Law*, Palgrave Macmillan, London, 2019, 91 ss.; R. Smits, *Reflections on euro area banking supervision: context, transparency and culture from an institutional law perspective*, in G. Lo Schiavo (ed.), *The European Banking Union and the Role of Law*, cit, 145 ss.; T.M.C. Arons, *Judicial Protection of Supervised Credit Institutions in the European Banking Union*, in D. Busch - G. Ferrarini (eds.), *European Banking Union*, 2nd ed., Oxford University Press, Oxford, 2020, 102 ff.

²⁸ About the profiles of significant connection between administrative discretionality, technique and politics in the European banking supervision, see A. Magliari, *Sindacato sulla discrezionalità e decisioni di vigilanza della BCE*, in *Giornale di diritto amministrativo*, 2019, 83; M. Macchia, *L’architettura europea dell’Unione bancaria tra tecnica e politica*, in *Riv. it. dir. pubbl. com.*, 2015, 1579 ff; L. Torchia, *La nuova governance economica dell’Unione europea e l’Unione bancaria*, in M.P. Chiti - V. Santoro (a cura di), *L’Unione bancaria europea*, cit., 61-62.

²⁹ Art. 22.

referred to, as indicated for the Board of Appeal of EBA and ESMA, and the representative participation of the States. Further similarities relate to the prerequisites for action by members, such as independence and public interest, the obligation to publicly declare commitments and direct or indirect interests that may conflict with independence, or the absence of interests.

However, despite the affirmed independence of the members of the Commission, it operates, in substance, as an internal office that expresses an opinion, quite different from the decision of a quasi-judicial body; this qualification, which is not clearly illustrated by the discipline except for the formal definition, has led to interpretative difficulties, clarified by the case law; moreover, the reference to the dispute appealed in the Review Commission is useful.

In the *Landeskreditbank-Baden-Württemberg* case, the EU General Court³⁰ and then the Court of Justice³¹ contributed significantly to the interpretation of certain aspects of the Single Supervisory Mechanism with respect to the determinant character of the “significance” of the bank, which must be recognised by an ECB decision as a prerequisite for submission to direct prudential supervision by the ECB and not to supervision by the competent national body.

The central issues relate to the possibility of reviewing the qualification and changing it if there are “special circumstances” depending on the specific case in relation to the stability objectives to be achieved on the basis of high standards of supervision and the methods of the new assessment according to technical assessments and a discretionary choice regarding the most appropriate classification of the credit institution in the sense of a subsequent “non-significance”. Decentralised supervision derives from this, since the solution centred on ECB supervision would not be adequate in the implementation of the objectives indicated in the EU Regulation n. 1024/2013.

The case stems precisely from the appeal before the General Court of the ECB’s initial decision³² confirming the significance of the credit institution, which was the subject of an assessment by the Review Commission and of a specific procedure. The re-examination opinion confirmed the legitimacy of the original decision and was the prerequisite, given that it did not have the character of an autonomous decision unlike the final acts of the other internal review bodies, for the subsequent ECB decision³³; the draft decision repealed and replaced the previous one, which was identical in content to the initial one, in the sense of classification as a significant credit institution.

³⁰ EU Tribunal, Section IV Extended, 16 May 2017, Case T-122/2017.

³¹ Court of Justice, Sec. II, 8 May 2019, Case C-450/2019.

³² Decision ECB/MVU/14/1^o September 2014, available at www.bankingsupervision.europa.eu, like the other decisions referred in this paper.

³³ Decision ECB/MVU/15/1, 5 January 2015.

The ECB ruled out the existence of “special circumstances³⁴” as justification for the prudential supervision exercised by the German authorities, on the basis of various legal considerations that affirmed the qualification of the applicant as a “significant” institution not contrary to the objectives of the 2013 regulation, nor did it reveal any risk profiles, and with regard to the “special circumstances” it was necessary to verify whether they were adequate justification for the reclassification as a non-significant entity, to be understood, according to the Union Court, restrictively and “only when direct supervision by the ECB is inappropriate, an entity may be reclassified from ‘significant’ to ‘less significant’”.

The principle of proportionality “for interpretative purposes” cannot require the ECB to verify a “proportionate” application of the criteria in art. 6.4. of the 2013 European Regulation, as an examination of the “inappropriate” nature of an institution’s classification as significant. Thus, the EU General Court clarified that the high standards of national supervisory systems do not entail the inappropriate character of the ECB’s direct supervision, considering the legal framework which does not make centralised supervision conditional on a finding of inadequacy of national supervision or the relevant rules.

