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Some issues and concerns

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Interplay of administrative review and judicial protection in European prudential supervision. Some issues and concerns*

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1. Introduction: scope of the presentation

This paper provides a brief outline of the main contours of administrative review of prudential decisions of the European Central Bank (ECB) (section 2), a short discussion of the main issues facing the Administrative Board of Review (ABoR) of the ECB (section 3) and, before section 5 on the follow-up of cases before the European Courts, a section 4 on transparency in the SSM context. Of the cases before the Luxembourg courts, two stand out: *L-Bank* and *Trasta*. As ABoR's Vice-Chair, Professor Concetta Brescia Morra, goes deeper into one of the issues prominent in *Trasta*, this paper will present the *Trasta* case and focus on the issues in *L-Bank* (section 6). In its concluding remarks (section 7), I will make some proposals for the European legislator and the ECB to enhance the administrative review process and the interplay between administrative and judicial review. Developments after the presentation of this paper are briefly discussed in a postscript on the *Arkéa* and *Trasta* cases.

2. Administrative review: contours, briefly

Those who would like to see an ECB decision in the area of prudential supervision reviewed have two tracks to follow: to request administrative review and, thereafter, to challenge the resulting second decision by the ECB in court, or to go to court directly. Considerations of *costs* and *timing* may decide the route.

In a Guide to costs,[1] adopted on the basis of Article 23(2) ABoR Establishment Decision,[2] the ABoR set the *costs* at very low levels: €500 for natural persons, and €5,000 for legal persons. The Guide helpfully specifies that the latter cost applies to supervised entities and other legal persons such as associations of consumers or creditors.

The *timing* is set out in the SSM Regulation,[3] which sets a two-month maximum limit for the ABoR to submit its Opinion to the Supervisory Board,[4] and in the ABoR Establishment Decision, which gives the Supervisory Board ten or twenty working days after the receipt of the ABoR Opinion to submit a new decision to the Governing Council: ten days in the case of a draft decision of identical content and twenty days when the draft abrogates or amends the original decision.[5]

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1 *Guide to the costs of the review*, at: https://www.bankingsupervision.europa.eu/organisation/governance/shared/pdf/abor_cost_guide/guidecostsreview.en.pdf.

2 Decision of the European Central Bank of 14 April 2014 concerning the establishment of an Administrative Board of Review and its Operating Rules (ECB/2014/16) (2014/360/EU): ABoR Establishment Decision, OJ L 175/47, 14 June 2014.

3 Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, OJ L 287/63, 29 October 2013.

4 Article 24(7) SSM Regulation. Two months are the limit: ABoR is to "express an opinion within a period appropriate to the urgency of the matter and no later than two months from the receipt of the request".

5 Article 17(2) ABoR Establishment Decision.

Naturally, going against the supervisor in formal proceedings is a step not easily chosen. The supervisor will continue to oversee the business of the challenger, and may react by intensifying its supervision. A good relationship with the supervisor, which continues after settling the dispute at hand, may dispel banks to request administrative or judicial review of a decision they disagree with. It is, therefore, remarkable that there have been quite a number of review cases before the ABoR and before the General Court. Below, I will come back to the judicial challenges. Still, when set against the total number of supervisory decisions, the 'review rate' is very low, indeed. With the actual number of prudential decisions given in the Annual Report 2016 as 1,835, out of a total of 2,686 authorisation procedures,[6] plus the many thousands[7] fee decisions each year,[8] one can calculate the review rate as follows: the number of review requests (8), divided by the number of supervisory decisions (1,835 + 3,099 = 4,934) = 0.16%, or one in every 617 decisions gets subject to ABoR review. That was for 2016; in 2017, the number of cases submitted to ABoR review dropped by 50% as ABoR had only 4 cases.

Administrative review may be fast, cheap and independent, but it does not amount to judicial scrutiny. ABoR proceedings are part of a second decision-making procedure at the ECB, and the Opinion of the Board will be known to the applicant[9] and to the ECB but not to the outside world. Unless there is follow-up judicial review, in which case the General Court and, on appeal, the Court of Justice, will take cognizance of the ABoR Opinion. This opacity of ABoR's contribution is an issue I will come back to.

Before a supervisory decision has been taken, the affected party will have been involved in discussions with the ECB. If the applicant for review is a significant institution, such discussions are a feature of on-going supervision. If review is requested by another applicant – say, a non-significant institution (withdrawal of the authorisation, refusal to accept new shareholders), or an intended board member (rejected as not fit and proper) – there will also have been prior exchanges with the ECB. Due process is required pursuant to the SSM Regulation,[10] implying the right to be heard and the right of defence, including access to the ECB's file. Reasoning (motivation) of prudential decisions is prescribed. The SSM Framework Regulation[11] sets out what this means for

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6 *ECB Annual Report on supervisory activities 2016*, pages 53 and 35 (footnote 24).

7 One for each bank supervised in the Euro Area at the consolidated level, which numbered 3,099 as at end-2016; see Table 4 of the *ECB Annual Report on supervisory activities 2016*, page 35.

8 Which contain an ABoR and judicial review clause at the end; see for the 2017 sample fee notice: https://www.bankingsupervision.europa.eu/organisation/fees/notice/shared/pdf/fee_notice_templates/fee_notice_template_2017.en.pdf.

9 Article 18 ABoR Establishment Decision on notification of the Opinion adopted by ABoR, the new draft decision submitted by the Supervisory Board and the new decision adopted by the Governing Council.

10 Article 22 SSM Regulation.

11 Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation) (ECB/2014/17), OJ L 141/1, 14 May 2014.

"ECB supervisory procedures":[12] it extensively regulates the right to be heard (Article 31), access to the files (Article 32), motivation of ECB decisions (Article 33), and their notification (Article 34). Thus, a request for administrative review will normally see the applicant and the ECB engage, for a second time, in a hearing: before the ABoR.

A hearing is conducted in many ABoR review cases as it allows for a dialogue between the ECB staff responsible for the decision under challenge and the applicant, under guidance of the ABoR members. The term 'members' is core here: the Alternate members do not attend the hearing and do not take part in the deliberation phase of the proceedings. Once an Alternate has been called to sit in a case, he will, of course, attend the hearing and vote on the Opinion.

As described elsewhere,[13] ABoR proceedings are divided in three phases: (a) the preparatory phase, which includes the assessment of the admissibility of the request; (b) the examination phase, which may also entail an oral hearing and the collection of the relevant evidence, and (c) the deliberative phase, ending with the adoption of the opinion and its submission to the Supervisory Board. Alternate members do not take part in the oral hearing and the subsequent deliberations and voting.

Upon receipt of the ABoR Opinion, the Supervisory Board is to propose a new decision to the Governing Council, after assessing the ABoR's views but not limited to the grounds for review brought forward by the applicant: the Supervisory Board "may take other elements into account in its proposal for a new draft decision".[14] Such new elements may be particularly relevant when the situation of the bank has changed since the adoption of the ECB's first decision, or new elements have surfaced that were unknown, or considered less relevant at the time the first ECB decision was taken. Suppose the bank has been put into resolution, or the seriousness of the issue has come to be seen under a different light: the Supervisory Board may then wish to reconsider its original decision even if ABoR did not find any fault with it, as taken at the time of its adoption.

