The Administrative Board of Review of the European Central Bank. A critical analysis

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ABSTRACT

The Administrative Board of Review provides the addressees of the European Central Bank supervisory decisions with effective protection of their rights within the Banking Union framework. Indeed, appealing to the Board is convenient compared to appealing to the Court of Justice of the European Union. However, the opinions of the Administrative Board of Review typically influence future judgments by the Court of Justice of the European Union, which is unlikely to diverge from what was decided at the administrative level. Therefore, instead of serving as a further instrument of protection, the Administrative Board of Review either shifts protection from the jurisdictional to the administrative level, if an individual decides to appeal to the Board; or it risks remaining a dead letter, if an individual prefers to appeal directly to the Court. Currently, the decision to appeal to the Administrative Board or directly to the Court of Justice depends on the authoritativeness and substantial independence of the members of the Administrative Board of Review. A further way to improve addressees' protection would be to publicize the opinions of the Administrative Board of Review, which could also increase the accountability of the Board without entailing high costs.

Keywords: *Banking Union – Single Supervisory Mechanism – Administrative Board of Review*

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1. *Introduction.*

Within the framework of the Banking Union [1] and through the Single Supervisory Mechanism (SSM), [2] specific tasks are conferred on the European Central Bank (ECB) – in its composition as Single Supervisory Board (SSB) – concerning the supervision of credit institutions in order to "bolster the [European] Union, restore financial stability and lay the basis for economic recovery". [3] Indeed, "a single supervisory mechanism should ensure that the Union's policy relating to the prudential supervision of credit institutions is implemented in a coherent and effective manner, that the single rulebook for financial services is applied in the same manner to credit institutions in all Member States concerned, and that those credit institutions are subject to supervision of the highest quality, unfettered by other, non-prudential considerations". [4]

Some of these tasks are less discretionary and more rarely exercised, such

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[1] For details, *ex multis*, see P. G. TEIXEIRA, *The Legal History of the Banking Union*, 18.3 *European Business Organization Law Review* (2017), 535; D. BUSCH, G. FERRARINI (eds.), *European Banking Union*, Oxford, Oxford University Press, 2015; N. MOLONEY, *European Banking Union: assessing its risks and resilience*, 51.6 *Common Market Law Review* (2014), 1609; N. VÉRON, *Europe's Radical Banking Union*, Bruegel Essay and Lecture Series (2015), 5.

[2] On the architecture and functioning of the first pillar of the Banking Union, without claiming to be complete, in the legal literature, E. CHITI, F. RECINE, *The Single Supervisory Mechanism in Action: Institutional Adjustment and the Reinforcement of the ECB Position*, 24.1 *European Public Law* (2018), 101; E. WYMEERSCH, *The Single Supervisory Mechanism or 'SSM', Part One of the Banking Union*, National Bank of Belgium Working Paper (2014), 255; C. V. GORTSOS, *Competence Sharing Between the ECB and the National Competent Supervisory Authorities Within the Single Supervisory Mechanism (SSM)*, 16.3 *European Business Organization Law Review* (2015), 401; C. BRESCIA MORRA, *From the Single Supervisory Mechanism to the Banking Union. The role of the ECB and the EBA*, LUISS Guido Carli, School of European Political Economy, working papers, (2014); F. CAPRIGLIONE, *European banking union. A challenge for a more united Europe*, 2.1. *Law and Economics Yearly Review* (2013), 5; E. FERRAN, V. S. G. BABIS, *The European single supervisory mechanism*, 13.2 *Journal of Corporate Law Studies* (2013), 255. On the other hand, in the economic literature and in the social and political literature, among others, see respectively A. BAGLIONI, *The European banking union: a critical assessment*, London, Springer, 2016; and D. HOWARTH, L. QUAGLIA, *The political economy of European banking union*, Oxford, Oxford University Press, 2016.

[3] Recital no. 2 of the Regulation (EU) No. 1024/2013 (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: hereinafter "SSM Regulation").

[4] Recital no. 12 of the SSM Regulation.

as authorising credit institutions and withdrawing authorisations of credit institutions.[5] Others, instead, are more discretionary, frequent and potentially more pervasive, such as the ECB's task of ensuring compliance with the acts which impose "requirements on credit institutions to have in place robust governance arrangements, including the fit and proper requirements for the persons responsible for the management of credit institutions".[6] More in detail, for example, the ECB verifies that each member of the board of directors of the banks subject to its supervision have the "fit and proper" requirements; thus, it can exclude a potential candidate from the role to be filled. An excessive discretion left to the ECB could entail the risk of arbitrariness and increase the inherent reputational risk, with a possible infringement of the rights of the addressees of the decisions or, better, an unjustified compression of their freedom to conduct a business.

This discretion cannot be unchallenged. Hence, it is crucial to allow the addressees of the ECB's decisions to effectively protect their rights.

On the one hand – and in general terms – "the ECB is an institution of the Union as a whole"; therefore, "it should be bound in its decision-making procedures by Union rules and general principles on due process and transparency".[7] Indeed, the Union is "based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty".[8]

On the other hand – and in particular – the ECB is an independent authority[9] and, consequently, needs greater safeguards;[10] thus, "any shift of supervi-

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[5] Art. 4, para. 1, let. a), SSM Regulation.

[6] Art. 4, para. 1, let. e), SSM Regulation.

[7] Recital no. 54, first part, of the SSM Regulation.

[8] Related to the former European Economic Community, see ECJ, 23 April 1986, *Les Verts v Parliament*, C-294/83, ECLI:EU:C:1986:166; this aspect is underlined by C. Brescia Morra, *The administrative and judicial review of decisions of the ECB in the supervisory field*, in Quaderni di Ricerca Giuridica della Banca d'Italia, 81 *Scritti sull'Unione Bancaria* (2016), 109. See, also, ECJ, 10 July 2003, *Commission v European Central Bank*, C-11/00, ECLI:EU:C:2003:395.

[9] The full independence – "in particular free from undue political influence and from industry interference which would affect its operational independence" – is fundamental for the ECB "in order to carry out its supervisory tasks effectively" (recital no. 75 of the SSM Regulation; see also art. 19 and art. 29, para. 1, SSM Regulation).

