EUROPEAN CENTRAL BANK

BANKING SUPERVISION

Administrative Board of Review:

Eight years of experience reviewing ECB supervisory decisions

The Administrative Board of Review (ABoR) is a body of the ECB that carries out reviews of the ECB's supervisory decisions. An administrative review may be requested by any person or legal entity directly affected by an ECB supervisory decision. The ABoR members are independent external experts who are appointed for once-renewable five-year terms. This text sets out the ABoR review procedure and presents the major issues and questions faced by the ABoR in its first eight years (from September 2014 to September 2022).

1 The ABoR review procedure

The ABoR review procedure is governed by the SSM Regulation (the main piece of legislation on the role of the ECB in prudential supervision) and the ABoR Decision (the ECB legal act establishing the review panel). Both legal acts specify that the ABoR members and the two alternates are to act independently and in the public interest. The ABoR must adopt an opinion within two months of receipt of a complete request for review. The ABoR reviews the procedural and substantive conformity of the contested decision with the SSM Regulation. Taking account of the ABoR opinion, the ECB's Supervisory Board then submits a new decision to the ECB's Governing Council. This new decision may abrogate the contested decision, replace it with an amended decision, or replace it with a decision that is identical to the contested decision.

1.1 Who can contest a decision before the ABoR?

The ABoR has had to deal with a number of requests for review filed by credit institutions and other entities or natural persons, such as shareholders, directors or proposed acquirers of a qualifying holding in a credit institution. The ABoR's jurisprudence and the Union courts' case law have established that the management of a bank may request a review of the withdrawal of the bank's licence, but applications from shareholders are not admissible when filing such a request.

1.2 Confidentiality of the ABoR review procedure

The ABoR review procedure is confidential, in keeping with Article 22(2) of the ABoR Decision.

While the ABoR does not make its opinions public, parts of the ABoR arguments may be made known to the public in litigation before Union courts. ABoR review cases become public in the event of subsequent court proceedings, as the Court of Justice will refer to this step in the proceedings and may take the ABoR opinion into account when deciding the case before it.

Applicants should be aware that any second, post-ABoR decision adopted by the ECB replaces the first decision, which is then considered to no longer exist: judicial proceedings started against the original decision will be considered inadmissible[1]. If an applicant intends to contest the post-ABoR decision, they should make a request to the Court of Justice for the review of the second, post-ABoR decision.

Section 2.11 gives an overview of cases before the Court of Justice which mention an ABoR review.

1.3 How does the ABoR review proceed?

The ABoR review is conducted on the basis of an application by any person or legal entity directly affected by an ECB supervisory decision. This application is called a notice of review, and must contain the grounds that the applicant invokes to support their assertion that the contested ECB decision is not in procedural and/or substantive conformity with the SSM Regulation.

There is in principle no corresponding written counter-submission by the ECB. However, when reviewing the contested decision, the ABoR looks at the comments table attached to the contested act – which shows the comments by the addressee of the decision in the hearing phase and how the ECB assessed these[2] – in order to establish what has already been discussed in the earlier stages of the administrative procedure. The ABoR examines how the ECB has evaluated and responded to the remarks made by the applicant in the hearing phase leading to the adoption of the contested decision.

Finally, in many cases, the ABoR considers that an oral hearing is necessary to fairly evaluate the request for review. During the oral hearing, both the applicant and the ECB can present their arguments and the ABoR can ask questions. The hearing provides another opportunity for discussion between the applicant and the ECB.

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1 This follows from the judgment of 6 October 2021, *Ukrselhosprom PCF* and *Versobank v ECB*, Joined Cases T-351/18 and T-584/18, ECLI:EU:T:2021:669, appeal pending (Case C-803/21 P) as well as the order of 17 November 2021, *Fursin and Others v ECB*, Case T-247/16 RENV, and the order of 20 December 2021, *Niemelä and Others v ECB*, Case T-321/17, ECLI:EU:T:2021:942, appeal pending (Case C-181/22 P).

2 On the right to be heard, see also Article 22 of the SSM Regulation.

Having given due consideration to the elements brought before it, the ABoR concludes its review with an opinion and proposes to the Supervisory Board a course of action, which the Supervisory Board is free to follow or not[3].