Two elements of ABoR review stand out from this discussion: in its examination of a case, ABoR, unlike subsequently the Supervisory Board when assessing what second decision to propose, is bound to the grounds relied upon by the applicant in its notice of review.[15] Also, as is usual in administrative review, the ABoR assesses the ECB's "procedural and substantive conformity with [the SSM Regulation]"[16] as matters stood when the ECB first acted (*ex tunc* review). Subsequent developments are irrelevant. Of course, the ABoR, being neither deaf

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12 Article 2(24) SSM Framework Regulation.

13 Concetta Brescia Morra, René Smits and Andrea Magliari, *The Administrative Board of Review of the European Central Bank: experience after two years, European Business Organization Law Review*, at: https://doi.org/10.1007/s40804-017-0081-3.

14 Article 17(1) ABoR Establishment Decision.

15 Article 10(2) ABoR Establishment Decision.

16 Article 10(1) ABoR Establishment Decision.

nor blind, will see and hear what may have happened after the decision under review has been adopted. In salient cases, the ABoR might wish to consider whether it is wise to share its appreciation thereof with the Supervisory Board when presenting its Opinion. Usual practice has it that the Chair of ABoR presents the Opinion before the Supervisory Board at its meeting discussing the follow-up decision that the Supervisory Board wishes to propose to the Governing Council.

3. Administrative review: issues, mainly

Elsewhere,[17] the issues the ABoR has faced have been extensively discussed. Suffice it here to cite from this contribution that they concern the 'significance' of a supervised entity; corporate governance; the outcome of the Supervisory Review & Evaluation Process (SREP),[18] under which the competent authority reviews the arrangements, strategies, processes and mechanisms implemented by the supervised entity in order to comply with the requirements set out in the CRR[19] and CRD IV[20] and, as a result, may impose higher capital and liquidity requirements than statutorily prescribed in view of the riskiness of a bank's business, as well as other supervisory measures;[21] the fit and proper (FAP) assessment of members of the management body;[22] and withdrawals of the authorisation.[23] As stated before, authorisation[24] and withdrawal of authorisation are Euro Area-wide competences of the ECB in respect of all credit institutions, as is the assessment of acquisition of qualifying holdings.[25] Recently, sanctions have been added as an issue the ABoR has dealt with.

A recurring theme, for the SSM as a whole and the ABoR, is the reliance on national law. As long as prudential rules are not laid down exclusively in legal acts with direct effect, i.e. couched in EU regulations and European Banking Authority (EBA) and ECB implementation and guidance, this aspect of the SSM will continue to bother us. This would be less of a hindrance, if national law

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17 See the joint article with Concetta Brescia Morra and Andrea Magliari in footnote 13 above.

18 Regulated in Articles 97-101 CRD IV.

19 Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012, OJ L 321/6, 30 November 2013.

20 Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC, L 176/338, 27 June 2013.

21 See Articles. 102-104 CRD IV and Article 16(2) of the SSM Regulation.

22 For which Article 91 CRD IV provides the legal framework.

23 Articles 18 and 67(2)(c) CRD IV, and Articles 80-84 SSM Framework Regulation.

24 Articles 4(a) and 14 SSM Regulation and Articles 73-79 SSM Framework Regulation.

25 Articles 4(c) and 15 SSM Regulation and Articles 85-88 SSM Framework Regulation.

faithfully and coherently implemented CRD IV but, alas, this is not the case.[26] Numerous are the issues of wide differences, in law and in practice, on such issues as FAP authorisations, governance and the treatment of bank holding companies. FAP assessments and bank holding supervision have been flagged as issues that need urgent legislative attention, even after the introduction of the CRD/CRR package.

4. Transparency: comparatively

In a recent paper for a conference in London,[27] I called for more transparency in the SSM and made a few suggestions on how to improve transparency of ABoR's functioning. My proposed improvements on this point followed the Commission's exhortations in its *SSM Review Report:*[28]

"It would be useful to take advantage of the growing jurisprudence developed by the ABoR by ensuring more transparency over the work undertaken by the ABoR, for instance through publication on the ECB's website of summaries of ABoR decisions and with due observance of confidentiality rules."

Without repeating here what I said in London, let me recall that there are two institutions that can enhance transparency: the ECB and the Court.

The ECB may permit the outcome of ABoR proceedings to become public:[29] the Governing Council may authorise the President of the ECB to make the outcome of ABoR proceedings public. Also, the ECB may amend the ABoR Establishment Decision as long as it remains within the confines of Article 24 SSM Regulation,[30] which is silent on publication of ABoR opinions. In the paper for the London conference, I proposed that the ECB may wish to give interim accounts of ABoR's work (not waiting for the annual report in which

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[26] These discrepancies exist beyond the area of Options and Discretions (OND) which the ECB has vigorously addressed in its campaign to unify Euro Area prudential rules. See Regulation (EU) 2016/445 of the ECB of 14 March 2016 on the exercise of options and discretions available in Union law (ECB/2016/4), OJ L 78/60, 24 March 2016; Guideline (EU) 2017/697 of the ECB of 4 April 2017 on the exercise of options and discretions available in Union law by national competent authorities in relation to less significant institutions (ECB/2017/9), OJ L 101/156, 13 April 2017; and Recommendation of the ECB of 4 April 2017 on common specifications for the exercise of some options and discretions available in Union law by national competent authorities in relation to less significant institution (ECB/2017/10), OJ C 120/2, 13 April 2017.

[27] Reflections on Euro Area banking supervision: context, transparency, review and culture *A contribution to the conversation on the SSM after three years*, paper for the Conference The European Banking Union and its relationship with the law: reflections three years on, London (UK), 23 October 2017.

[28] *Report from the Commission to the European Parliament and the Council on the Single Supervisory Mechanism established pursuant to Regulation (EU) No 1024/201*3, {SWD(2017) 336 final}, Brussels, 11.10.2017, COM(2017) 591 final, page 5, at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017DC0591&from=EN.

[29] Article 22(2) of Decision ECB/2014/16 of 14 April 2014 concerning the establishment of an Administrative Board of Review and its Operating Rules (2014/360/EU), OJ L 175/47, 14 June 2014 (ABoR Establishment Decision).

[30] Article 24(10) SSM Regulation instructs the ECB to adopt a decision with ABoR's operating rules.

1.5 page is devoted to ABoR) by giving quarterly statistics on the number of review requests and ABoR Opinions adopted, as well as the latter's nature, i.e. proposing abrogating the ECB's decision, its confirmation or its replacement with an amended decision[31]; whether suspension of the decision has been sought, and granted (or not); the subject matter of the contested issue (e.g., significance, SREP,[32] FAP,[33] corporate governance). More is hardly possible without publishing confidential information, contrary to the injunctions of the ABoR Establishment Decision[34].

The place of the ABoR in the decision-making process at the ECB makes disclosure of the exact contents or a summary of its Opinions before the decision-making is complete awkward and, after the second decision, likely to influence possible follow-up proceedings in Luxembourg. After all, should ABoR have found no faults with the original decision, this would help the ECB and hinder the applicant while the reverse would be true if the ABoR had found that the decision needed to be abrogated or amended. The ABoR's Opinion is known to the Court, of course, so it is only the *public* disclosure that may have an incidence on the outcome.