[10] The concern of a possible encroachment on arbitrariness is dating back. *Ex multis*, M. Everson, *Independent agencies: hierarchy beaters?*, 1.2 *European Law Journal* (1995), 180.

sory powers from the Member State to the Union level should be balanced by appropriate transparency and accountability requirements".[11] Whereas, the condition of having to respond to the choices made should encourage in the EU institutions that have political responsibility virtuous behaviour.[12]

Among other regulatory strategies, the European lawmaker established the Administrative Board of Review (ABoR) in the SSM framework, to allow an internal administrative review of the supervisory decisions taken by the ECB. Even if there are some benefits, a comprehensive analysis of how it works and the judicial system in which the ABoR is inserted leads to a conclusion – instead of a further instrument of protection, the introduction of the ABoR either shifts the protection from the jurisdictional to the administrative level (if it is considered reliable), or risks to remain a dead letter (if it is considered unreliable). Indeed, as a matter of fact, from the one hand, among the 38 requests for re-examination from 2014 to 2019 only 2 resulted in an ECB decision being abrogated and replaced with new decisions after ABoR Opinion (whereas, only 9 resulted in an ECB decision being amended or its reasoning being improved);[13] on the other hand, among the 4,934 ECB's supervisory decisions taken in 2016, only 0.16% were subject to review so far (and there is a similar percentage in the other years)[14] Thus, this good in-

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The need for accountability is also affirmed by COUNCIL OF THE EUROPEAN UNION, *Council conclusions on the European Court of Auditors' Special Report No 29/2016: "Single Supervisory Mechanism – Good start but further improvements needed"*, n. 6558/17, Brussels, February 21, 2017, which emphasizes "the importance of ensuring the highest standards in terms of accountability and transparency of the SSM".

[11] Recital no. 55 of the SSM Regulation. This strategy is compliant with the international standards on the topic: see INTERNATIONAL ORGANIZATION OF SECURITIES COMMISSIONS (IOSCO), *Objectives and Principles of Securities Regulation*, May 2017, Principle 2 – The Regulator should be operationally independent and accountable in the exercise of its functions and powers; and BASEL COMMITTEE ON BANKING SUPERVISION, *Core Principles for Effective Banking Supervision*, Bank for International Settlement, September 2012, Principle 2: Independence, accountability, resourcing and legal protection for supervisors, which states that on the one hand "the supervisor possesses operational independence, transparent processes, sound governance, budgetary processes that do not undermine autonomy and adequate resources" and on the other hand, it "is accountable for the discharge of its duties and use of its resources".

[12] In politics, like in every repetitive game, the path to achieve cooperation is a tit-for-tat strategy; this could teach the other players to cooperate. See R. AXELROD, *The Evolution of Cooperation*, Basic Book, New York, 1984.

[13] EUROPEAN CENTRAL BANK, *Annual Report on supervisory activities*, 2019, table no. 4. Actually, the ABoR opinions were 28, because 5 requests were withdrawn, and 5 requests were declared inadmissible.

[14] Data collection is based on R. SMITS, *Interplay of administrative review and judicial pro-*

strument must be fixed and this paper is an attempt to contribute to do it.

The article is structured as follows. Section 2 presents the regulatory strategies used in the European Union to prevent the ECB from wielding an excessive margin of discretion in exercising its powers. The problems inherent to the traditional forms of protection for the addressees of the authorities' decisions are described in Section 3. Section 4 gives an overview of the new ABoR. The benefits of the new tool deriving from the rules governing its operation are described in Section 5, with a special focus on the reduction of both transaction costs and the deferential attitude typical of judgments against decisions of authorities with technical discretion. Instead, Section 6 underlines some practical implications and possible limits of the new system. Section 7 proposes, from a policy perspective, a possible solution. Section 8 concludes.

2. *The regulatory strategies used by the European lawmaker.*

In order to prevent the ECB from wielding an excessive margin of discretion in exercising its powers the legislator has adopted a multitude of accountability strategies. [15]

Traditionally [16] the typical *ex ante* mechanism consists of indicating the ob-

tection in European prudential supervision. Some issues and concerns, in QUADERNI DI RICERCA GIURIDICA DELLA BANCA D'ITALIA, 84 *Judicial review in the Banking Union and in the EU financial architecture* (2018), 29.

[15] For a historical evolution, the definition of the concept of accountability in relation to the context, as well as for the purposes it pursues, see, *ex multis*, F. ALLEMAND, *Accountability and audit requirements in relation to the SSM*, in ECB LEGAL CONFERENCE, *Shaping a new legal order for Europe: a tale of crises and opportunities*, 4-5 September 2017, 59.

[16] Highlights of the voluminous literature on the role of independent authorities and, in particular, on their regulatory function as well as on their accountability include E. CHITI, *European Agencies' Rulemaking: Powers, Procedures and Assessment*, 19.1 *European Law Journal* (2013), 93; S. GRILLER, A. ORATOR, *Everything Under Control? The "Way Forward" for European Agencies in the Footsteps of the Meroni Doctrine*, 35.1 *European Law Review* (2010), 3; M. SCHOLTEN, M.V. RIJSBERGEN, *Limits of Agencification in the European Union*, 15 *German LJ* (2014), 1223; E. CHITI, *In the Aftermath of the Crisis–The EU Administrative System Between Impediments and Momentum*, 17 *Cambridge Yearbook of European Legal Studies* (2015), 311. With specific reference to ESMA, see C. DI NOIA, M. GARGANTINI, *Unleashing the European securities and markets authority: Governance and accountability after the ECJ decision on the short selling regulation (Case C-270/12)*, 15.1 *European Business Organization Law Review* (2014), 1; N. MOLONEY, *The European Securities and Markets Authority and Institutional Design for the EU Financial Market–A Tale of Two Competences: Part (1) Rule-Making*, 12.1 *European Business Organization Law Review* (2011), 41.

jectives of the supervisory activity. Indeed, "an effective system of banking supervision has clear responsibilities and objectives for each authority involved in the supervision of banks and banking groups". [17] In fact, the ECB is required to base its decisions [18] on the objectives set by the legislator, [19] which maintains control over its work; in other words, the supervisor "is accountable through a transparent framework for the discharge of its duties in relation to those objectives". [20]

Moreover, there are further *ex post* obligations for the ECB. In order to fill the so called "democratic deficit", *vis-à-vis* the institutions of the European Union – in fact, "the European Parliament and the Council as democratically legitimised institutions representing the citizens of the Union and the Member States" [21] – and national parliaments, [22] the ECB is obligated to report annually

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[17] BASEL COMMITTEE ON BANKING SUPERVISION, *Core Principles for Effective Banking Supervision*, Bank for International Settlement, September 2012, Principle 1: Responsibilities, objectives and powers.