1.4 Recognition of the role of the ABoR

The *L-Bank* case[4] was the first review that led to post-ABoR litigation in court. The General Court and, on appeal, the Court of Justice, took the ABoR opinion into account when assessing whether the motivation of the ECB's post-ABoR decision was adequate. The Union courts established that, insofar as the contested ECB decision conforms with the proposal in the ABoR's opinion, it is an extension of that opinion and the explanations contained therein may be taken into account to determine whether the contested decision contains an adequate statement of reasons. The *L-Bank* case saw a clear recognition of the ABoR's role, and this has subsequently been reiterated in other judgments. One such example is the General Court's 2017 *Arkéa* judgment[5] which was issued after another ABoR opinion and confirmed by the Court of Justice in 2019.

2 Matters considered by the ABoR

Since its establishment in 2014, the ABoR has reviewed numerous ECB decisions examining a variety of matters. Noteworthy issues include the significance of credit institutions for the purpose of the SSM, the perimeter of the consolidated supervision, breach of prudential rules (for example, large exposure limits), corporate governance rules, the power to adopt supervisory measures based on national law, compliance with supervisory requirements, withdrawal of banking licence, administrative sanctions (including anonymising an ECB sanction), acquisition of qualifying holdings, the use of internal models to calculate required regulatory capital[6] and on-site inspections. As a result, the ABoR has had the opportunity to establish its own jurisprudence, elements of which are set out below.

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3 "The Supervisory Board shall take into account the opinion of the Administrative Board of Review" (Article 24(7) of the SSM Regulation); "The Supervisory Board's assessment shall not be limited to examination of the grounds relied upon by the applicant as set forth in the notice of review, but may also take other elements into account in its proposal for a new draft decision" (Article 17(1) of the ABoR Decision).

4 The Court decisions found in favour of the ECB. Of wider significance is the Court's acknowledgement of the exclusive nature of ECB prudential powers: judgment of 16 May 2017, *Landeskreditbank Baden-Württemberg v ECB*, Case T-122/15, ECLI:EU:T:2017:337. This judgment was confirmed on appeal by the Court of Justice in the judgment of 8 May 2019, *Landeskreditbank Baden-Württemberg v ECB*, Case C-450/17 P, ECLI:EU:C:2019:372. Furthermore, in its judgment of 30 July 2019 (2 BvR 1685/14, 2 BvR 2631/14) the German Federal Constitutional Court gave a reading of the Court of Justice's *L-Bank* judgment.

5 See judgment of 13 December 2017, *Crédit mutuel Arkéa v ECB*, Case T-712/15, ECLI:EU:T:2017:900, judgment of 13 December 2017, *Crédit mutuel Arkéa v ECB*, Case T-52/16, ECLI:EU:T:2017:902 and judgment of 2 October 2019, *Crédit Mutuel Arkéa v European Central Bank*, Joined Cases C-152/18 P and C-153/18 P, ECLI:EU:C:2019:810. The *Arkéa* judgment concerns a SREP decision adopted in respect of the Crédit Mutuel group, of which *Arkéa* forms a part, in recent times an unwilling part because of a dispute between it and the central body of this group of French cooperative banks, the *Confédération Nationale du Crédit Mutuel* (CNCM) and another group of mutual banks (the CM11–CIC group). See summary of the judgments.

6 In the context of the Targeted Review of Internal Models (TRIM) project, reported by the ECB.

2.1 Reasoning of supervisory measures

A recurring element in ABoR opinions has been the need for the ECB to provide adequate reasoning of its decisions in a manner that is comprehensible for the contesting party. The ABoR includes a standard statement in its opinions on the need for reasoning to be more extensive the more incisive a decision is adopted:

"Discretionary measures taken by the ECB need to be consistent and proportionate. The more intrusive the measures, the greater the level of reasoning that is called for."[7]

The ABoR has insisted that an ECB decision "respects the business model and specificities of the credit institution" and has recently asserted that "for supervisory decisions to be effective and considered legitimate, adequate reasoning should be provided", while for a supervisory measure of an intrusive nature "reasoning is all the more important" and should go "beyond mere reliance on the law and explain the prudential need to adopt the decision".