This brings us to what the Court may do. The Court may divulge information on pending cases which includes the fact that these cases are post-ABoR proceedings, something that will be clear from the file. The file will contain the (second) ECB decision against which the applicant militates in court and the preceding ABoR opinion. Even if an applicant seeks redress in Luxembourg fighting the first ECB decision against which it also initiated administrative review, the Court will be aware of the on-going ABoR proceedings, albeit not in a position to divulge them. But for all 'regular' cases of going to Luxembourg via Frankfurt, the Court should feel free to include the existence of prior ABoR proceedings in the information it provides to the general public, even before the adoption of the judicial decision.[35] This falls short of presenting a summary but it makes life easier for those who would like to follow administrative review, and for ABoR members who seek to give information about the work they undertake. Therefore, I call on the Court to deliver us from darkness and add a qualification as <post-ABoR proceedings> to the summary of relevant cases on the Curia website and in the Official Journal. Where the ECB can't help, the Court should.

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31 Article 16(2) ABoR Establishment Decision mentions three options for ABoR to propose to the Supervisory Board; the first decision may be "abrogated, replaced with a decision of identical content, or replaced with an emended one".

32 SREP: Supervisory Review and Evaluation Process: Articles 104-107 CRD IV, and Article 4(1)(f) SSM Regulation. See: https://www.bankingsupervision.europa.eu/about/ssmexplained/html/srep.en.html, and the *SSM SREP Methodology Booklet* at: https://www.bankingsupervision.europa.eu/ecb/pub/pdf/srep_methodology_booklet_2016.en.pdf?486e2833820b13c740ffb49a0ee57672.

33 Fit And Proper assessments. See the ECB's *Guide to fit and proper assessments*, at: https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.fap_guide_201705.en.pdf.

34 Article 22 ABoR Establishment Decision.

35 That is, in the publication on the *Curia* website or the information published in the *Official Journal*.

5. Subsequent cases at the European Courts

What can one say now, based on public sources, on the follow-up cases of ABoR proceedings before the Courts in Luxembourg? Two cases can be identified as such: the *L-Bank* Case (T-122/15), that lead to ground-breaking findings on the attribution of competences within the SSM but which is subject to appeal, and the *Trasta* Case (T-698/16), on which more below as the Order of the General Court on the admissibility of shareholders is bound to attract the interest of the Commission and may be challenged by the ECB. (Developments since the presentation of this paper at the November 2017 Rome conference are discussed in the postscript at the end of this paper.)

Without disclosing confidential information, I can say that more cases pending in Luxembourg are familiar and not just because Federico Della Negra and I undertake an effort to make the case law on banking union transparent. We seek to provide a regular update of the list of cases published on the EBI website.[36]This list, originally made available in September 2017, has been updated in January 2018. The latest list includes over 100 cases against the Single Resolution Board (SRB) and/or the Commission and/or the ECB concerning the resolution of *Banco Popular* in Spain. As simply listing these cases hardly improves transparency, they are classified according to several attributes: the number of defendants (single, i.e., just the SRB or multiple, i.e., also the Commission and/or the ECB), the claims (requests to annul the resolution decision,[37] claims for damages[38], requests for a new calculation, and/or requests to declare provisions of the SRM Regulations inapplicable as incompatible with higher norms of EU law).[39]

There are also cases pending at the European Courts that have not previously been before the ABoR. A number of cases are pending against the ECB on prudential issues: 18 as of 1 September 2017 among which there are four groups of connected cases: the French banking industry against the ECB on a particularly French issue (the prudential treatment of protected public savings accounts); *Crédit Agricole* challenging the ECB on governance issues; *Credit Mutuel Arkéa* challenging the ECB on governance[40], and the two *Trasta* cases[41]. Individual stand-alone cases concern a challenge by Mr. Silvio Berlusconi of the ECB's refusal to authorise a qualifying holding in *Banca Mediolanum* because of a tax fraud conviction[42] in application of Articles 22 and 23 CRD IV; and a case on the ECB's withdrawal of the authorisation of a Maltese bank by the credit institution and its shareholders.[43] Since September 2017, a few cases have been initiated against the ECB, one of which comes within the purview of this

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36 See: https://ebi-europa.eu/publications/eu-cases-or-jurisprudence/.

37 Article 263 TFEU.

38 Article 340 TFEU.

39 Article 277 TFEU.

40 This case has led to a judgment of the General Court which is also discussed in the postscript.

41 See section 6 for a discussion of the case.

42 Case T-913/16 (*Fininvest and Berlusconi v ECB*).

43 Case T-321/17 (*Niemelä e a. v ECB*).

paper as it concerns banking union.[44] It relates to an alleged failure to carry out supervisory duties in respect of *Banca di Credito Cooperativo di Frascati*, and a failure to instruct the *Banca d'Italia* to take certain measures. The case invokes Italian law with which I am unfamiliar[45] and highlights the issue of the application of national law by the ECB.

(Cases against the ECB in other capacities, i.e. on monetary policy, its task of guardian of the euro and its role in the troika imposing conditionality on debtor States are not included in the list at the EBI website and are beyond the scope of this paper. Neither are cases on access to information, one of which originates with a financial-sector counterparty but relates to monetary policy).[46]

A brief overview of the connected cases shows the major issues which are before the Court.

The French banking industry against the ECB

Six cases by French banks[47] against the ECB concern its apparent dismissal of an application for authorisation to exclude certain public-sector exposures from the calculation of the leverage ratio. This concerns regulated savings in the form of the *Livret A* and connected deposits with the *Caisse des Dépôts et Consignations* (CDC). The French banks allege that the ECB incorrectly assesses the prudential risk associated with these exposures and thus renders a provision[48] of the CRR ineffective that allows specifically for the exclusion from the calculation of a bank's assets of certain exposures to a public entity. In Case T-751/16, Finland has been given leave to intervene in support of the ECB.[49]

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44 Case T-641/17 (*Ferri v ECB*).

45 Legislative Decree No 72 of 2015 (on the resolution power of the *Banca d'Italia*; see: https://www.bancaditalia.it/compiti/risoluzione-gestione-crisi/index.html?com.dotmarketing.htmlpage.language=1) and Legislative Decree No 385 of 1993, the *Consolidated Law on Banking*; see: https://www.bancaditalia.it/compiti/vigilanza/normativa/index.html?com.dotmarketing.htmlpage.language=1.

46 Case T-730/16 (*Espírito Santo Financial Group v ECB*) on access to information on the ECB's suspension of *Banco Espírito Santo S.A.*'s Eurosystem monetary policy counterparty status and obliging it fully to repay its debt to the Eurosystem. See the Judgment of the General Court 26 April 2018; ECLI:EU:T:2018:234.

47 Numbers 11-16 on the list: Case T-758/16, (*Crédit Agricole v ECB*); Case T-768/16, (*BNP Paribas v ECB*); Case T-757/16 (*Société générale v ECB*); Case T-751/16 (*Confédération Nationale du Crédit Mutuel v ECB*); Case T-745/16 (*BPCE v ECB*); and Case T-733/16 (*Banque Postale v ECB*).