The German credit institution had brought legal proceedings against the ECB’s second decision, adopted after the review and the opinion of the Administrative Commission; among the pleas in law put forward by the appellant³⁵ were the infringement of the art. 6.4 and art. 70 of the MVU Framework Regulation in the choice of criteria applied, flaws in the assessment of the facts and breach of the obligation to state reasons. The Tribunal³⁶, confirming the legitimacy of the ECB’s decision, stated that the existence of special circumstances is sufficient to justify the reclassification of the credit institution, but in order to ascertain their existence, it is necessary to apply art. 70.1 of the MVU Framework Regulation, which refers to “special circumstances that lead to the classification of the institution as less significant”. Moreover, the ECB’s choice is contained in a decision which “incorporates” the opinion of the Review Commission, and it considered the existence of special circumstances, but on the condition that the objectives of the Regulation would be better served by direct supervision by national authorities; however, in the present case, this condition had not been demonstrated by the appellant³⁷.

³⁴ Prerequisite required by art. 6.4 of EU Reg. n. 1024/2013 and art. 70.2 (“Special circumstances determining the classification of a supervised entity as less significant”) of the MUV Framework Regulation, more precisely EU Reg. n. 468/2014 of the European Central Bank, 16 April 2014, establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and the competent national authorities and with the designated national authorities.

³⁵ See Advocate General, Case C-450/17 P, 5 December 2018.

³⁶ EU Tribunal, Extended Sec IV, 16 May 2017, T-122/2015.

³⁷ See paragraph 128.

3.2. The interpretative contribution of the Court of Justice

The Tribunal judgment was appealed to the Court of Justice³⁸, which confirmed and expanded on the approach already adopted by the General Court in respect of aspects relating to the obligation to state reasons for the ECB's decision, its content and the nature of the Review Board; The European Court of Justice, after stating that the arguments presented by the Review Board are justification of the ECB's decision and expression of the obligation to state reasons³⁹ provided also for the institution, qualified the body as an articulation of the ECB, entirely internal, overcoming, in essence, any uncertainty about the actual administrative nature, even if formally contained in the name of the body.

Certainly, the wide margin of discretion of the European institution's decision prevails, as emerges from recital n. 55 of EU Reg. n. 1024/2013, which establishes a significant responsibility "in terms of safeguarding financial stability in the Union and exercising its supervisory powers as effectively and proportionately as possible".

The ECJ confirms the internal nature of the administrative review of decisions adopted by the ECB in the form of an opinion and a proposal to annul the initial decision and replace it with a decision of identical content or with a different one, indicating the changes; the judgment examines the various stages of the procedure up to the referral of the case to the Supervisory Board for the drafting of a new draft decision based on the opinion, to be submitted to the Governing Council, and the legal effects of the acts. The draft 'repeals' (in the sense of annulment of an administrative act), in any event, the initial decision, which is replaced by a decision of identical content or by an amended decision, and the final adoption of the new decision takes place automatically because of a hypothesis of silence-consent, if the Governing Council does not object within ten days. The duty to state reasons is defined, which is required for the opinion of the Review Commission, the new draft decision adopted by the Supervisory Board and the decision of the Governing Council, all of which must be notified to the parties⁴⁰.

There is no express duty to state reasons in case of adoption of the draft decision without considering the opinion, although this could be considered implicit in the duty to consider as mandatory. Certainly,

³⁸ Court of Justice, Sec. I, 8 May 2019, Case C-450/17 P.

³⁹ Constant guidance interprets art. 296 TFEU with reference to a statement of reasons appropriate to the nature of the act from which "it must make clear and unequivocal the logical process followed by the institution from which it emanates, so as to enable the persons concerned to know the reasons for the measure adopted and the competent court to exercise its review" (Court of Justice 5 December 2013, Case C-455/2011 P; Court of Justice 10 March 2016, Case C-247/2014). The duty to state reasons takes on a particular dimension in relation to the circumstances of the case and, therefore, to the content of the act, the nature of the reasons and the interest of the addressees of the act or of third parties, directly and individually affected. However, the statement of reasons does not have to express all the factual and legal elements, since the establishment of the obligations under art. 296 TFEU depends on the wording of the rule, but also on the concrete context and the overall framework of the applicable rules (Court of Justice 5 December 2013, Case C-455/2011 P, § 91; Court of Justice 10 March 2016, Case C-247/2014, § 16).

⁴⁰ Art. 24.9 of EU Reg. n. 1024/2013 and art. 18 of ECB Decision n. 360/2014.

the nature of the administrative remedy requires that the Board of Vigilance cannot limit itself to the examination of the appellant's grounds, but it will inevitably have to consider the solution of the Review Board and the proposal for the new draft decision may take other elements into account⁴¹.