2.2 Conformity of the measure with the principle of proportionality

Closely related to the previous point is the paramount role that the principle of proportionality plays in the ABoR's opinions, as this principle should guide all actions by EU institutions. Proportionality resurfaces as an issue in many review proceedings. In one early opinion, the ABoR asked the ECB to provide extended argumentation on the proportionality of its decision and to specifically address the impact that the applicant claimed the decision would have.

The ABoR's assessment of the proportionality of ECB measures, where it is being contested by the applicants, is especially challenging in those cases where the ECB enjoys discretion. When exercising its discretion in any case, the ECB should assess and explain the proportionality of its measures. The proportionality principle has also been considered in relation to deadlines for compliance with an ECB order or request.

2.3 Reading the Single Rulebook

Closely related to the reasoning requirement is the issue of how to interpret Single Rulebook terms. The ABoR has used references to "a lack of motivation" to underline that an ECB decision was based on an interpretation without explaining why this interpretation had been chosen and applied, especially when departing from the official guidance of regulatory agencies. Examples are the ABoR analysis of the ECB interpretation of the term "joint control" in the context of Article 22 of Directive 2013/34/EU on annual financial statements (in cases of dominant influence or

[7] The ABoR's approach on motivation was made public in the 2017 Annual Report: "In particular, the Administrative Board considered that the more intrusive the measures imposed, the greater the level of reasoning that is called for".

control), proportionate consolidation governed by Article 26 of Directive 2013/34/EU in cases of joint ventures and the "integrity" criterion in the Joint Guidelines on the prudential assessment of acquisitions and increases of qualifying holdings in the financial sector[8] adopted by the European Supervisory Authorities.

The ABoR has often been confronted with the guidelines of the European Banking Authority (EBA), notably on fit and proper requirements for members of a bank's management body (EBA/GL/2012/06), the supervisory review and evaluation process (SREP) (EBA/GL/2014/13) and the scoring of institutions as "other systemically important institutions" (EBA/GL/2014/10). The abovementioned Joint Guidelines on the prudential assessment of acquisitions and increases of qualifying holdings (JC/GL/2016/01) have also featured in the ABoR's deliberations. The EBA's Guidelines on probability of default estimation, loss given default estimation and the treatment of defaulted exposures (EBA/GL/2017/16) have played a role in some ABoR assessments. Finally, the EBA's Guidelines adopted pursuant to Article 396(3) of the Capital Requirements Regulation (CRR) (EBA/GL/2021/09) have also been invoked. Like all competent authorities, the ECB is to comply with guidelines issued by an EU regulatory authority, and to justify any deviation therefrom.

2.4 Insufficiently harmonised national law

Differences in national rules for supervision have posed a challenge for the ECB and the ABoR. This has been specifically mentioned in the ECB's Annual Report 2015[9] and repeated in the ECB's Annual Report 2016[10]. The status of national "law" is sometimes also an issue of diverse views, for example, when a circular or other less formal method of communication by a national authority is at issue.

2.5 Rights of defence in the case of licence withdrawal: standing of shareholders and the board of directors

As indicated above, shareholders of a bank cannot act to defend the interests of that bank (and indirectly their own interests) by requesting a review. This question arose in cases in which the entity concerned had already been liquidated or its management had been dismissed through liquidation or the appointment of a special administrator.

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8 Joint Guidelines on the prudential assessment of acquisitions and increases of qualifying holdings in the financial sector (JC/GL/2016/01), 20 December 2016.

9 "The Administrative Board has observed a lack of harmonisation in the implementation of European law at national level in areas such as bank consolidation or fit and proper requirements. In examining the requests for review, the Board noted that, in allowing a broad range of interpretation among the credit institutions, these differences make it challenging to review ECB decisions in a consistent manner." In their joint contribution, "The Administrative Board of Review of the European Central Bank: Experience After 2 Years", *European Business Organization Law Review*, September 2017, Concetta Brescia Morra, Andrea Magliari and René Smits also state that "diversity in national law represents a major challenge also for the ABoR".

10 The Annual Report 2016 remarked that "The review of ECB decisions was challenging particularly due to regulatory fragmentation (diverse transposition of European law at national level) and the remaining wide scope for national discretions.".