48 Article 429 (14) CRR: "Competent authorities may permit an institution to exclude from the exposure measure exposures that meet all of the following conditions: (a) they are exposures to a public sector entity; (b) they are treated in accordance with Article 116(4); (c) they arise from deposits that the institution is legally obliged to transfer to the public sector entity referred to in point (a) for the purposes of funding general interest investments." Article 116(4) CRR: "In exceptional circumstances, exposures to public-sector entities may be treated as exposures to the central government, regional government or local authority in whose jurisdiction they are established where in the opinion of the competent authorities of this jurisdiction there is no difference in risk between such exposures because of the existence of an appropriate guarantee by the central government, regional government or local authority."

49 Order of 16 May 2017 in Case T-751/16 (*Confédération Nationale du Crédit Mutuel v ECB*); ECLI:EU:T:2017:361.

Credit Mutuel Arkéa

Two cases by *Credit Mutuel Arkéa* against the ECB[50] relate to a SREP decision and concern the governance of the group. The publicly available information shows that this French bank challenges SREP decisions of two dates (5 October 2015 and 4 December 2015). Usually, a two-month period between the dates of decisions challenged may lead one to surmise ABoR proceedings were conducted in between: a second decision normally follows a first when the ABoR has opined on the matter. A hearing has been held in these cases on 6 June 2017[51]. The ABoR has, indeed, reviewed *Arkéa*'s challenge to an earlier SREP decision, as the judgments in these cases bear out (see the postscript).

Crédit Agricole

Another four cases[52] all originate from the *Credit Agricole* group and concern issues of governance: the cumulative functions of the Chair and the CEO and the time allotted to the function of bank director plus the four eyes principle. The ECB is alleged to have misconstrued Article 13 CRD IV (*Effective direction of the business and place of the head office*) and Articles L 511-13 (four eyes principle) and L 511-52 (sufficient time allocation requirement for directors of a credit institution) of the French *Code monétaire et financier*. Also, infringement is alleged of Articles 13 and 88 (*Governance arrangements*) CRD IV, and of Article L 511-58 of the French *Code monétaire et financier* (on the cumulative functions of the Chair and the CEO). ECB decisions of 29 January 2016 were attacked by the four banks. A hearing has been held in these cases on 23 October 2017.

6. L-Bank and Trasta judgments after administrative review

This section discusses two follow-up cases that have led to remarkable outcomes already. It should be emphasised at the outset that both decisions are subject to appeal. *Disclosure*: I have been involved as an Alternate Member of ABoR in the preparatory stages of both reviews.

L-Bank Case

In *L-Bank*, the General Court resoundingly rejected a challenge by a German bank of its qualification as a significant institution. In doing so, it also determined that the prudential supervisory powers that the SSM Regulation attributed to the ECB in Article 4 (**Tasks conferred on the ECB**) are exclusive and have only partially been delegated by Article 6 (**Cooperation within the SSM**) to National Competent Authorities (NCAs) who, when exercising those powers, do not act

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50 Numbers 2 and 3 on the list: Cases T-712/15 and T-52/16 (*Crédit Mutuel Arkéa v ECB*).

51 While at the time of presenting this paper more was not publicly known, judgments have been rendered since which are briefly discussed in the postscript.

52 Numbers 5-8 on the list: Case T-133/16 (*Caisse régionale de crédit agricole mutuel Alpes Provence v ECB*); Case T-134/16 (*Caisse régionale de crédit agricole mutuel Nord Midi-Pyrénées v ECB*); Case T-135/16 (*Caisse régionale de crédit agricole mutuel Charente-Maritime Deux Sèvres v ECB*); Case T-136/16 (*Caisse régionale de crédit agricole mutuel Brie Picardie v ECB*). See the Judgment of the General Court 24 April 2018; ECLI:EU:T:2018:219.

under national law but as per this delegation. The paragraphs below are largely taken from my paper[53] for the Conference **The New ECB in Comparative Perspectives**, held at the European University Institute, 19-20 September 2017. As is well-known, the Council[54] conferred executive tasks in the area of prudential supervision on the ECB and delineated the banking sector of the Euro Area in two classes: significant and less significant institutions (LSIs). The former would fall completely under the supervision of the ECB, whereas the latter would remain under national supervision.[55] The twin tasks of authorising all banks in the Euro Area and of assessing the suitability of their shareholders were conferred on the ECB,[56] in addition to its task of direct supervision of significant banks. The ECB should ensure consistency among the elements of the SSM.[57] The ECB may decide to exercise supervision directly itself.

When the effective date of prudential supervision by the ECB came near (4 November 2014),[58] several significant entities resisted being submitted to the ECB's supervision. One such bank, *Landeskreditbank Baden-Württemberg – Förderbank*, requested a review of the decision determining it to be significant and went to court after being unsuccessful at the ABoR. The resulting judgment of the General Court contains a number of important points. It establishes that, for a request to be classified as less significant[59] to be successful, the applicant needs to prove that direct ECB supervision is *less able* to ensure achievement of the SSM Regulation's objectives than national supervision; a significant entity cannot escape ECB purview by showing that national supervision *is just as able* to achieve the SSM Regulation's objectives. These latter are repeatedly described as: consistent application of high prudential standards.[60]

The *L-Bank* judgment is most noticeable for its finding that the tasks of the ECB are of an exclusive nature and that the functions of the NCAs concern

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53 Competences and alignment in an emerging future *After L-Bank: how the Eurosystem and the Single Supervisory Mechanism may develop*, published as ADEMU Working Paper 77 on the ADEMU website: http://ademu-project.eu.

54 Article 127(6) TFEU. Note that, since the Maastricht Treaty, the activation of a prudential task for the ECB had required a legislative act by the Council and assent of the European Parliament (Article 105(6) EC Treaty: "The Council may, acting unanimously on a proposal from the Commission and after consulting the ECB and after receiving the assent of the European Parliament, confer upon the ECB specific tasks concerning policies relating to the prudential supervision of credit institutions and other financial institutions with the exception of insurance undertakings."), whereas the Lisbon Treaty reduced Parliament's role to a merely consultative one.

55 Article 6(4) SSM Regulation.

56 Article 4(1)(a) and (c) SSM Regulation, in conjunction with Article 6(4).

57 Article 4(5) SSM Regulation.

58 Article 33(2) SSM Regulation.

59 In accordance with Article 70 Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation) (ECB/2014/17), OJ L 141/1, 14 May 2014.

60 As in Article 5(b) SSM Regulation, and recitals 12 and 83: "supervision of the highest quality, unfettered by other, non-prudential considerations". "Consistent application of high supervisory standards" is also referred to in several provisions of the SSM Framework Regulation, notably in Article 70, which was at the core of the case.

the exercise of delegated powers. Basing itself on the wording of Article 4(1) SSM Regulation, "that, '[w]ithin the framework of Article 6, the ECB shall… be exclusively competent to carry out, for prudential supervisory purposes, the following tasks in relation to all credit institutions established in the participating Member States', followed by a list of nine tasks.",[61] the General Court finds "that it is apparent from the examination of the interaction between Article 4(1) and Article 6 of the [SSM] Regulation (…) that the logic of the relationship between [ECB and NCAs] consists in allowing the exclusive competences delegated to the ECB to be implemented within a decentralised framework, rather than having a distribution of competences between the ECB and the national authorities in the performance of the tasks referred to in Article 4(1) of that regulation."[62]

Concerning the core provision at issue, the Court finds: "Similarly, under Article 6(4), second subparagraph, of that same regulation the ECB has exclusive competence for determining the 'particular circumstances' in which direct supervision of an entity which should fall solely under its supervision might instead be under the supervision of a national authority." The General Court concludes as follows: "It follows from all the foregoing that the Council has delegated to the ECB exclusive competence in respect of the tasks laid down in Article 4(1) of the [SSM] Regulation and that the sole purpose of Article 6 of that same regulation is to enable decentralised implementation under the SSM of that competence by the national authorities, under the control of the ECB, in respect of the less significant entities and in respect of the tasks listed in Article 4(1)(b) and (d) to (i) of the [SSM] Regulation,[63] whilst conferring on the ECB exclusive competence for determining the content of the concept of 'particular circumstances' within the meaning of Article 6(4), second subparagraph, of that same regulation, which was implemented through the adoption of Articles 70 and 71 of the SSM Framework Regulation".[64]

Reading the recitals of the SSM Regulation underpins the Court's interpretation.[65] Among these recitals is no. 28: its reservation of certain tasks to national authorities notably fails to include any of those enumerated in Article 4(1), or the direct supervision of LSIs.[66] The General Court sees the ECB having

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61 Paragraph 20 of the *L-Bank* judgment.