The Court of Justice clarifies that these acts are attributable to the same European institution as they are adopted by internal bodies and are “intrinsically linked to each other”; they are part of the internal administrative review procedure of the decisions adopted by the institution for the tasks provided for in the EU Reg. n. 1024/2013. The special features examined clearly distinguish this form of review from the other cases examined.

The grounds of the opinion and the contested decision were the focus of the appeal already in the General Court, as the appellant *Landeskreditbank* contested the qualification of “significant institution⁴²” as emerged in the opinion of the Review Commission and then in the subsequent new ECB decision formulated by the Supervisory Board, which was finally adopted by the Governing Council. This qualification was confirmed by the Court of Justice, which ruled out any error of law in the drafting of the judgment of the General Court; the opinion was closely linked to the decision and, consequently, could well be taken into account in the assessment of legality from the point of view of sufficient reasoning “since the decision had been delivered in accordance with that opinion, it was in the context of that opinion and the explanations contained therein could be taken into account in order to examine the sufficiently reasoned nature of the decision at issue⁴³”.

Thus, the mandatory non-binding opinion is part of the decision-making procedure and is, in any case, difficult to be attributed to the exercise of an advisory function in the classical sense, since the objective is the adoption of a review decision. The definition of an opinion seems to be justified by the intention of guaranteeing the fullness of supervisory powers and discretion of the European institution; this inevitably undermines the external image of the role of the ABoR and probably arouses mistrust in banking institutions which prefer judicial protection for disputes which, in general, are characterised by their economic value and significant legal consequences.

The application issues are varied and to date only partially clarified by case law. In addition, there is a problem with the transparency of the activity of the Review Commission as it emerges from the 2017 Report⁴⁴ on the MVU in which the European Commission highlighted the need for improvement. It

⁴¹ See art. 17.1 of Decision ECB/2014/16. Consider also ECB Decision n. 1378/2019, which introduced some changes regarding the deadlines for receipt of the opinion and the procedure for adopting the draft decision.

⁴² Art. 6.4 of EU Reg. n. 1024/2013.

⁴³ For these aspects, see the judgment in §§ 31, 32, 125, 127, 128 and 129.

⁴⁴ See European Commission, Report from the Commission to the European Parliament and the Council on the Single Supervisory Mechanism established pursuant to Regulation (EU) n. 1024/2013, COM (2017), 591 final, 5, at www.ec.europa.eu.

would be useful to publish in full the previous cases subject to review and the decisions adopted, making them more accessible through publication on the ECB's Banking Supervision institutional website⁴⁵, while duly respecting confidentiality rules for the credit activities involved.

The Review Commission could, in fact, publish an autonomous case report and not refer to the MVU's annual report which devotes a limited space of not even two pages to review appeal cases⁴⁶; up-to-date information about the number of review requests, the subject matter, and the opinions already adopted should be guaranteed, as well as references to their content, confirmation or replacement by an amended decision and whether a suspension of the decision has been requested and granted (or not). These publicity arrangements are relevant for possible consideration in judicial protection and for the democratic control of the reviewing authority, although there is an unavoidable conflict between the objectives of transparency and re-preservation⁴⁷ of individual positions and the need to balance interests. As noted by the European Commission in its 2017 Report, "the ECB argues that the opinions of the Review Board have had a wider influence on the ECB's supervisory practice than the individual cases to which they relate" with the potential to guide the institution and economic actors differently.

4. The decisions of the Banking Resolution Committee, the Appeal Panel and the limited extent of administrative litigation

The art. 85 of the EU Reg. n. 806/2014, which contains uniform rules of procedure in the field of resolution of credit institutions in the framework of the Single Mechanism⁴⁸, establishes the Appeal Panel and the adoption of its rules of procedure; the definition of Appeal Panel suggests, also in this case, a