The withdrawal of Trasta's licence led to an ABoR review and subsequent court proceedings pitting the shareholders against the ECB and the European Commission. The Court of Justice, overturning an earlier finding of admissibility of the shareholders by the General Court[11], found in accordance with the ABoR's initial approach[12] to accept the originally mandated attorney in his challenge on behalf of the bank, and rejected the admissibility of the bank's shareholders in their contestation of the withdrawal of the bank's licence[13].

In the Nemea case, the ABoR received a request for review filed jointly by bank directors and shareholders[14].

Recently, in a case also concerning the withdrawal of a bank's licence and an ABoR review, the General Court confirmed the lack of standing of shareholders to challenge the ECB decision[15]. This approach is consistent with the findings of lack of standing of shareholders to challenge the Single Resolution Board's no resolution decisions in the ABLV cases[16].

2.6 New developments and new facts

A particularly challenging issue has been the emergence of new developments after the contested decision, or of new facts during the review process. While an administrative review needs to assess that the legal act conforms with the legal framework at the time of the contested measure being adopted, the ABoR will not shy away from new facts that arise during the hearing, and the ABoR will not disregard a material change in the applicant's situation. When there is a relevant change "in real life", the ABoR acknowledges this and proposes to the Supervisory Board that it takes this change into account.

When the Supervisory Board receives the ABoR opinion, it re-examines the case and is competent to take all relevant considerations into account, as confirmed by the General Court in the *Versobank* case[17].

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11 Order of 12 September 2017, *Trasta Komercbanka AS v ECB*, Case T-247/16, ECLI:EU:T:2017:623 rejecting the claim of *Trasta Komercbanka* as inadmissible and upholding the shareholders' claim as admissible.

12 See opinion of Advocate General Kokott of 11 April 2019 in Joined Cases C-663/17 P, C-665/17 P and C-669/17 P, ECLI:EU:C:2019:323, points 19 and 74.

13 Judgment of 5 November 2019, *ECB v Trasta Komercbanka and Others*, Joined Cases C-663/17 P, C-665/17 P and C-669/17 P, ECLI:EU:C:2019:923.

14 See order of 20 December 2021, *Niemelä and Others v ECB*, Case T-321/17, ECLI:EU:T:2021:942, appeal pending (Case C-181/22 P).

15 Judgment of 6 October 2021, *Ukrselhosprom PCF and Versobank v ECB*, Joined Cases T-351/18 and T-584/18, ECLI:EU:T:2021:669, appeal pending (Case C-803/21 P).

16 Order of 14 May 2020, *Bernis and Others v SRB*, Case T-282/18, ECLI:EU:T:2020:209, judgment of 24 February 2022, *Bernis and Others v SRB*, Case C-364/20 P, ECLI:EU:C:2022:115, and judgment of 6 July 2022, ABLV Bank v SRB, Case T-280/18, ECLI:EU:T:2022:429, appeal pending (Case C-602/22 P).

17 Judgment of 6 October 2021, *Ukrselhosprom PCF and Versobank v ECB*, Joined Cases T-351/18 and T-584/18, ECLI:EU:T:2021:669, paragraph 79.

2.7 The right to be heard

The ABoR has established that in order to ensure the effective right to be heard, the full scope of a contemplated supervisory measure should be discussed with the applicant within a reasonable time frame before a decision is finalised.

2.8 Level playing field

In some review cases, the ABoR was confronted with arguments stating that an ECB decision did not respect the level playing field, as the decision would affect the applicant adversely on the banking market. The ABoR assesses such pleas on the basis of the principle of equality and in the context of ECB Banking Supervision's role in furthering consistent prudential standards across the euro area. In such cases, the ABoR has underlined that to ensure a level playing field, the ECB should use its prudential powers in a consistent manner across the participating Member States, in accordance with all general principles established by the Union legal framework.

2.9 Suspension of the contested decision

The ABoR has established that an extraordinary situation such as the coronavirus (COVID-19) pandemic could justify – balancing the relevant interests – suspending the application of an ECB prudential decision.