62 Paragraph 54 of the *L-Bank* judgment (underlining added, RS). The Court uses the term 'Basic Regulation' when referring to the SSM Regulation; the quotes in this paper employ the usual citation of this fundamental legal act.

63 So, all tasks except those listed in Article 4(1)(a): authorising credit institutions and withdrawing authorisations, and Article 4(1)(c): assessment the acquisition and disposal of qualifying holdings in credit institutions.

64 Paragraph 63 of the *L-Bank* judgment (underlining added, RS).

65 Notably, it reads recital 37 (which includes the following: "in order to ensure high-quality, Union-wide supervision, national competent authorities should be responsible for assisting the ECB in the preparation and implementation of any acts relating to the exercise of the ECB supervisory tasks.") such "that direct prudential supervision by the national authorities under the SSM was envisaged by the Council of the European Union as a mechanism of assistance to the ECB rather than the exercise of autonomous competence."

66 Paragraph 57 of the *L-Bank* judgment.

"important prerogatives even when the national authorities perform the supervisory tasks laid down in Article 4(1)(b) and (d) to (i) of the [SSM] Regulation",[67] which it considers "indicative of the subordinate nature of the intervention by the national authorities in the performance of those tasks".[68] The ECB's competence to issue regulations, guidelines or general instructions to NCAs is relevant and, while there is no "possibility for the ECB to issue individual guidelines to a national authority, that is compensated for by the possibility offered by Article 6(5)(b) of the [SSM] Regulation[69] to remove direct prudential supervision of an entity from the competence of a national authority".[70]

In rejecting a comparison with competition law competences that *L-Bank* brought forward and which the Court finds inapplicable, the judgment[71] makes quite clear that "under the SSM the national authorities are acting within the scope of decentralised implementation of an exclusive competence of the Union, not the exercise of a national competence (underlining added, RS)."

These considerations place the division of powers in the SSM and, thereby, the relationship between the ECB and the NCAs in a different light: exclusive competences at the centre, partially delegated to the State agencies involved in the SSM.

The *L-Bank* judgment highlighted the role of the ABoR, adopting its Opinion as part of the reasoning for the ECB's second decision. The Court reads the ECB's second decision in the light of the ABoR Opinion and includes the Opinion among the reasoning (motivation) of that second decision.

Allow me to quote paragraph 127 of the *L-Bank* judgment: "in so far as the contested decision ruled in conformity with the proposal set out in the Administrative Board of Review's Opinion, it is an extension of that opinion and the explanations contained therein may be taken into account for the purpose of determining whether the contested decision contains a sufficient statement of reasons." Calling the second ECB decision, adopted after the ABoR's Opinion, "an extension" of ABoR's findings,[72] may be a bold translation of the original French text.[73] The language sounds less encompassing in the original French: « *dans la mesure où la décision attaquée a statué dans un sens conforme à la*

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67 Again, all tasks except those listed in Article 4(1)(a): authorising credit institutions and withdrawing authorisations, and Article 4(1)(c): assessment the acquisition and disposal of qualifying holdings in credit institutions.

68 Paragraph 59 of the *L-Bank* judgment.

69 "(…) (b) when necessary to ensure consistent application of high supervisory standards, the ECB may at any time, on its own initiative after consulting with national competent authorities or upon request by a national competent authority, decide to exercise directly itself all the relevant powers for one or more credit institutions referred to in paragraph 4, including in the case where financial assistance has been requested or received indirectly from the EFSF or the ESM;" (underlining added, RS)

70 Paragraphs 60-61 of the *L-Bank* judgment.

71 Paragraph 72 of the *L-Bank* judgment.

72 Paragraph 31 of the *L-Bank* judgment.

73 Which merely states: "*l'avis de la commission administrative de réexamen, dans le prolongement duquel s'inscrit la décision attaquée*".

proposition figurant dans l'avis de la commission administrative de réexamen, elle s'inscrit dans le prolongement dudit avis et les explications qui y figurent peuvent être prises en compte aux fins d'examiner le caractère suffisamment motivé de la décision attaquée » (underlining added, RS). Yet, the Court clearly makes the ABoR's input part of the process of adoption of the ECB's second decision and relies on ABoR's findings to assess the reasoning of the ECB in the second round. This underscores the sensitive nature of revealing the ABoR's findings at an early stage.

On appeal,[74] *L-Bank* alleges that the General Court misinterpreted the provisions on significance of the SSM Regulation and the SSM Framework Regulation (relying on the English text only and not applying the principle of proportionality); also, it alleges distortion of the ECB decision, disregarding the alleged lack of reasoning by the ECB, and procedural errors by bringing in issues not discussed during the proceedings (probably, the issue of exclusive ECB competences, RS). If confirmed on appeal, *L-Bank* is a watershed on prudential powers at the EU level.[75]

Trasta Case

In *Trasta*, two case are on-going: one[76] against the ECB's first decision on the withdrawal of the authorisation of *Trasta Komercbanka AS* (hereafter also: TKB), and the other[77] against the second decision after ABoR proceedings.

Trasta is a less significant bank that was originally licensed in 1991 by the *Finanšu un kapitãla tirgus komisija* (Financial and Capital Markets Commission (FCMC)) of Latvia. On a proposal of the FCMC, the ECB withdrew the license on 3 March 2016. On 14 March, liquidation proceedings were started in Latvia, and on 17 March the liquidator appointed over *Trasta* revoked all powers of attorney. On 3 April, ABoR was requested to review the withdrawal of the authorisation. It gave its Opinion ("decision" states the Court) on 30 May: "By a decision of 30 May 2016, the board of review held that the allegations of procedural and substantive breaches entailed by the contested decision were unfounded and that that decision was sufficiently reasoned and proportionate, while recommending that the governing body of the ECB clarify certain elements."[78] On 13 May 2016, i.e. before the ABoR Opinion, "the lawyer representing TKB during the administrative proceedings brought an action for annulment of the contested decision on behalf of TKB and, as a precaution, on behalf of six of its direct and indirect shareholders."[79] The ECB adopted a second decision withdrawing

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74 Case C-450/17 P.