[18] Art. 22, para. 2, co. 2, SSM Regulation and art. 33 Regulation (EU) No 468/2014 (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: hereinafter "SSM Framework Regulation").

[19] The ECB pursues the goals of contributing to (1) "the safety and soundness of credit institutions" and (2) "the stability of the financial system" – both within the Union and each Member State –, (3) "with full regard and duty of care for the unity and integrity of the internal market", and (4) with an "equal treatment of credit institutions" (art. 1 SSM Regulation). Other purposes are added to these: (5) "the protection of depositors"; (6) the improvement of "the functioning of the internal market"; (7) the respect of "the principles of equality and non-discrimination"; lastly, (7) "the conferral of supervisory tasks on the ECB should be consistent with the framework of the ESFS and its underlying objective to develop the single rulebook and enhance convergence of supervisory practices across the whole Union" (see recital no. 30 and 31 of the SSM Regulation).

[20] See BASEL COMMITTEE ON BANKING SUPERVISION, *Core Principles for Effective Banking Supervision*, Bank for International Settlement, September 2012, Principle 2: Independence, accountability, resourcing and legal protection for supervisors; in the same sense, INTERNATIONAL MONETARY FUND, *The Making of Good Supervision: Learning to Say "No"*, Monetary and Capital Markets Department, May 18, 2010, claims that "to balance independence, supervisory agencies should have to report to the public on their use of resources, key decisions, and as far as possible, the effectiveness of their supervision in relation to their supervisory objectives".

[21] Recital no. 55 of the SSM Regulation. Democratic accountability within the EU has been defined in art. 10 TEU: for an analysis of this aspect in relation to ECB's activity, see D. FROMAGE, *Guaranteeing the ECB's democratic accountability in the post-Banking Union era: An ever more difficult task?*, in *Maastricht Journal of European and Comparative Law* (2019), 1.

on its activities and to reply orally or in writing to questions put to it. In addition, the Chair of the Supervisory Board of the ECB may share information on the execution of the institution's supervisory tasks. Furthermore, it is possible to have access to the ECB's files.[23] Even if dictated with the main purpose of guaranteeing the independence of the ECB, the special discipline of removal of a member of the SSB can also contribute to the protection of rights, preventing, in the most serious cases, the spreading of situations detrimental to the Union; the Chair of the Supervisory Board can in fact be removed from his office only when she "no longer fulfils the conditions required for the performance of his duties or has been guilty of serious misconduct".[24]

However, there are reasons that raise the urgency of identifying a different approach. First, the current strategies could be inadequate to challenge the discretion, because they serve different functions – as already mentioned, the functions of filling the "democratic deficit" or of guaranteeing the independence of the ECB. Second, they do not ensure effective protection for the addressees of decisions. The supervisory objectives are general clauses – standards – characterized by vagueness[25] and lacking quantitative targets, making them much harder to measure than those of monetary policy.[26] The control of other institutions is typically influenced by political dynamics and could be limited when "confidential information" is involved.[27] In addition, removal of

[22] The involvement of national parliaments is furthermore justified "given the potential impact that supervisory measures may have on public finances, credit institutions, their customers and employees, and the markets in the participating Member States" (recital no. 56 of the SSM Regulation). On this topic, see G. TER KUILE, L. WISSINK, W. BOVENSCHEN, *Tailor-made accountability within the Single Supervisory Mechanism*, 52.1 *Common Market Law Review* (2015), 155.

[23] See art. 20 and 21 SSM Regulation.

[24] Art. 26, para. 4, SSM Regulation.

[25] The cost-benefit analysis and an in-depth description of the characteristics of the standards as opposed to the rules are a classic of the international literature: see, for all, L. KAPLOW, *Rules versus standards: An economic analysis*, 42 *Duke Lj* (1992), 557; K.M. SULLIVAN, *Foreword: The Justices of Rules and Standards*, 106 *Harv. L. Rev.* (1992), 22; and, lastly, C. R. SUNSTEIN, *Problems with Rules*, 83 *California LR* (1995), 953. More recently, see F. SCHAUER, *The Tyranny of Choice and the Rulification of Standards*, 14 *J. Contemp. Legal Issues* (2004), 803; and R.B. KOROBKIN, *Beahvioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 *Or. L. Rev.* (2000), 23.

[26] S. LAUTENSCHLÄGER, *Transparency and accountability in monetary policy and banking supervision*, in ECB LEGAL CONFERENCE, *Shaping a new legal order for Europe: a tale of crises and opportunities*, 4-5 September 2017, 25.

[27] See art. 22, para. 2, co. 2, SSM Regulation; indeed, in its annual report on the Banking

the Chair of the Supervisory Board is permitted only in exceptional circumstances.

From this point of view, it is easy to understand why the SSM Regulation is explicit in observing that "the right of the addressees of the ECB's decisions to be heard should be fully respected as well as their right to request a review of the decisions of the ECB according to the rules set out in this Regulation". [28]

3. *The problems inherent to the traditional forms of protection for the addressees of the authorities' decisions.*

A typical form of protection is the possibility of appealing to the Court of Justice of the European Union (hereinafter "CJEU").