⁴⁵ At www.bankingsupervision.europa.eu. See *ECB Annual Report on supervisory activities 2019*, 88-89: the very concise report shows that there were only four administrative appeals filed in the same year and five opinions adopted by the Review Commission of which one dates to an appeal filed in 2018. For two appeals, the relevant opinion found that the appeal was inadmissible and for a different case, the opinion was the basis for a new ECB decision; in addition, another opinion decided to amend the content of the original contested decisions and, at the pre-trial stage of two appeals, the Commission ordered hearings that allowed the appellants and the ECB to comment on the contested decisions on an adversarial basis. See also *ECB Annual Report on supervisory activities 2020*, 90; in 2020 the ABoR adopted only two opinions: in the first case, the request of the administrative review was inadmissible and in the second opinion the administrative commission proposed replacing the ECB decision by a decision of identical content (art. 24.7 of the SSM regulation). The issues concerned the ECB's TRIM and an on-site inspection which had not led to a follow-up letter or a supervisory decision. In addition, the ABoR published on the ECB's website an adjustment to its work in relation to the suspension of the application of supervisory decisions because of Covid-19 pandemic; for an in-depth study see K. Lackhoff (ed.), *Banking Supervision and COVID-19, A Handbook*, C. H. Beck-Hart-Nomos, München, 2021.

⁴⁶ See R. Smits, cit., 145-149.

⁴⁷ About access to documents relating to the decisions of the Governing Council of the ECB and the confidentiality of the decisions (access to the amount of the claim resulting from the extracts of the minutes of the decision), see Court of Justice, Section I, 19 December 2019, Case C-442/2018; for the discipline see Art. 10.4 of the Protocol on the ESCB/ECB Statute and Decision 2004/3/ECB (2004/258/EC), Art. 4.1.

⁴⁸ See A. Baglioni, *The European Banking Union, A Critical Assessment*, Palgrave, London, 2016, 31 ff, spec. 81 ff; S. Gleeson, *The Single Resolution Mechanism and the EU crisis management tools*, in G. Lo Schiavo (ed.), *The European Banking Union and the Role of Law*, cit., 216 ff; T.M.C. Arons, *Judicial Protection of Supervised Credit Institutions in the European Banking Union*, cit., 122 ff.

quasi-judicial connotation and the composition criteria are very similar to the other review bodies already examined, since the discipline specifies the independent action of the members and in the public interest. The appeal decision may either confirm the Committee's decision or refer the matter back to the Committee for a further decision, in which case the Committee is bound by the Commission's binding decision and must adopt an amended solution.

The case history of appeals filed since 2016 does not show a significant number of requests for review of Single Resolution Committee decisions⁴⁹; requests for review of decisions have mainly concerned the payment of contributions by credit institutions, but most appeals have been deemed inadmissible as they relate to the contributions to be paid to the Resolution Fund, a matter outside the remit of the Review Committee.

Indeed, the most economically significant disputes such as the complex quantification of the compulsory contributions to the Fund financed by credit institutions are referred to the European Courts and a recent Court of Justice decision⁵⁰ has clarified the interpretation of art. 103.2 of the Dir. EU/59/2014 and, with regard to the calculation of ex-ante contributions to a national resolution fund, did not exclude liabilities resulting from transactions between a second-tier bank and the members of a syndicate consisting of this bank and cooperative banks to which the former provided services of various kinds without having control over them. On the other hand, loans on a competitive and non-profit-making basis for the purpose of promoting the public policy objectives of a central or regional administration of a Member State were excluded.

The General Court of the European Union⁵¹, due to the nature of the decisions of the Resolution Committee quantifying the ex-ante contributions⁵², affirmed that they are final and, therefore, they are not preparatory or endo-procedural measures, as they manifest the definitive position of the Committee at the end of the procedure and, therefore, directly contestable in court.

⁴⁹ See M.P. Chiti, *The European Banking Union and EU Administrative Law*, in G. Lo Schiavo (ed.), *The European Banking Union and the Role of Law*, cit., 63-64.

⁵⁰ Court of Justice, Sez. I, Grand Chamber, 3 December 2019, Case C-414/2018.

⁵¹ EU Tribunal, Extended Sec. VIII, 28 November 2019, Case T-365/2016, Joined Cases T-377/2016, T-645/2016, T-809/2016 and others.

⁵² Art. 70.2 of the EU Reg. n. 806/2014; the Fund is, as it is known, financed by the obligatory contributions of institutions (credit institutions, investment firms, included in the supervision on a consolidated basis ex art. 2, letter b, EU Reg. n. 806/2014) collected *ex ante* at national level (art. 67.4). For the interpretation of this discipline and on calculation criteria see *Credito Fondiario s.p.a.*, Court of Justice, Sect. VIII, 5 March 2020, Case C-69/2019, paras. 2-5, and the contested order of the EU Tribunal 19 November 2018, T-661/16, which had dismissed the appeal for manifest inadmissibility as being out of time, as confirmed by the Court of Justice ruling. See Court of Justice, Grand Chamber, 15 July 2021, Case C-584/2020 P and Case C-621/2020 P, *European Commission/Landesbank Baden-Württemberg/Fédération Bancaire Française/Single Resolution Board*.