75 See my paper mentioned in footnote 53 above.

76 Number 9 on the list: Case T-247/16 (*Trasta Komercbanka and others v ECB*).

77 Number 10 on the list: Case T-698/16 (*Trasta Komercbanka and others v ECB*).

78 Paragraph 7 of the Order.

79 Paragraph 8 of the Order.

the licence on 11 July 2016. As indicated, this second decision is the subject of separate appeal proceedings in Luxembourg.[80]

In its Order of 12 September 2017, the Court starts with testing the interest of the bank itself (TKB) and its shareholders in the proceedings, and finds that both have an interest: if the original ECB decision were annulled, TKB and the shareholders could claim damages for the three month-period between the original withdrawal of the licence and the withdrawal after the ABoR Opinion.[81] However, because the power of attorney granted by TKB to its lawyers had been withdrawn, validly according to the Court, upon researching[82] and applying Latvian law,[83] TKB's appeal is thrown out because the bank is not validly represented by the attorney who initiated proceedings.

The Court attaches importance to the fact that the District Court in Riga hearing the liquidation proceedings "rejected TKB's application to maintain its directors' power of attorney for the purpose of adopting decisions relating to the administrative proceedings before the ECB and the judicial proceedings before the Court of Justice of the European Union".[84]

The Court finds that accepting the withdrawal of the power of attorney does not violate EU law, notably, the right to effective judicial protection: "The application of Latvian law does not lead to all banks whose approval was withdrawn being deprived of a remedy, but to the responsibility for seeking that remedy being entrusted to the liquidator." Thus, the Court refuses to hear TKB's case.[85] The Court considers that the ECB could not have prevented the opening of liquidation procedures by the FCMC which led to the liquidator becoming capable of withdrawing the director's powers, including their power to request administrative (ABoR) or judicial review (CJEU).

Acknowledging that this Order is an interim step in pending proceedings and that it is appealed, I note that the General Court treads rather lightly the effective judicial protection of a credit institution. By finding that the liquidator, installed at the behest of the supervisory authority, has the power to determine whether an appeal can be lodged against the withdrawal of the license, the bank is effectively barred from taking action. It is unlikely that a liquidator will challenge the supervisory authority's decision to withdraw the authorisation, the very basis for his functioning in this capacity.

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80 Case T-698/16 (*Trasta Komercbanka and others v ECB*).

81 Paragraphs 21-23 of the Order.

82 "(…) it is for the General Court to determine the applicable national law and, moreover, to determine whether, by virtue of that right, the liquidator has the power to revoke the authority to act and whether it did revoke it" (paragraph 25 of the Order).

83 According to the Directive on Reorganisation and Winding up of Credit Institutions (2001/24/EC), "the law of the Member State in which a credit institution has been authorised applies to the respective powers of the credit institution and its liquidator" (paragraph 26 of the Order).

84 Paragraph 34 of the Order.

85 Paragraph 50 of the Order: "There is therefore no need to adjudicate on TKB's application."

Perhaps because it bars the credit institution itself from taking judicial action, the shareholders are given room to do so: the Court examines whether its shareholders have a separate, own claim to make. A shareholder "must show that it has a legal interest in bringing proceedings separate from that possessed by an undertaking which it partly controls and which is concerned by a European Union measure. Otherwise, in order to defend its interests in relation to that measure, its only remedy lies in the exercise of its rights as a member of the undertaking which itself has a right of action".[86] So, only when shareholders cannot defend their interests through their powers in an undertaking, is there room for them to operate independently from the company in court.[87] As TKB's liquidation prevents its shareholders from exercising their shareholders' right to make TKB bring an action against the withdrawal of the banking licence, the Court finds that the shareholders have an interest in bringing a case.[88] This does not suffice to hear their case, as their 'interest' is separate from their *locus standi* before the court,[89] so an analysis follows of the individual and direct concern of the withdrawal decision to the shareholders.

The *Plaumann* formula states that "persons other than those to whom a decision is addressed may claim to be individually concerned only if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of those factors distinguishes them individually just as in the case of the person addressed (underlining added, RS)".[90] The Court finds that the shareholders were "identified or identifiable at the time when it was taken on the basis of criteria specific to the members of the group"; the withdrawal of TKB's banking license "affects the shareholder applicants in their particular capacity as shareholders of the bank whose authorisation has been withdrawn and differentiates the 42 direct shareholders of that bank from any other person".[91]

The Court continues: "(…) for a person to be directly concerned by the measure at issue, the measure must directly affect the legal situation of the individual and leave no discretion to the addressees of that measure who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from the EU rules alone, without the application of other intermediate rules".[92] Relying on earlier case law that "shareholders cannot be regarded as directly and individually concerned by a decision in so far as it does not, of itself, affect the substance or extent of the rights of the shareholders, either as regards their proprietary rights or the ability, conferred on them by

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86 Paragraph 53 of the Order.

87 Paragraph 54 of the Order.

88 Paragraphs 55-58 of the Order.

89 Paragraph 52 of the Order.

90 Paragraph 60 of the Order, with a reference to Case 25/62 (*Plaumann v Commission*); EU:C:1963:17.

91 Paragraph 62 of the Order.

92 Paragraph 64 of the Order, referring to a judgment of 13 October 2011 in Cases C-463/10 P and C-475/10 P (*Deutsche Post and Germany v Commission*); EU:C:2011:656.

those rights, to participate in the management of the company",[93] the Court applies this test to the *Trasta* shareholders. It finds that withdrawing the licence "prevent[s TKB] from achieving its object and having an economic activity", thereby directly affecting the shareholders.[94] Not content with this finding, the Court elaborates and mentions "the intensity" of the withdrawal: the right to receive dividends becomes "illusory", and the exercise of voting rights becomes "essentially formal".[95] Moreover, there is no need for provisional measures at State or EU level for the withdrawal of the banking licence to have effect.[96] So, the direct shareholders are directly affected, as well. Thus, they have standing.

The indirect shareholder contesting the ECB's decision, Ivan Furstin, profits from this: his position is not separately examined.[97] In a conclusion that I personally find hard to follow, the Court finds that the action by "the applicants, who are direct (my underlining, RS) shareholders of TKB, are directly and individually concerned by the contested decision" is admissible.[98] As the list of shareholders is not attached to the Order, an outsider cannot assess what the Court may mean by this: first apparently accepting the indirect shareholder and then excluding him?

This Order, or a decision on appeal, will have major consequences for the admissibility of shareholders in other cases, such as competition law cases. Also, it may influence the stance of ABoR on admissibility of shareholders. It is too early to elaborate on these issues, and not appropriate to comment on matters that are pending.[99] Again, differences show up in national laws, this time concerning the follow-up of a withdrawal of a banking licence, such differences leading to possibly divergent outcomes, also in terms of review and protection against the withdrawal of an authorisation. Access of affected parties to judicial and administrative review even of altogether sound supervisory decisions is a fundamental element of a well-functioning democratic community of law.

7. Concluding remarks

Administrative and judicial review of prudential decisions is on-going and developing.

Numbers do not tell the whole story, for several reasons:

- Numbers of individual cases may conceal clusters of issues: the 19 cases

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93 Paragraph 65 of the Order, referring to paragraph 35 of the judgment of 28 October 1993 in Case, T-83/92 (*Zunis Holding and Others v Commission*); EU:T:1993:93.