In fact, the CJEU shall review the legality of acts of the European Central Bank, other than recommendations and opinions, intended to produce legal effects *vis-à-vis* third parties. [29] Specifically provided for the second pillar of the Banking Union, "proceedings for failure to act may be brought before the

Union, the EUROPEAN PARLIAMENT, *Resolution on Banking Union – Annual Report 2016* (2016/2247(INI)) (2018/C 252/17), February 15, 2017, "shares the opinion of the ECA that an audit gap has emerged since the establishment of the SSM; is concerned that owing to limitations imposed by the ECB on the ECA's access to documents, important areas are left unaudited; urges the ECB to fully cooperate with the ECA to enable it to exercise its mandate and thereby enhance accountability". In other words, access to relevant information is not straightforward: see, M.B. BEROŠ, *ECB's accountability within the SSM framework: Mind the (transparency) gap*, in *Maastricht Journal of European and Comparative Law* (2019), 1. In the sense that a clear accountability relationship also between the ECB and the national competent authorities (NCAs) should be required, A. KARAGIANNI, M. SCHOLTEN, *Accountability Gaps in the Single Supervisory Mechanism SSM Framework*, 34 *Utrecht J. Int'l & Eur. L.* (2018), 185.

[28] Recital no. 54, second part, of the SSM Regulation.

[29] See, in general, recital no. 60 and, with specific reference to authorisation by a judicial authority for the on-site inspections, art. 13, para. 2, SSM Regulation. On the division of competences between CJEU and national courts, with a specific study on the so called "Common procedures" between the ECB and the NCAs, see C. BRESCIA MORRA, *The Interplay between the ECB and NCAs in the "common procedures" under the SSM Regulation: are there gaps in legal protection?*, in QUADERNI DI RICERCA GIURIDICA DELLA BANCA D'ITALIA, 84 *Judicial review in the Banking Union and in the EU financial architecture* (2018), 79. See also AG Campos Sánchez-Bordona, 27 June 2018, *Silvio Berlusconi, Finanziaria d'investimento Fininvest SpA (Fininvest) v Banca d'Italia, Istituto per la Vigilanza Sulle Assicurazioni (IVASS)*, C-219/17, ECLI:EU:C:2018:502.

Court of Justice in accordance with Article 265 TFEU";[30] being a general principle, the provision is also extensible to the first pillar. Finally, the authorities are responsible for damage caused by themselves or by their members in the performance of their duties.[31]

However, these general rules find some limitations in the case of decisions with a high degree of technicality and for which the subject allows discretion. Nevertheless, according to settled jurisprudence, the Court has extended the perimeter of its judgment. In fact, even if the decision is the result of complex economic assessments, "not only must those Courts establish, among other things, whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it".[32]

In conclusion, the intensity of judicial review in the supervisory field does not depend on the topic, but on the scope of discretion granted by the legislator for challenging the decision and the complexity of the subject matter. The less discretion the ECB has (e.g. when it simply implements the law), the more intensive the Court's review will be; conversely, when the ECB's decision implies a complex technical assessment, the Court may choose to exercise some self-restraint with respect to any appraisal of the facts.[33]

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[30] Article 86 Regulation (Eu) No 806/2014 (Regulation (Eu) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010: so called "SRM Regulation").

[31] In addition to the general rule set out in Article 340 TFEU, for the ECB, see recital no. 61 of the SSM Regulation.

[32] More recently, see ECJ, 8 December 2011, *Chalkor AE Epexergasias Metallon v European Commission*, C-386/10 P, ECLI:EU:C:2011:815; and ECJ, 8 December 2011, *KME Germany AG, KME France SAS, KME Italy SpA v European Commission*, C-272/09 P, ECLI:EU:C:2011:810. See, also, ECJ, 22 November 2007, *Spain v Lenzing*, C-525/04, ECLI:EU:C:2007:698; and ECJ, 15 February 2005, *European Commission v Tetra Laval*, C-12/03, ECLI:EU:C:2005:87. In the context of a review by the Courts of the European Union of complex economic assessments made by the Commission in the field of State aid, stating also that "it is not for those Courts to substitute their own economic assessment for that of the Commission", see ECJ, 20 September 2017, *European Commission v Frucona Košice a.s.*, C-300/16, ECLI:EU:C:2017:706; and ECJ, 21 March 2013, *European Commission v Buczek Automotive*, C-405/11 P, ECLI:EU:C:2013:186.

[33] "In this way, by adapting the intensity of the judicial review to the scope of the discretion granted, the Court will respect independent policy choices while ensuring the appropriate judicial scrutiny that the democratic legal order requires": see C. ZILIOLI, *Justiciability of central*

Nevertheless, the protection of individuals who are affected by the decisions of the authorities presents structural problems. On the one hand, the existence of high transaction costs can make the use of this instrument inefficient (for example, the cost of lawyers and consultants could overcome the possible benefits). [34] Moreover, the delays that characterize the judicial process could cause a situation of unsustainable uncertainty for the banks, which would undermine their operations. [35] On the other hand, the deferential attitude by the Court that normally exists in cases assessing a complex economic situation reduces the chance of censorship of the authority's decision. In fact, the latter enjoys a wide measure of discretion; in such a context, the Court cannot substitute its assessment of scientific and technical facts for that of the authority on which the Treaty has placed that task. [36] As a consequence, "in reviewing the legality of the exercise of such discretion, the Court must confine itself to examining whether that exercise discloses manifest error, constitutes misuse of powers, or demonstrates a clear disregard of the limits of its discretion on the part of that institution". [37]

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banks' decisions and the imperative to respect fundamental rights, in ECB LEGAL CONFERENCE, *Shaping a new legal order for Europe: a tale of crises and opportunities*, 4-5 September 2017, 91.

[34] As noted, *ex multis*, by E. WYMEERSH, *Banking Union; Aspects of the Single Supervisory Mechanism and the Single Resolution Mechanism compared*, ECGI Working Paper Series in Law No. 290/2015, "a procedure before the CJEU is costly and burdensome".

[35] Moreover, in this regard the precautionary remedy does not seem to be an efficient solution to this problem.

[36] With specific reference to the legislative power, see Court of First Instance, 8 July 2010, *Afton Chemical Limited v Secretary of State for Transport*, C-343/09, ECLI:EU:C:2010:419. For more details on this topic, see A.H. TÜRK, *Oversight of Administrative Rulemaking: Judicial Review*, 19.1 *European Law Journal* (2013), 126 and more in depth A.H. TÜRK, *Judicial Review in EU Law*, Cheltenham, Elgar European Law series, 2010.