In 2017, litigation by means of administrative appeals⁵³ mainly concerned the *Banco Popular* crisis with several requests for the annulment of the Committee's resolution decision, which, however, does not include the matters under the Commission's competence, hence the doubtful knowledge of the institutions and the limited clarity of such an important matter. Further appeals up to 2019 relate to decisions rejecting requests for access to documents⁵⁴ concerning the *Banco Popular* resolution with requests for hearings, and hence, in some cases, the decision to produce the documents in the light of the principles of transparency and democratic control. However, the Commission has recognised a significant margin of discretion for the Resolution Committee in assessing whether the conditions for an exception to access to documents exist, e.g. whether there is a risk to financial stability.

The issue of access to documents is central and constant in the litigation before the Appeal Panel, especially as there are appeals concerning access to documents also in 2020 and 2021. The cases are linked to even complex factual and legal contexts and, regardless of the outcome of the review, they confirm a widespread need for effective transparency about the acts of the SRB and entities involved in the resolution⁵⁵.

There are also several uncertainties about the scope of the decisions that can be reviewed by the Review Committee, despite the list expressly provided for in art. 85 of EU Regulation n. 806/2014, due to the obvious complexity of the matter that needs further investigation in a context of regulatory solutions; the open issues concern the content of the decisions that can be challenged and the competence of the body that decides administrative appeals on urgent matters that are very critical for the resolution and the very existence of banking institutions.

5. Reflection on the instruments examined: do they represent effective protection of the economic operators and contribute to administrative integration?

The schemes of administrative appeals examined have in common the intention of resolving disputes relating to the content of decisions of European authorities internally and in a simplified manner by means of administrative review instruments⁵⁶ and a single European review body established by a regulation, as in other sectors with the aim of effectiveness of protection of economic operators and

⁵³ See Section *SRB Appeal Panel* at www.srb.europa.eu. For the recent activity of the Resolution Committee see *2020 Resolution Reporting*.

⁵⁴ See cases 1-4/19 by decision of 19 April 2019; case 5/19 by decision of 29 April 2019; case 6/19 by decision of 9 October 2019; cases 7-8/19 by decision of 27 January 2020, at www.srb.europa.eu.

⁵⁵ See case 8/19 by decision 27 January 2020; case 4/20 by decision 19 October 2020 and case 1/21 by decision 28 June 2021. See also E. Koupepidou, *Introduction to the panel on transparency versus confidentiality of supervisory decisions, documents and information*, in *ESCB Legal Conference 2020*, Frankfurt, 2021, 219 ff.

⁵⁶ About these protection instruments S. Cassese, *A New Framework of Administrative Arrangements for the Protection of Individual Rights*, in *ECB Legal Conference 2017, Shaping a new legal order for Europe: a tale of crises and opportunities*, Frankfurt, 2017, 239 ff.; Id., *A European Administrative Justice?*, in *Riv. it. dir. pubbl. com.*, 2017, 1319 ff.

administrative integration of the systems. Appeals against decisions in the field of banking and financial supervision and regulation do not preclude judicial protection before the courts of the EU, nor do they represent a condition for bringing an action, but they broaden the possibility of protection with less onerous solutions, albeit with problems of interpretation and uncertainties in the process of clarification. The differences between the institutions mainly concern the autonomy of the review bodies and the discretion in the decision-making process. The Administrative Commission (in the proper sense) of the ECB as an internal body of the ECB, cannot adopt rules of procedure or operation, which are instead the responsibility of decisions of the European institution itself⁵⁷ as provided for in art. 283 TFEU; the same provision provides for only the Governing Council and the Executive Board as decision-making bodies, a framework recently confirmed by case law⁵⁸. Therefore, the Review Board cannot be endowed with fully autonomous powers within the limits provided for by the TFEU. The Supervisory Board itself, although responsible for important functions, is defined as an internal body by art. 26, paragraph 1, EU Reg. n. 1024/2013.

This gives rise to some perplexities. The secretarial functions are exercised by the (secretary's) office of the ECB Supervisory Board as a support to the secretariat of the Administrative Commission⁵⁹, for the handling of appeals, hearings and draft decisions, the drafting of minutes and legal expertise⁶⁰, certainly for organisational and cost reasons, but in fact with a conflict of tasks. Therefore, an appropriate distinction between the supervisory function and the review of decisions would be appropriate for greater independence, transparency and the need for separation between the body monitoring the decisions and the body taking them. The explicit regulatory distinction between the supervisory tasks and the well-established monetary policy function is already well known⁶¹.