94 Paragraph 66 of the Order.

95 Paragraph 67 of the Order.

96 Paragraph 68 of the Order.

97 Paragraph 70 of the Order.

98 Paragraphs 71-72 of the Order.

99 As discussed in the postscript, the decisions on admissibility are challenged from three sides at the CJEU.

before the General Court mainly concern four issues;

- Numbers may conceal actual outcomes: any impression that the ABoR fails to opine differently from the ECB is false as, even when the ultimate outcome is considered in accordance with the required standard (procedural and substantive conformity with the SSM Regulation and the principles and rules referred therein – including the EU Charter of Fundamental Rights), the Opinion is likely to have suggested material improvements, notably on motivation (reasoning);
- Administrative review has an impact way beyond an actual case: the ABoR may question the approach taken by the ECB which, in turn, may lead to changes in procedures and approaches. Never underestimate the incidence of independent scrutiny.

The lack of harmonisation and convergence, that is, the absence of a real, Union-wide *single* rulebook is striking; it consumes resources in the review process (as it undoubtedly does in supervision proper) and may lead to outcomes that are far from satisfactory on a comparative basis: equal treatment relies on equality of business conditions and prudential regulation and enforcement across Europe. I refer to the observations by Andrea Magliari, Concetta Brescia Morra and myself in our article on the ABoR after two years, which highlights the national discrepancies and notes two areas of concern: FAP testing and bank holding company supervision. We still have a long way to go.

Permit me, here, to support, the call for completion of banking union by Nicholas Véron in his recent study for the European Parliament[100] in which he excellently makes a case for sovereign concentration charges and for a European Deposit Insurance System (EDIS) that is fully mutualised, as per the Commission's original proposals, thus not following its recent backtracking.

The absence of transparency on review cases is an issue that is not easily resolved but on which steps may be undertaken, even within the current legal context. If the ECB does not act, the *mantram* is: *Luxembourg help us!* It is submitted that the Court can increase transparency on banking union-related cases by identifying that these are post-ABoR, if they are, in its immediate postings on pending cases.

Far too early, but not something to leave out of sight completely: an alignment of financial sector review mechanisms[101] may yield better results than the current patchwork of different pathways. The labyrinth facing the applicant may be explicable to the legal expert who understands why we have so many different regimes but must be baffling to financial sector operators and the public at large.

RS, 19 November 2017

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[100] Nicolas Véron, *Sovereign Concentration Charges: A New Regime for Banks' Sovereign Exposures*, Bruegel, 17 November 2017, at: http://bruegel.org/wp-content/uploads/2017/11/IPOL_STU2017602111_EN.pdf.

[101] Differing, for valid reasons but with puzzling variations in outcomes, between legal acts adopted by the EBA, by the ECB and by the SRB.

8. Postscript

Since the presentation of the draft paper at the Rome Conference, developments have taken place that are briefly touched upon here: judgments in the *Arkéa* case and appeals against the *Trasta* order.

The *Arkéa* judgments

On 13 December 2017, the General Court gave two judgments in cases instituted by *Crédit Mutuel Arkéa* (*Arkéa*) against the European Central Bank (ECB). Both cases concerned 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). It should be noted that several other judicial and administrative bodies have been involved in the on-going strife[102] within the *Crédit Mutuel* group: the *Autorité de la Concurrence* (the French national competition authority),[103] the *Tribunal Administratif de Rennes* and the French *Conseil d'État,*[104] the *Tribunal de Grande Instance de Paris* and the *Cour d'Appel de Paris.*[105] Even the *Crédit Mutuel* trademark is the subject of judicial proceedings in Luxembourg.[106] Recent developments seem to indicate a rupture: *Arkéa* chairman Jean-Pierre Denis is reported to have proposed to the Board to leave the CNCM.[107]

The existence of two, largely identical judgments derives from the fact that the applicant has acted against the ECB's SREP decision of 5 October 2015 (Case T-712/15), which was the result of review by the Administrative Board of Review (ABoR) of a SREP decision of 17 June 2015, and, subsequently, proceeded against a further ECB decision of 4 December 2015 (Case T-52/16), in which the ECB amended its 5 October decision by lowering the own funds

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[102] Called "*La guerre des Crédits Mutuels*" by a French information service on banking CBanque.

[103] See: *Décision n° 16-D-30 du 21 décembre 2016 relative à des pratiques de la Confédération Nationale du Crédit Mutuel dans le secteur bancaire.* The *Autorité de la Concurrence* declared the complaint by *Arkéa* against the CNCM and the CM11-CIC group for allegedly entering into anti-competitive agreements and carving up markets inadmissible.

[104] In proceedings in which the CNCM requested, and was granted, an injunction against Arkéa to provide it with data for the establishment of a group-wide recovery and resolution plan.

[105] This appeals court is reported to have declared invalid the procedure by which the CNCM was to convert from an "*association*" into a cooperation and, then, to request authorisation from the ECB as a credit institution. However, the CNCM has a different reading of this recent (16 January 2018) judgment.

[106] See Case T-13/18 (*Crédit mutuel Arkéa/EUIPO - Confédération nationale du Crédit mutuel (Crédit Mutuel)*), and *La marque « Crédit Mutuel » au cœur d'un conflit intra-groupe*, LinkedIn post of 30 November 2017 by Nathalie Pacaud, at : https://fr.linkedin.com/pulse/la-marque-cr%C3%A9dit-mutuel-au-c%C5%93ur-dun-conflit-nathalie-pacaud.

[107] *La Tribune on-line*, 17 January 2018: *Big bang en vue : Arkéa se prépare à quitter le Crédit Mutuel*. See, also: *Crédit Mutuel Arkéa : l'indépendance est maintenant sur les rails*, Ouest-France, 19 January 2018, at: https://www.ouest-france.fr/bretagne/credit-mutuel-arkea-l-independance-est-maintenant-sur-les-rails-5511120 and *Crédit Mutuel Arkéa. Une caisse contre le départ de la Confédération*, Ouest-France, 13 February 2018, at : https://www.ouest-france.fr/bretagne/credit-mutuel-une-caisse-contre-le-depart-de-la-confederation-5561541.

requirement imposed on the applicant from 11% to 10.75%. Textual differences of the two judgments reflect the distinct proceedings but, by and large, the judgments are identical. In this paper, references are to the judgment[108] in Case T-712/15. This postscript is based on the French text of the judgment and employs my own translations into English that I did not systematically check against the provisional translation which just came out.

Disclosure: I have been a voting member in the ABoR review proceedings.

The main point of contention between *Arkéa* and the ECB is the latter's indirect supervision of *Arkéa* through the CNCM, with *Arkéa* claiming it should be supervised directly and separately from the *Crédit Mutuel* group. Three main lines of arguments are maintained by the applicant: the CNCM is not a credit institution and, hence, cannot fall under the supervision of the ECB (which the Treaty allows to effect prudential supervision of credit institutions only); there is no 'group'; and the 11% CET1 capital requirement resulting from the SREP decision is unlawful. On the existence of a 'group', the relevant provisions are Article 2(21)(c) SSM Framework Regulation and Article 10(1) CRR. Article 10 CRR allows supervisory authorities to waive the application of CRR provisions for credit institutions within the same Member State which are permanently affiliated to a central body which supervises them when three conditions have been met: (a) the commitments of the central body and the affiliated institutions are joint and several, or entirely guaranteed by the central body; (b) the solvency and liquidity of the central body and all affiliated institutions are monitored as a whole on the basis of consolidated accounts; and (c) the central body's management may issue instructions to the management of the affiliated institutions. Article 2(21)(c) SSM Framework Regulation refers to the conditions laid down in Article 10 CRR for one of its definitions of a 'supervised group'.

