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The model of the protection of rights concerning financial institutions and their clients in the field of the EU financial supervision¹

**Model ochrony praw instytucji finansowych i ich
klientów w zakresie europejskiego nadzoru finan-
sowego**

Streszczenie. Celem niniejszego artykułu jest omówienie unijnego systemu ochrony praw szeroko rozumianych instytucji finansowych, a także podmiotów korzystających z usług finansowych. Kompleksowe omówienia ochrony klienta znacznie przekroczyłyby ramy artykułu. Autorka odniesie się natomiast do dwóch kwestii: pierwsza to przyjęty w prawie unijny model weryfikacji decyzji podmiotów rynku finansowego, druga to pozycja normatywna Trybunału Sprawiedliwości UE w systemie prawa unijnego. Niezbędnym jest ukazanie relacji między

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Europejskimi Urzędami Nadzoru Finansowego a TSUE, a także dotychczasowej praktyki stosowania prawa w tytułowym zakresie.

Słowa kluczowe: Europejskie Urzędy Nadzoru Finansowego; decyzje; weryfikacja; Trybunał Sprawiedliwości Unii Europejskiej.

Abstract. The purpose of this article is to consider the EU system of protection of rights of a broadly understood financial institutions and users of financial services. A comprehensive description of client protection would considerably exceed the framework of this paper. Nevertheless, the author addresses two issues: firstly, a model of verification concerning financial market decisions, which was adopted by the EU and, secondly, a normative position of the Court of Justice of the European Union (CJEU) in the EU legal system. It essential to show a relationship between the European Supervisory Authorities and the CJEU, as well as the practice heretofore regarding an application of the law within the scope of this article.

Keywords: European Supervisory Authorities; decisions; verification; the Court of Justice of the European Union.

1. The concept of the European System of Financial Supervision

Establishing new supervisory structures with regard to the EU financial market was a response to the global financial crisis at the beginning of the 21st century. This response was mainly based on the recommendation by the European Council of June 2009 which indicated that the aim of this system should be the enhancing of the quality and coherence of national supervision, and the strengthening of the oversight of cross-border groups through establishing a European single rule book applicable to all financial market participants in the internal market. The European System of Financial Supervision has been operating since 1 January 2011. The main objective of the system is to ensure that financial sector regulations are adequately implemented and applied to preserve financial stability and to ensure confidence in the financial system as a whole and sufficient protection for the customers of financial services.

The European System of Financial Supervision shall consist of the following:

1. The European Systemic Risk Board (ESRB) headquartered in Frankfurt am Main²,
2. The European Supervisory Authorities (ESA):
 - the European Banking Authority (EBA) headquartered in London³,
 - the European Insurance and Occupational Pensions Authority (EIOPA) headquartered in Frankfurt am Main⁴,
 - the European Securities and Markets Authority (ESMA) headquartered in Paris⁵,
3. The Joint Committee,
4. The competent or supervisory authorities in the Member States as specified in the applicable Union acts⁶.

² Regulation (EU) No 1092/2010 of the European Parliament and of the Council of 24 November 2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board (OJ L 331, Dec. 12, 2010, p. 1). See: C. Borio, *Implementing a Macroprudential Framework: Blending Boldness and Realism*, Bank for International Settlements, 22 July 2010, p. 18, <https://www.bis.org/repofficepubl/hkimr201007.12c.pdf> (dostęp: 1.09.2017); C. Borio, *Towards a macroprudential framework for financial supervision and regulation?*, „CESifo Economic Studies” 2003, Vol. 49, No. 2, pp. 181–216.

³ Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC (OJ L 331, Dec. 15, 2010, p. 12).

⁴ Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC (OJ L 331, Dec. 15, 2010, p. 48).

⁵ Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC ((OJ L 33, Dec. 15, 2010, p. 84).

⁶ See: M. Fedorowicz, *Funkcje nowego europejskiego nadzoru finansowego ze szczególnym uwzględnieniem funkcji nadzorczych w sektorze bankowym*, „Kwartalnik Prawa Publicznego” 2010, No. 4, pp. 59–79; A. Jurkowska-Zeidler, *Zmiany w otoczeniu regulacyjnym rynku finansowego* [in:] Z. Ofiarski (ed.), *XXV lat przeobrażeń w prawie finansowym i prawie podatkowym – ocena dokonań i wnioski na przyszłość*, Szczecin 2014, p. 711 et seq.; A. Zalcewicz, *Zmiany struktury instytucjonalnej i koncepcji nad-*

In accordance with the provisions of Article 2, paragraph 3 of the ESA regulations⁷ the Authority shall cooperate regularly and closely with the ESRB as well as with the European Supervisory Authority (European Insurance and Occupational Pensions Authority) and the European Supervisory Authority (European Securities and Markets Authority) through the Joint Committee, ensuring cross-sectoral consistency of work and reaching joint positions in the area of supervision of financial conglomerates and on other cross-sectoral issues.