[37] *Ex multis*, ECJ, 19 July 2016, *Tadej Kotnik and Others v Državni zbor Republike Slovenije*, C-526/14, ECLI:EU:C:2016:570 and Court of First Instance, 17 October 2002, *Astipesca v Commission*, T-180/00, ECLI:EU:T:2002:249. For more details on this topic, see P. EECKHOUT, T. TRIDIMAS, 29 *Yearbook of European Law*, Oxford, Oxford University Press, 2010. This approach is confirmed by the European lawmaker, in a very close matter such as the one of bank crisis management: "crisis management measures taken by national resolution authorities may require complex economic assessments and a large margin of discretion … Therefore, it is important to ensure that the complex economic assessments made by national resolution authorities in that context are used as a basis by national courts when reviewing the crisis management measures concerned. However, the complex nature of those assessments should not prevent national courts from examining whether the evidence relied on by the resolution authority is factually accurate, reliable and consistent, whether that evidence contains all relevant

From this point of view, it seems reasonable to consider that appeal to the CJEU represents a tool for the protection of the addressees of the decisions especially as a limit to obvious cases of rule violations, thus casting some doubts on the effectiveness of protection in 'grey-area' cases.

4. *The Administrative Board of Review.*

As already stipulated in other sectors, [38] the European lawmaker has set up an Administrative Board of Review in order to "provide natural and legal persons with the possibility to request a review of decisions taken under the powers conferred on it by [the SSM Regulation] and addressed to them, or which are of direct and individual concern to them". [39] In any case, it is "without prejudice to the right to bring proceedings before the CJEU in accordance with the Treaties". [40]

The ABoR is composed of "five individuals of high repute, from Member States and having a proven record of relevant knowledge and professional experience, including supervisory experience, to a sufficiently high level in the fields of banking or other financial services". It "shall have sufficient resources and expertise to assess the exercise of the [supervisory] powers of the ECB" and it "shall decide on the basis of a majority of at least three of its five members". [41]

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information which should be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn therefrom" (recital no. 89 of the Directive 2014/59/EU establishing a framework for the recovery and resolution of credit institutions and investment firms: so called "BRRD").

[38] With specific reference to the Board of Appeal of the ESAs, see SIR W. BLAIR, G. CHENG, *The role of judicial review in the EU's financial architecture and the development of alternative remedies: The experience of the Board of Appeal of the European Supervisory Authorities*, in QUADERNI DI RICERCA GIURIDICA DELLA BANCA D'ITALIA, 84 *Judicial review in the Banking Union and in the EU financial architecture* (2018), 17. For an overview of other "review or appeal bodies", see A. MAGLIARI, *I rimedi amministrativi nel settore della vigilanza finanziaria europea. Modelli a confronto*, in *Riv. it. dir. pubbl. com.*, 2016, 1331; as well as P. CHIRULLI, L. DE LUCIA, *Specialised adjudication in EU administrative law: the boards of appeal of EU agencies*, 6 *European law review* (2015), 832.

[39] Recital n. 64 of the SSM Regulation. In the sense that it could be a useful tool, J.C. LAGUNA DE PAZ, *Administrative and judicial review of EU supervisory decisions in the banking sector*, 20.2 *Journal of Banking Regulation* (2019), 159.

[40] Art. 24, para. 11, SSM Regulation.

[41] Art. 24, para. 2 and 3, SSM Regulation.

The ABoR has to carry out "an internal administrative review of the decisions taken by the ECB," the scope of which "shall pertain to the procedural and substantive conformity with this Regulation of such decisions",[42] "while respecting the margin of discretion left to the ECB to decide on the opportunity to take those decisions".[43] Consequently, in addition to checking whether the relevant procedural rules were complied with and whether the facts on which the disputed decisions were based were accurately stated, the ABoR's review has been limited "to establishing whether the contested decision was impaired by a manifest error or misuse of powers and whether or not it clearly exceeded the bounds of the ECB's discretion".[44] Moreover, the review "shall be limited to examination of the grounds relied on by the applicant as set out in the notice of review",[45] without the possibility of further investigations or of taking *ex officio* evidence.[46]

"Any natural or legal person" may petition the ABoR to "request a review of a decision of the ECB … which is addressed to that person, or is of a direct and individual concern to that person",[47] using the modalities prescribed by the regulation,[48] except for cases involving a "decision of the Governing Council" as referred to in paragraph 7 of the article 24.[49]

Regarding the relevance of the ABoR's opinion, "the Supervisory Board shall take [it] into account … and shall promptly submit a new draft decision

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[42] Art. 24, para. 1, SSM Regulation.

[43] Recital n. 64, second part, of the SSM Regulation; art. 10, para. 1, Decision ECB/2014/16 concerning the establishment of an Administrative Board of Review and its Operating Rules (hereinafter "ECB Decision SSM").

[44] EUROPEAN CENTRAL BANK, *Annual Report on supervisory activities*, 2016. See, also, C. BRESCIA MORRA, R. SMITS, A. MAGLIARI, *The Administrative Board of Review of the European Central Bank: Experience After 2 Years*, 18.3 *European Business Organization Law Review* (2017), 567, and C. BRESCIA MORRA, (fn. 8).

[45] Art. 10, para. 2, ECB Decision SSM.

[46] This conclusion is also confirmed by L.S. MORAIS, L.T. FETEIRA, *Judicial Review and the Banking Resolution Regime. The evolving landscape and future prospects*, in QUADERNI DI RICERCA GIURIDICA DELLA BANCA D'ITALIA, 84 *Judicial review in the Banking Union and in the EU financial architecture* (2018), 53.

[47] Art. 24, para. 5, first part, SSM Regulation.

[48] Art. 24, para. 6, SSM Regulation. For further details, see K. LACKHOFF, M. MEISSNER, *Contesting decisions in the Single Supervisory Mechanism: what banks must observe for a proceeding at the Administrative Board of Review*, 30 *Journal of International Banking Law & Regulation* (2015), 285.