The Court methodically addresses the applicable provisions, applying a literal, teleological and contextual interpretation and dissecting, one by one, the arguments of *Arkéa*. Doing so, it fully finds for the ECB. As the scope of this paper does not permit a more in-depth annotation of the *Arkeá* judgments,[109] I here only enumerate the following seven main points that I derive therefrom:

1. The role of ABoR's Opinion in the assessment of the ECB's second decision confirmed

The Court strongly confirms the role of ABoR as it imputes to the ECB the reasoning in ABoR's Opinion when the second decision is in line with this Opinion, and assesses the ECB's motivation for this second decision also on the basis

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[108] The numbers of paragraphs in the judgment in Case T-712/15 jump with one digit to those in Case T-52/16.

[109] More on the Court's reasoning in my *Short note on the Arkéa judgments* of 19 January 2018, at: https://ebi-europa.eu/wp-content/uploads/2018/01/Note-on-the-Arke%CC%81a-judgments-for-publication-final.pdf.

of the ABoR Opinion.[110] The Court extensively quotes[111] and endorses[112] ABoR's findings. Notably, when referring to the ECB's reasons to effect consolidated supervision of the *Crédit Mutuel* group through the CNCM, the Court notes: "that, if the reasons for which the ECB decided to organize consolidated supervision of the *Crédit Mutuel* group through the CNCM are not explicitly stated in the contested decision, the [ABoR] provided grounds on this point, which have been transcribed in paragraphs 8 to 10 [of the judgment] above."[113]

2. Objectives pursued by consolidated supervision identified

These ends are: to enable the ECB to understand the risks likely to affect a credit institution which does not originate from it, but from the group to which it belongs; and: to avoid a fragmentation of the prudential supervision of the entities who make up these groups by different supervisory authorities.[114]

3. A central body of a group in the sense of Article 10 CRR does not have to be a credit institution

Neither the SSM Regulation nor the CRR require that a central body qualifies as a credit institution.[115]

4. Sanctioning power vis-à-vis a central body absent in the SSM Regulation

The ECB does not have sanctioning powers vis-à-vis a central body under the SSM Regulation.[116] The Court quotes ABoR's consideration that it is not necessary for the ECB to have the complete arsenal of supervisory or sanctioning powers over the parent entity of a group to exercise prudential supervision on a consolidated basis.[117]

5. Supervisory discretion to grant a waiver (or not) when Article 10(1) CRR's conditions are met

An individual waiver from the requirements of prudential supervision remains a discretionary power even when the conditions laid down in Article 10 CRR are fulfilled.[118]

6. Even potential risks identified by the ECB may justify imposing an extra own funds requirement

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110 Paragraphs 49 and 50 of the judgment in Case T-712/15.
111 Paragraphs 9-11 of the judgment in Case T-712/15.
112 Paragraphs 51; 70; 120; 130-131; 147-148; 157-158 of the judgment in Case T-712/15.
113 Paragraph 51 of the judgment in Case T-712/15.
114 Paragraphs 59, 61 and 64 of the judgment in Case T-712/15.
115 Paragraphs 107 and 151 of the judgment in Case T-712/15.
116 Paragraphs 89-92 of the judgment in Case T-712/15.
117 Paragraph 9 of the judgment in Case T-712/15.
118 Paragraphs 67 and 100 of the judgment in Case T-712/15.

Article 97 CRD IV grants supervisory authorities the power to impose extra guarantees in relation to "risks to which the institutions are *or might be* exposed"; this necessarily entails the possible taking into account of future events likely to alter their risk profile.[119]

7. Article 16 SSM Regulation: wide powers for the ECB

The Court's wide reading becomes clear from the following two quotes:

"(…) it follows from a joint reading of Article 16 (1) (c) and (2)(a) of the [SSM Regulation] that, in the event that prudential examinations carried out by the ECB show that the own funds and liquidity held by a credit institution do not ensure sound management and risk coverage, the ECB is entitled to require a credit institution to go beyond these minimum requirements".[120]

"the purpose for which the powers referred to in Article 16 (2) of the [SSM Regulation] were conferred on the ECB, as stated in paragraph 168 above, can in particular be found in the need to remedy a situation in which the own funds and liquidity of a credit institution do not ensure sound management and risk coverage".[121]

The *Trasta* appeals

The General Court's Order of 12 September 2017 is subject to three appeals: by the bank and its shareholders (Case C-669/17),[122] by the ECB (Case C-663/17 P)[123] and by the Commission (Case C-665/17 P).[124] *Trasta* and its shareholders "claim that the General Court erred in assuming that TKB's remedy is entrusted to the liquidator. The appellants claim that this assumption is irreconcilable with Article 263 TFEU and the guarantee of an effective remedy as well as a number of related principles". Their further claims relate to the relationship between a company and its shareholders (the appellants "claim that the General Court erred in assuming that the shareholders' action is a substitute for the shareholders' ability to defend TKB's license through an action by TKB itself") and to further substantive and procedural issues.

The European Commission attacks the admissibility decision on principled grounds. It contests that "[t]he General Court has erroneously considered that it was necessary to declare admissible an application for annulment brought by shareholders of a credit institution in liquidation against a decision to withdraw the authorisation of the credit institution in order to provide an effective remedy. In so doing, it has neglected the other remedies available to the credit institution, in the form of a timely application for annulment and of a request for interim

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119 Paragraph 167 of the judgment in Case T-712/15.

120 Paragraph 168 of the judgment in Case T-712/15.

121 Paragraph 212 of the judgment in Case T-712/15.

122 OJ C 42/8, 5 February 2018.

123 OJ C 32/16, 29 January 2018.

124 OJ C 42/6, 5 February 2018.

measures, and to the shareholders, in the form of an action for damages against the European Central Bank before the European Courts and possibly in the form of other actions before national courts." The Commission's appeal concerns core elements of standing under Article 263 TFEU: the condition of legal interest in bringing proceedings and the conditions of individual and direct concern.

The European Central Bank also opposes the General Court's findings that "the shareholder applicants had an interest and legal standing in the General Court regarding the action for annulment of the contested decision". The General Court allegedly misconstrued "case law requiring that shareholders show that they possess a separate interest in bringing proceedings against a Decision addressed to the undertaking which they partly controlled". According to the ECB, shareholders cannot be said to have a legal interest in a bank having a licence which differs from the bank's own legal interest in having that licence.[125] The possibility to obtain damages or dividends would not substantiate a legal interest separate from that of the credit institution. Shareholders may be admitted in a claim for damages in a liability suit against the ECB. The ECB also pleads that the shareholders were neither individually nor directly concerned, so they do not have *locus standi*. The ECB emphasises the difference between *economic* losses and the *legal* position of those suffering them.

One may expect the proceedings on admissibility to precede any appeal on the substance of the case. The resulting admissibility approach of the CJEU will also determine access to administrative review as the ABoR might be expected to follow the case law of the Court on substantive and procedural matters.

[125] I present this plea, formulated case-specific, i.e. relating to *Trasta Komercbanka,* in general terms here.