The particular ESA shall comprise the following: the Board of Supervisors, Management Board, Chairperson, Executive Director, and the Board of Appeal (Article 6 of the ESA regulations). Each of the ESAs shall be a Union body with legal personality. In Member States, the ESAs shall enjoy the most extensive legal capacity accorded to legal persons under national law. Each Authority shall be represented by its Chairperson (Article 5 of the ESA regulations). The scope of individual ESAs has been indicated in the regulations considering the sector-specific approach (Article 1, paragraph 2 of the ESA regulations).

The Authority shall have the powers set out in the ESA regulations, in particular to:

1. Develop draft regulatory technical standards,
2. Develop draft implementing technical standards,

zoru nad jednolitym rynkiem finansowym UE [in:] A. Dobaczewska, E. Juchniewicz, T. Sowiński (eds.), *System finansów publicznych. Prawo finansowe wobec wyzwań XXI w.*, Warsaw 2010, p. 300 et seq.

⁷ Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC (OJ L 331, Dec. 15, 2010, p. 12); Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC (OJ L 331 z 15.12.2010, p. 48). Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC ((OJ L 331, Dec. 15, 2010, p. 84).

Due to the same regulations on the subject matter, numbering of normative acts – hereinafter referred to as the ESA regulations.

3. Issue guidelines and recommendations,
4. Take individual decisions addressed to competent bodies,
5. In cases concerning directly applicable Union law, take individual decisions addressed to financial institutions,
6. Issue opinions to the European Parliament, the Council, or the Commission,
7. Collect the necessary information concerning financial institutions,
8. Develop common methodologies for assessing the effect of product characteristics and distribution processes on the financial position of institutions and on consumer protection,
9. Provide a centrally accessible database of registered financial institutions in the area of its competence.

With regard to the verification of supervisory decisions, it is about the acts (including decisions issued) and omissions. The Board of Supervisors shall comprise the following:

- the head of the national public authority competent for the supervision of credit institutions in each Member State, who shall meet in person at least twice a year,
- and – without the right to vote:
 - the Chairperson,
 - one representative of the Commission,
 - one representative of the ESRB,
 - one representative of each of the other two European Supervisory Authorities,
- in case of EBA – also one representative of the European Central Bank.

2. Prerequisites to issue decisions

Pursuant to the ESA regulations, decisions shall be adopted in the following situations:

- a breach of Union law (Article 17 of the ESA regulations)
- an action in emergency situations (Article 18 of the ESA regulations)

- a settlement of disagreements between competent authorities in cross-border situations (Article 19 of the ESA regulations)
- a decision adopted by the Authority in accordance with the scope of its competence, and
- a decision which, although in the form of a decision addressed to another person, is of direct and individual concern to that person.

Before taking the decisions provided for in this Regulation, the Authority shall inform any named addressee of its intention to adopt the decision, setting a time limit within which the addressee may express its views on the matter, taking full account of the urgency, complexity, and potential consequences of the matter. This applies *mutatis mutandis* to recommendations specifying the measures required to ensure observance of EU law⁸. The decisions of the Authority shall state the reasons on which they are based, and the addressees of decisions of the Authority shall be informed of the legal remedies available under this Regulation (Article 39, paragraph 1 – 3 of the ESA regulations).

There is no doubt about the fact that the criterion of verification used by the court with regard to adopting a decision is the criterion of legality (compliance with law). The ESAs shall however implement specific tasks within the protection of financial market stability. Pursuant to recital 11 of the Preamble to the ESA regulations “The Authority should protect public values such as the stability of the financial system, the transparency of markets and financial products, and the protection of depositors and investors”. Thus the question arises of whether the criterion of relevance should not be taken into account. Indicating financial market stability as one of the most important assets to be protected makes one opt for the opinion that the criterion of relevance turns out to be necessary as a natural consequence of the EU stability interest⁹.