[49] Art. 24, para. 5, second part, SSM Regulation.

to the Governing Council. The new draft decision shall abrogate the initial decision, replace it with a decision of identical content, or replace it with an amended decision". [50] From this point of view, the non-binding nature of the ABoR's opinion could compromise its effectiveness, thus undermining the protection of the addressees of the ECB's decisions. This is compounded by the belief that the Supervisory Board is not obliged to state reasons if decides not to adapt the ABoR's opinion. [51] However, there are other enforcement strategies.

Indeed, if the opinion conflicts with the decision of the ECB, it is possible for the individual to appeal to the CJEU, bringing with them the support of the authoritative ABoR opinion. The ECB would then generally prefer to adapt to what is indicated rather than depart from it, which would risk resistance to a possible judgment necessarily influenced by the provisions of the ABoR. [52]

Conversely, if the opinion confirms the decision of the ECB, it seems rare that the person concerned would appeal to the CJEU to obtain a change in the decision. The authoritativeness (high repute, relevant knowledge and professional experience) [53] of the ABoR members and a "first degree" of judgment should be enough to satisfy the applicant's demands for justice. In any case, the awareness of the CJEU's deference towards decisions taken by authority with technical discretion (see *supra*, paragraph 3), more strongly marked by the presence of an opinion produced by independent experts (the members of the ABoR), dissuades the appellant, who considers acceptance of his appeal – and therefore a censure of the decision against him – highly unlikely.

The importance of the ABoR's opinion is further confirmed by the EU institutions. Indeed, the Court of Justice has recently highlighted its role in the decision-making process of the ECB. [54] Likewise, the European Commission,

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[50] Art. 24, para. 7, SSM Regulation; art. 16, para. 5, ECB Decision SSM.

[51] M. CLARICH, *Il riesame amministrativo delle decisioni della Banca Centrale Europea*, in S. CIVITARESE MATTEUCCI, L. TORCHIA (eds.), *La tecnificazione, A 150 anni dall'unificazione amministrativa italiana*, Firenze, Firenze University Press, 2017, 263.

[52] In this sense, C. BRESCIA MORRA, R. SMITS, A. MAGLIARI, (fn. 44), 567; C. BRESCIA MORRA (fn. 8); more recently, M. PERASSI, *Foreword*, in QUADERNI DI RICERCA GIURIDICA DELLA BANCA D'ITALIA, 84 *Judicial review in the Banking Union and in the EU financial architecture* (2018), 5.

[53] Recital n. 64 of the SSM Regulation; art. 24, para. 1, SSM Regulation.

[54] General Court of the European Union, 13 December 2017, *Crédit mutuel Arkéa v ECB*, T-712/15 and T-52/16, ECLI:EU:T:2017:900; General Court of the European Union, 16 May 2017, *Landeskreditbank Baden-Württemberg – Förderbank v ECB*, T-122/15, ECLI:EU:T:2017:337 (for further information, see R. D'AMBROSIO, M. LAMANDINI, *La «prima volta» del Tribunale*

in its report on the SSM, stated that the ABoR "is actively used by those concerned" and that the "ECB maintains that its opinions have had an influence in the ECB's supervisory practice broader than the individual cases to which they relate to". [55]

5. *The benefits of the new tool.*

The approach adopted by the legislator makes it possible to address the structural limitations highlighted above (see *supra*, paragraph 3).

The new system aims to reduce transaction costs associated with recourse to justice, [56] which is an explicit objective of the SSM Regulation. [57] In fact, compared to the CJEU, appeal to the ABoR is cheaper; except for "any disproportionate costs incurred by the applicant in submitting written or oral evidence and in respect of legal representation", indeed, "no cost shall be borne by the applicant in cases in which the Governing Council abrogates or amends the initial decision as a consequence of the notice of review". [58] Moreover, it takes place in a short time. The person requesting the review has to submit the request for review "within one month of the date of notification of the deci-

dell'Unione europea in materia di Meccanismo di Vigilanza Unico, 4 *Giur. Comm.* (2017), 594; F. ANNUNZIATA, *European Banking Supervision in the Age of the ECB. Landeskreditbank Baden-Württemberg-Förderbank v. ECB*, in *Bocconi Legal Studies Research Paper Series*, 2018, 1); see also R. SMITS, *Interplay of administrative review and judicial protection in European prudential supervision. Some issues and concerns*, in QUADERNI DI RICERCA GIURIDICA DELLA BANCA D'ITALIA, 84 *Judicial review in the Banking Union and in the EU financial architecture* (2018), 29.

[55] EUROPEAN COMMISSION, *Report from the Commission to the European Parliament and the Council on the Single Supervisory Mechanism established pursuant to Regulation (EU) No 1024/2013*, Brussels, 11.10.2017 COM(2017) 591 final.

[56] The topic is a classic of the debate on the Alternative Dispute Resolutions procedures (hereinafter "ADR"): for a comparison between the appeal to the ADR and the one to the court, without claiming to be complete, see R. DEVASAGAYAM, J. DEMARS, *Consumer Perceptions of Alternative Dispute Resolution Mechanisms in Financial Transactions*, 8.4 *Journal of Financial Services Marketing* (2004), 378 and S. SHAVELL, *Alternative dispute resolution: an economic analysis*, 24.1 *The Journal of Legal Studies* (1995), 1. Broadly, G. BOCCUZZI, *I sistemi alternativi di risoluzione delle controversie nel settore bancario e finanziario: un'analisi comparata*, in *Quaderni di Ricerca Giuridica della Banca d'Italia*, vol. 68, 2010, 7.

[57] "For reasons of procedural economy, the ECB should establish an administrative board of review to carry out such internal review" (Recital no. 64 of the SSM Regulation).