The number of appeals before the two committees reviewing supervisory decisions of the ECB and the Resolution Committee is not particularly high, but can be considered a satisfactory tool, given that only in limited cases was judicial protection subsequently activated. However, several actions for annulment were raised directly before the EU General Court due to the economic significance of the decisions. More

⁵⁷ See the ECB Decision 14 April 2014 on the establishment of an Administrative Review Board and its operating rules (ECB/2014/16); the ECB Decision 2019/1378, 9 August 2019, amending the previous one.

⁵⁸ For a clear interpretation of Artt. 129-130 TFEU and Art. 7 of the ESCB-ECB Statute see Court of Justice, Grand Chamber, 26 February 2019, Case C-202/2018 and C-238/2018, in the part relating to the legal context and in §§ 46-50. The judgment concerns a question of removal governor of a national central bank and of temporary prohibition to exercise it, a case which requires the demonstration of the existence of sufficient indications of serious misconduct (art. 14.2, § 2 ESCB-ECB Statute).

⁵⁹ Art. 6 of the Decision ECB/2014/16.

⁶⁰ Indeed, art. 6.3 of Decision ECB/2014/16, states that “The ECB shall provide the Administrative Commission with adequate support, including the legal expertise necessary to assist it in assessing the exercise of the ECB's powers under Regulation (EU) n. 1024/2013”.

⁶¹ Art. 25 of the EU Reg. n. 1024/2013.

impetus would be needed for administrative remedies, which, for some issues, can be considered more effective and faster than court actions and certainly less costly.

There is a problem with the difficult framing of the review as an alternative remedy to judicial review for appeals against ECB decisions, given the inclusion of the opinion in the decision-making process of the Supervisory Board and in the active administrative function. In fact, it would be more appropriate to consider the review as a mode of further application of the sectoral discipline according to a unitary procedure, as affirmed by the European court, which also outlined the necessary motivation of the opinion, which does not have to contain all the elements of fact and law⁶².

The interpretative contribution of the Court of Justice⁶³ has clarified on several occasions the new institutions and the nature of the internal administrative review of decisions taken by the ECB on the procedural and substantive compliance with the 2013 EU Regulation, concerning a decision containing prudential requirements applicable to a banking group⁶⁴ and a case of a decision to withdraw a banking license under the new procedure⁶⁵. In both cases, the credit institutions concerned first lodged an administrative appeal with the Review Commission and the adopted opinion rejected the review on the grounds that the procedural and substantive violations were unfounded and confirmed the legitimacy of the decision as sufficiently reasoned and proportionate, while recommending that the ECB Governing Body clarify certain elements. The approved draft decision consequently repealed the disputed initial

⁶² EU Tribunal, Extended Sec. IV, 16 May 2017, Case T-122/2015; see § 124 on the obligation to state reasons, which must necessarily specify all relevant factual and legal elements, in order to meet the requirements of art. 296 TFEU, and “reference must be made not only to its tenor, but also to its context and to the body of legal rules governing the matter”; see also Court of Justice, Sec. III, 11 July 2013, C-439/2011 P, see § 116 and the case law referred to.

⁶³ On the role of “constitutional control” exercised by the Court of Justice in the interpretation of EU rules see K. Lenaerts, *The Court of Justice and the Economic and Monetary Union: a constitutional perspective*, in *ECB Legal Conference 2019*, cit., 419 ff.; C. Zilioli, K.- P. Wojcik (eds.), *Judicial Review in the European Banking Union*, E. Elgar, Cheltenham, 2021.

⁶⁴ Court of Justice 2 October 2019, C-152/2018 and C-153/2018 P; *Crédit Mutuel* is a decentralised banking Group as a network of local branches having a cooperative society status and each branch adheres to a regional federation and each federation to a central body of the network (CNCM), provided for by the French Monetary and Financial Code. The ECB notified a draft decision to this body regarding the prudential requirements applicable to the Group for subsequent communication to the relevant credit institutions and indicating a deadline for their possible comments; the decision adopted provided for prudential requirements under which a certain own funds ratio of 11% was imposed, which was the subject of the dispute during the review and, the legitimacy being confirmed by the Commission, in the subsequent legal action before the General Court of the EU, which decided in the sense of confirmation by judgment of 13 December 2017, T-712/2015 and T-52/2016. The Court of Justice reconstructs the regulatory framework clearly, above all, the supervision on a consolidated basis (§§ 58-64), confirming the content of the judgment of the General Court, according to which the prudential supervision of credit institutions belonging to banking groups on a consolidated basis has two purposes: “to allow the ECB to understand the risks likely to affect a credit institution which originate not from the latter, but from the group to which it belongs” and “to avoid a splitting of the prudential supervision of the entities making up that group”.