2.10 Publication of a sanction

The ABoR has established that an anonymised sanction can be justified only if the publication thereof would likely have significant negative consequences on the applicant. Publication in anonymised form is only allowed in specific cases. The publication of a sanctioning decision is neither a penalty itself nor an accessory element to the penalty, but a requirement imposed by the legislator aimed at ensuring the general deterrent effect of a sanction by informing the public. Assessing whether publication would cause disproportionate damage to the applicant[18] is limited to establishing the possible consequences of the publication. The assessment does not revisit the elements previously taken into account to determine the proportionality of a penalty. The proportionality of the decision to publish the sanction is ensured by assessing the exceptions provided for by the legislator in Article 68(2) of the Capital Requirements Directive and Article 132(1) of the SSM

[18] Disproportionate damage to the applicant means damage that goes beyond a negative impact on the reputation of the supervised entity and its standing in the market, which is what the legislative injunction of publication accepts as a consequence of the publication of the sanction for the breach of a prudential rule.

Framework Regulation under which anonymisation should take place. This approach has also been adopted by the General Court[19].

2.11 Overview of ABoR reviews in the public domain

Below is an overview of ABoR cases that have been submitted for further review to the Union courts. These cases have raised several issues: notably, the withdrawal of a banking licence together with the preliminary question of shareholder standing in *Trasta* (Case T-247/16 and Case T-698/16), *Niemelä and Others v ECB* (Case T-321/17) and *Ukrselhosprom PCF and Versobank v ECB* (Case T-351/18 and Case T-584/18). The judgments in *L-Bank* (Case C-450/17 P) on significance, *Arkéa* (Case C-152/18 P and Case C-153/18 P), concerning a SREP decision and finding wide powers for the ECB under Article 16 of the SSM Regulation (Case T-150/18 and Case T-345/18) should also be mentioned. The *Crédit Agricole* cases (Case T-133/16 to T-136/16) involved the combination of executive and non-executive functions: the General Court came to the same conclusions as the ABoR while following a separate line of reasoning, as seen in this summary. The imposition of sanctions was brought before the court in *VQ v ECB* (Case T-203/18), and publicly available information on the fine shows that the case concerns *Banco Sabadell*, on which the ABoR had issued an opinion[20].

The ABoR issued an opinion for several cases in which the application for judicial review does not mention previous administrative review, or for which proceedings are ongoing without a judicial decision. These ABoR reviews are therefore not yet in the public domain.

ABoR reviews in the public domain

	Case number	Subject matter
1	*L-Bank* (Cases T-122/15 and C-450/17 P)	Significance of credit institutions
2	*Arkéa* (Cases T-712/15, T-52/16, C-152/18 P and C-153/18 P)	SREP
3	*Crédit Agricole* (Cases T-133/16, T-134/16 and T-135/16)	Combination of executive and non-executive functions
4	*Trasta* (Cases T-247/16, T-698/16 and C-663/17 P, C-665/17 P and C-669/17 P)	Withdrawal of authorisation as a credit institution
5	*Niemelä and Others* (Case T-321/17)	Withdrawal of authorisation as a credit institution
6	*BNP Paribas* (Cases T-150/18 and T-345/18)	SREP
7	*Ukrselhosprom PCF* and *Versobank* (Cases T-351/18 and T-584/18)	Withdrawal of authorisation as a credit institution
8	*VQ* (Case T-203/18).	Sanctions

19 Judgment of 8 July 2020, *VQ v ECB*, Case T-203/18, ECLI:EU:T:2020:313, paragraphs 69-99.

20 Judgment of 8 July 2020, *VQ* v *ECB*, Case T-203/18, ECLI:EU:T:2020:313, paragraphs 7 and 8.

In addition to the judgments by the Union courts, the ABoR reported these general topics as the subject of review requests:

- "significance" cases (Annual Report 2014);
- corporate governance;
- compliance with supervisory requirements;
- withdrawal of a licence (Annual Report 2016, Annual Report 2017, Annual Report 2018 and Annual Report 2019);
- administrative sanctions, including anonymising ECB decisions (Annual Report 2017 and Annual Report 2019);
- acquisition of qualifying holdings (Annual Report 2018 and Annual Report 2019);
- internal models (Annual Report 2019 and Annual Report 2020);
- on-site inspections (Annual Report 2020);
- power to adopt supervisory measures based on national law (Annual Report 2021).

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For specific terminology please refer to the SSM glossary (available in English only).