[58] Art. 21, para. 4, ECB Decision SSM. See also ECB Guide to the costs of the review, available at www.bankingsupervision.europa.eu.

sion to the person requesting the review, or, in the absence thereof, of the day on which it came to the knowledge of the latter as the case may be". The ABoR then expresses an opinion "within a period appropriate to the urgency of the matter and no later than two months from the receipt of the request". "The Supervisory Board", on its side, "shall promptly submit a new draft decision to the Governing Council" that "shall be deemed adopted unless the Governing Council objects within a maximum period of ten working days". [59]

In addition, it does not present the problems of deference typical of judgments against decisions of authorities with technical discretion because those who judge are experts in the subject; as it has been already described, the ABoR, indeed, "shall be composed of five individuals of high repute, from Member States and having a proven record of relevant knowledge and professional experience, including supervisory experience, to a sufficiently high level in the fields of banking or other financial services". [60] At the same time, the ABoR members must embody the traditional third-party position that characterizes judges. They must respect the independence requirement, to avoid a possible conflict of interests with the "belonging" authority. In addition to the fact that members "shall not be bound by any instructions", "current staff of the ECB, as well as current staff of competent authorities or other national or Union institutions, bodies, offices and agencies who are involved in the carrying out of the tasks conferred on the ECB" are excluded from being part of the ABoR. Moreover, the members of the ABoR "shall act independently and in the public interest. For that purpose, they shall make a public declaration of commitments and a public declaration of interests indicating any direct or indirect interest which might be considered prejudicial to their independence or the absence of any such interest". [61]

[59] Art. 24, para. 6 and 7, SSM Regulation.

[60] Art. 24, para. 2, SSM Regulation. As it has been pointed out, albeit with regard to the 'ECB's monetary policy, to the argument that the restriction of judicial control is correct due to the lack of knowledge and technical experience of the judges it is possible to oppose a counter-argument: "equip" the judges, i.e. create a special "specialized chamber", which can also improve the legal framework and accountability of the ECB. See R.M. LASTRA, C. GOODHART, *Populism and Central Bank Independence*, Discussion Paper Series, DP12122, Centre for Economic Policy Research, 2017. In a favourable sense, in the United States, the US Supreme Court Judge Stephen Breyer: see L. CAPLAN, *A Workable Democracy. The optimistic project of Justice Stephen Breyer*, 119.4 *Harvard Magazine* (2017), 48.

[61] Art. 24, para. 2 and 4, SSM Regulation.

6. *Practical implications and possible limits of the new system.*

The considerations carried out on the enforcement of the decisions adopted by the ABoR (see *supra*, paragraph 4) and the analysis of the first cases show, however, a different picture from the one conceived by the legislator – instead of a further instrument of protection, the introduction of the ABoR *de facto* risks to shift the protection from the jurisdictional to the administrative level.

In particular, from 2014 to 2019, there were 38 requests for re-examination, 2 of which resulted in an ECB decision being abrogated and replaced with new decisions after ABoR Opinion (whereas, only 9 resulted in an ECB decision being amended or its reasoning being improved). [62] Despite the difficulty of assessing the effectiveness of the ABoR's opinions (it is in fact impossible to distinguish between "decision amended" and "reasoning improved"), the ECB argued that the ABoR "continued to be effective in helping to reduce the cost and time of reviewing supervisory decisions for all parties involved" on the basis that "in most cases in 2017, applicants chose not to proceed with a judicial review following the review by the Administrative Board". [63] The reason is not difficult to find – an ABoR opinion contrary to the ECB decision increases the legal risk for the latter, in the same way an opinion confirming the choice of authority reduces its legal risk and increases that of the addressee, who is thus disincentivised to bring proceedings before the CJEU.

This does not pose a problem of compliance with the provisions of the Treaties. The new system, in fact, respects all of the jurisdictional protections, the addressee of the ECB's decisions being able to appeal the CJEU after the 'experts' opinion' regardless of the prior recourse to the board of review, since this appeal to the ABoR is not a condition of procedure before the CJEU. However, for a complete analysis of this instrument, it seems reasonable to observe that the new system substantially limits the protection of the decisions' addressee to the sole opinion of the ABoR.

From this point of view, the degree of protection the addressee receives in the current system depends to a large extent on the authoritativeness and substantial independence of the members of the ABoR, thus raising the urgency of protection verification. In fact, even if – as it has been said – there are several rules to guarantee the independence of the ABoR, it is also true that its

[62] EUROPEAN CENTRAL BANK, (fn. 13).

[63] EUROPEAN CENTRAL BANK, *Annual Report on supervisory activities*, 2017.

members "and two alternates [are] appointed by the ECB", [64] thus exacerbating the risk of a possible conflict of interest.

From another point of view, verification of the effectiveness of individual protection could also be important to avoid circumvention of the ABoR. If the addressee believes she is not receiving effective protection under the ABoR's decision, foreseeing a possible negative opinion (which, therefore, would increase her legal risk), she might decide to avoid this step and appeal directly to the Court of Justice. This conclusion would transform the ABoR review into a dead letter, frustrating the lawmaker's objective.

7. *A policy suggestion: the publication of ABoR's opinions.*

In order to solve this problem and promote ABoR accountability, the lawmaker has provided that "the new draft decision submitted by the Supervisory Board and the decision adopted by the Governing Council [of the ECB] shall be reasoned and notified to the parties". [65]

The fact that "the effectiveness of the recourse mechanism against decisions of the ECB" is the subject of a review report on the application of the SSM Regulation by the European Commission [66] also allows the interpreter to help improve the system through policy indications.

In this regard, requiring the ABoR to publish its decisions [67] (as it happens,

[64] Art. 24, para. 2, SSM Regulation.

[65] Art. 24, para. 9, SSM Regulation.

[66] Art. 32, para. 1, let. i), SSM Regulation.