⁶⁵ Court of Justice, Grand Chamber, 5 November 2019, Case C-663/2017 P, C-665/2017 P and C-669/2017 P, which concerns the order of the EU Tribunal 12 September 2017. The authorisation procedure is provided in artt. 4.1, a) and 14.5 of EU Reg. No. 1024/2013.

decision and replaced it, but essentially confirmed its content, hence the litigation before the European courts.

The principle of effective protection seems to be implemented through the two remedies, but in administrative cases the opinion and the internal character of the deciding body do not present, in essence, adequate guarantees of independence and impartiality.

Of particular interest are a number of 2018 judgments of the EU General Court resulting from direct actions to impeach supervisory decisions, a first group of which⁶⁶ relate to French credit institutions for which the ECB approved the appointment of chairmen of boards of directors of each of the applicant banks but opposed those same specific appointments on grounds of incompatibility as they simultaneously held the position of acting director in each of those banks. For a diverse complex issue of the calculation of the leverage ratio and the granting of the benefit of EU Reg. n. 575/2013, the European Court⁶⁷ emphasised the wide discretion of the ECB whose assessment cannot be substituted in any way. Therefore, for disputes on aspects of economic and organisational importance, banking institutions reasonably adopt the solution of direct judicial recourse, which allows the maximum guarantee of independence and transparency, albeit with the limitation of the review of legitimacy only.

The jurisprudence of the judges of the Union has contributed significantly to the interpretation of some aspects of the application of the MUV, especially for the decisive character of the “significance” of the bank, which must be recognised by a decision as a prerequisite for submission to the direct prudential supervision of the ECB and not to the supervision of the competent national body⁶⁸.

The central questions concerned the possibility of reviewing the qualification and changing it if there were “special circumstances” depending on the concrete case in relation to the stability objectives to be achieved on the basis of high supervisory standards and the modalities of the new assessment according to technical assessments and a discretionary choice as to the most appropriate classification of the credit institution in the sense of a subsequent “non-significance”.

⁶⁶ ECB Decision 7 October 2015; the EU Tribunal, Extended Section II, 24 April 2018, Joined Cases T-133-136/2016, confirms the ECB’s solution regarding the distinction and separation between the exercise of executive and non-executive functions in the management body, in the sense that the same person cannot hold at the same time the position of Chairman of the Board of Directors and that of effective manager, an expression of senior management.

⁶⁷ EU Tribunal, Extended Sec. II, 13 July 2018, Case T-733/2016, Case 768/2016, Case T-758/2016, Case T-757/2016, Case T-751/2016 and Case T-745/2016, in this Review, 2019, 82 ff. The General Court annulled the ECB’s supervisory decisions denying certain authorisations to French credit institutions according to the interpretation of the framework that made the derogation rule about the calculation of the leverage ratio in relation to certain regulated products inapplicable, without a careful and impartial examination of the elements of the case.

⁶⁸ EU Tribunal, Extended Sec. IV, 16 May 2017, T-122/2015, cit.; Court of Justice, Sec. II, 8 May 2019, Case C-450/2019, cit.

The Court of Justice⁶⁹ also clarified that the decisions and opinions are attributable to the same European institution as they are adopted by internal bodies and are “intrinsically linked to each other” are part of the internal administrative review process of the decisions adopted by the institution for the tasks provided for in EU Reg. n. 1024/2013. The special features clearly distinguish this form of review from the other hypotheses examined, even within the same banking and financial sector, and confirm the clearly administrative internal nature of the Commission, an aspect that already emerges from the same formal qualification and that raises perplexities in comparison with the other cases.

The review instruments - even if in fact used to a limited extent - contribute to the European administrative integration⁷⁰, through the single competent review body, the legal acts and the common administrative procedures, which, for banking supervision, are often composed, as they involve the national authorities according to the principle of “close cooperation” as provided for by EU Reg. n. 1024/2013 and by the “Framework Regulation” of 2014 for the exercise of administrative powers in several cases “co-managed”, such as, for example, for banking authorisations and administrative sanctions⁷¹.

The remedy of administrative redress is certainly reserved for areas where the competent authorities exercise decision-making powers affecting individual subjective positions, which are more frequently private, although public entities are not excluded; in the event of disputes, above all, the Board of Appeal decides appeals on the basis of rules of procedure of the adversarial process similar to a judicial judgment and with impartiality, re-evaluating the initial decision of the competent body for legitimacy and merit, modifying or replacing the original content with binding effect, in line with the activity of the Appeal Panel, which, however, can only review certain decisions.

⁶⁹ Court of Justice, Sec. I, 8 May 2019, Case C-450/17 P.

⁷⁰ On these topics, see S. Antoniazzi, *La Banca Centrale Europea tra politica monetaria e vigilanza bancaria*, Giappichelli, Torino, 2013, 187 ss.; S. Antoniazzi, *The ECB's Banking Supervision and European Administrative Integration: Organisation, Procedures and Legal Acts*, in *Italian Journal of Public Law*, 2015, 318 ff; for the European administrative law aspects and procedures see C. Harlow - R. Rawlings, *Process and Procedure in EU Administration*, Hart Publishing, London, 2014, 268 ff; M. Macchia, *Integrazione amministrativa e Unione bancaria*, Giappichelli, Torino, 2018.

⁷¹ See M. Clarich, *Le sanzioni amministrative bancarie nel meccanismo di vigilanza unico*, in *Banca Impresa Società*, 2014, 339 ff.

6. Concluding remarks

The framework of the European administrative justice is characterised by judicial protection instruments and various solutions of administrative appeal⁷²; these measures can - or must, in some cases⁷³ - precede the actions before the European courts. The Boards of Appeal of the decisions of EBA, ESMA and the Resolution Committee have common profiles, unlike the Board of Review of the ECB decisions, since in this case the decision is an opinion as an internal act, expression of the administrative function of supervision. Given the difficulties and complexity of the concrete issues with significant legal and economic consequences, a certain uniformity of instruments would be necessary for the effectiveness of the protection of operators and for the need for legal certainty in the same banking and financial sector. Certainly, the differentiated disciplines in relation to the various sectors of EU competence characterise European administrative law, inevitably conditioning the forms of protection, albeit in compliance with the general principles set out in art. 298 TFEU concerning the executive function and the administrative integration of orders⁷⁴. Furthermore, it can be said that the review of decisions of European authorities promotes the implementation of transparency and control objectives in a democratic system⁷⁵.

⁷² E.g., consider the administrative appeals in the field of Community trademarks under artt. 66-71 of EU Reg. n. 100/2017; the appeals against decisions relating to the harmonisation of the single market under art. 8, EU Reg. n. 515/2019; the review of administrative acts relating to access to information in environmental matters under EC Reg. n. 1367/2006 and the review of the withdrawal of authorisations for the marketing of medicinal products under art. 9, EC Reg. n. 726/2004. Finally, the case of the administrative appeal of individual decisions of ACER (European Agency for the Cooperation of Energy Regulators), as provided for in artt. 2, d), 25-28 of EU Reg. n. 942/2019, is very interesting. For some summary considerations on the wide range of sectoral administrative appeals provided for by various European disciplines, some of which are no longer in force as they have been innovated or modified, and on the affinities with the evolution of statutory tribunals, see L. De Lucia, *I ricorsi amministrativi nell'Unione Europea dopo il Trattato di Lisbona*, in *Riv. trim. dir. pubbl.*, 2013, 325 ff., especially 367-368.

⁷³ The complaint, which is also a prerequisite for the admissibility of the judicial appeal, provided for by artt. 90-91 of the Staff Regulations of Officials of the European Administration.

⁷⁴ See K. Lackhoff, *Introduction to the panel on judicial review in a multi-level administrative framework*, in *ESCB Legal Conference 2020*, cit., 269 ff.; D. Triantafyllou, *The Banking Union as a new field for composite administrative procedures*, *ivi*, 273 ff.; A. Valavanidou, *Judicial review in the multi-level administrative framework of the SRM*, *ivi*, 278 ff.

⁷⁵ About the principles of legality, transparency and democratic control in the Banking Union, expression of the prevalence of the principle of Rule of Law, see A. Türk, *Liability and accountability for policies announced to the public for press releases*, in *ECB Legal Conference 2017*, cit., 43 ff.; D. Fromage - R. Ibrido, *Accountability and democratic control in the European Banking Union*, G. Lo Schiavo (Ed.), *The European Banking Union and the role of law*, cit., 43 ff.; R. Smits, *Reflections on euro area banking supervision: context, transparency and culture from an institutional law perspective*, *ibidem*, 130 ff.; R. Smits, *The ECB and the Rule of Law*, in *ECB Legal Conference 2019, Building bridges: central banking law in an interconnected world*, cit., 350 ff., where the Author examines the historical evolution of the principle and its application to the ECB's competences.