[67] The publicity of the Board's decisions grounds also on other arguments: underlying the fact that "the Board's decisions do add value to the ECB's decisions" and, consequently, "it seems, in fact, plausible to argue that – where the completeness or soundness of the motivation of the ECB's decision must be assessed in Court – the decisions of the Board must, so to speak, come to light", see F. ANNUNZIATA, (fn. 54). In favour of this proposal, M. PERASSI, (fn. 52), 8 who states that "the administrative review regime sometimes shows margin for improvement: that is the case of further transparency for opinions of the Board of review of the European Central Bank"; more generally, in the sense that "it is necessary to give interested parties a voice before administrative authorities and to enhance contentious but administrative procedures through transparency, openness and impartiality", S. CASSESE, *A new framework of administrative arrangements for the protection of individual rights*, in ECB LEGAL CONFERENCE, *Shaping a new legal order for Europe: a tale of crises and opportunities*, 4-5 September 2017, 239. The suggestion also comes from the EUROPEAN COMMISSION, *Final report from the Commission to the European Parliament and the Council on the Single Supervisory Mechanism established pursuant to Regulation (EU) No 1024/2013*, Brussels, 11.10.2017 COM

for example, in Italy for the Arbitro bancario finanziario [68] and the Arbitro per le controversie finanziarie [69]) would increase both the protection for addressees of the ECB's decisions and the accountability of the Board, without entailing high additional costs. In fact, a public control (i.e. made by the "market") on what has been decided encourages the ABoR to operate correctly. [70] In addition, knowledge of prior decisions allows for better protection of subjects involved in future cases, possibly also before the Court of Justice, since they would have case law that they could use to their advantage. The publishing of decisions could also become a sort of 'guide' for intermediaries that want to prevent litigation.

At the same time, this regulatory strategy would allow the ABoR to reduce the discretion of the ECB, thus increasing legal certainty. Addressing specific cases, the ABoR could give opinions on particular situations. In this way, it would specify the legal rules that give the supervisory power to the ECB, ensuring that addressees of the ECB's decisions are more aware of how the standards that give the power to the authority should be interpreted. [71]

In this last sense, it is the system that would benefit from the proposal. The data collected so far (0.16% of the ECB's decisions are subject to review), in

(2017) 591 final, stating that "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".

[68] Arbitro Bancario Finanziario (ABF): The Banking and Financial Ombudsman is an out-of-court settlement scheme for disputes between customers and banks and other financial intermediaries, concerning banking and financial transactions and services. See more on www.arbitrobancariofinanziario.it.

[69] Arbitro per le controversie finanziarie (ACF): Established by Consob, it is a tool for resolving disputes between retail investors and intermediaries for the violation of the duties of care, correctness, information and transparency that intermediaries must respect when providing investment services or the collective asset management service. See more on www.acf.consob.it.

[70] Conversely, "as opinions are not published, it is not possible to offer a full evaluation of the work of the Administrative Board of Review": see, M. CLARICH, *The System of Administrative and Jurisdictional Guarantees Concerning the Decisions of the European Central Bank*, in M. CHITI, V. SANTORO (eds.), *The Palgrave Handbook of European Banking Union Law*, Cham, Palgrave Macmillan, 2019, 91.

[71] This role is typically interpreted by the Courts. In this very case, however, because "in most cases … applicants chose not to proceed with a judicial review following the review by the Administrative Board" (EUROPEAN CENTRAL BANK, *Annual Report on supervisory activities*, 2017), the CJEU is substantially 'disarmed': this consideration underlines the key role that the ABoR – and the publication of its decisions – could play.

fact, show a prudent use of appeal by the addressees; the interest in a good relationship with the supervisory authority – which, in any case, continues to carry out its supervisory tasks – makes it difficult to choose to request a review of its decision.[72] The knowledge of the 'jurisprudential' orientation (meaning both that of the internal Commission and that of the CJEU) could consequently support the choice of those who intend to proceed with the appeal, because the appellant has more elements to undertake the choice.

There is no shortage of tools to achieve this result. First, the Governing Council of the ECB could authorise "the President of the ECB to make the outcome of [the proceedings of the Administrative Board] public" (art. 22, para. 2, ECB Decision SSM). Furthermore, the ECB could amend the decision with which it has stipulated the Administrative Board of Review's operating rules, respecting the limits set by the legislator (on the point, see art. 24, para. 10, SSM Regulation). In addition, the Court of Justice could disclose the ABoR's previous opinion for an impending case. The Court might also include the existence of previous ABoR proceedings in the information it provides to the general public, even before the adoption of the judicial decision.[73]

Even if all these paths could be travelled, the last one appears to be the least effective; as noted above (see *supra*, paragraph 4), recourse to the CJEU after having carried out an internal review should be statistically improbable, *de facto* depriving positive effects of the proposed solution.

Nevertheless, the possible costs of this approach do not appear to exceed the benefits just mentioned. The privacy of the interested parties can be respected by omitting references to the persons while leaving the relevant facts. Alternatively, one could simply publish an extract or the principle of law, to reduce any reputational risk of the subject involved.

Another solution could be to change the subject that appoints the members of the ABoR – in fact, replacing the ECB with a third party allows to mitigate the possible conflict of interest. However, such a solution seems more drastic and therefore requires more vigorous political support.

8. *Conclusions.*

In one of its recitals the SSM Regulation stated that "the right of the addressees of the ECB's decisions to be heard should be fully respected as well

[72] Data collection and the observation is based on R. SMITS, (fn. 14), 32.

[73] For the details, see R. SMITS, (fn. 14).

as their right to request a review of the decisions of the ECB". [74]

From this point of view, the establishment of the ABoR is to be welcomed, as the benefits are not difficult to identify. ABoR review is cheaper than appealing to the CJEU, and the decision takes place in a shorter time. In addition to reasons of procedural economy, it should present fewer problems of deference when decisions by authorities with technical discretion are involved. In other words, it improves access to justice.

However, the consideration carried out on the enforcement of the decisions adopted by the ABoR suggests that instead of a further instrument of protection, the introduction of the ABoR either shifts the protection from the jurisdictional to the administrative level (if it is considered reliable), or risks to remain a dead letter (if it is considered unreliable).

Hence, the degree of protection the addressee of the ECB's decisions receives under the current system depends to a large extent on the authoritativeness and substantial independence of the members of the ABoR.

If one of the European Commission priorities is to evaluate "the effectiveness of the recourse mechanism against decisions of the ECB" [75] this paper is an attempt to contribute to the discussion, suggesting the publication of the ABoR's opinions.

[74] Recital no. 54, second part, of the SSM Regulation.

[75] Art. 32, para. 1, let. i), SSM Regulation.