⁸ See Article 17, paragraph 3 of the ESA regulations.

⁹ M. Fedorowicz, *Nadzór nad rynkiem finansowym Unii Europejskiej*, Warsaw 2013, p. 426.

3. An appeal against the decision of the ESA (before lodging a complaint to the CJEU)

An appeal against a decision of the Authority referred to in Articles 17, 18, and 19 may be lodged by any natural or legal person, including competent authorities, and against any other decision taken by the Authority in accordance with the Union acts referred to in Article 1(2) which is addressed to that person, or against a decision which, although in the form of a decision addressed to another person, is of direct and individual concern to that person.

The appeal, together with a statement of grounds, shall be filed in writing at the Authority within 2 months of the date of notification of the decision to the person concerned, or, in the absence of a notification, of the day on which the Authority published its decision. The Board of Appeal shall decide upon the appeal within 2 months after the appeal has been lodged.

An appeal along with justification against the decision shall be filed in writing through the ESA which filed the decision within two months of the notification of the decision to the person concerned or, in the absence thereof, of the date of publishing the decision by the Authority. The appeal shall be examined by the Board of Appeal being a joint body of the EUNF (Article 58, paragraph 1 of the ESA regulations). With the foundation of the concept of the Board of Appeal it was assumed that this Authority should be a joint body to all three ESAs, but that it should be independent of their administrative and regulatory structures¹⁰. This was expected to contribute to the efficiency and coherence of the Authority's settlements.

The Board of Appeal, a joint body to the three ESAs, shall be composed of six members and six alternates, who shall be individuals of high repute with a proven record of relevant knowledge and professional experience on a sufficiently high level in the field of supervision, banking, insurance, occupational retirement schemes, securities markets, or other

¹⁰ Recital 58 in the preamble to the ESA regulations.

financial services¹¹. The Board of Appeal designates its President. The term of office of the members of the Board of Appeal shall be five years. This term may be extended once (Article 58, paragraph 4 of the ESA regulations).

The decisions of the Board of Appeal shall be adopted on the basis of a majority of at least four of its six members. Where the appealed decision falls within the scope of this Regulation, this majority of four members shall include at least one of the two members of the Board of Appeal appointed by the Authority (Article 58, paragraph 6 of the ESA regulations).

The Board of Appeal may confirm the decision taken by the competent body of the Authority, or remit the case to the competent body of the Authority. That body shall be bound by the decision of the Board of Appeal and that body shall adopt an amended decision regarding the case concerned (Paragraph 5). The Board of Appeal shall adopt and make public its rules of procedure. The decisions taken by the Board of Appeal shall be reasoned and shall be made public by the Authority.

Undeniably, potentially the biggest field of cooperation between the ESAs and national supervisors includes the cases where there is the power to adopt individual decisions for the ESAs, pursuant to the disposition of Article 17, 18 and 19 of the ESA regulations¹². In accordance with the disposition of Article 60, paragraph 1 of the ESA regulations, any natural or legal person, including competent authorities, may appeal against a decision of the Authority, which, although in the form of a decision addressed to another person, is of direct and individual concern to that person. This is about an individual decision which may oblige a concrete entity to take actions required to carry out the obligations under that legislation, including the cessation of a defined practice. It should be emphasized that this also includes intervention decisions and thus decisions

¹¹ The Board of Appeal shall not be composed of staff of national supervisory bodies or other domestic or Union institutions involved in the ESA activities.

¹² M. Fedorowicz, *Współpraca między Europejskimi Urzędami Nadzoru Finansowego a Komisją Nadzoru Finansowego w zakresie nadzoru nad rynkiem finansowym w UE* [in:] E. Fojcik-Mastalska, E. Rutkowska-Tomaszewska (eds.), *Nadzór nad rynkiem finansowym. Aktualne tendencje i problemy dyskusyjne*, „Studia Finansowopravne” 2011, No. 1, p. 41.

within awarding licences, decisions on imposing financial penalties and fines, and decisions on the amount of registration fees¹³.

As the CJEU highlighted, the ESA decision, in order to be referred to the Board of Appeal, should be either one of the decisions specified in Articles 17–19 of the ESA regulations or a decision which has been adopted in accordance with the acts of the Union, referred to in Article 1, paragraph 2 of the ESA regulations, i.e. within the scope in which the acts of EU law apply to broadly comprehended financial institutions including directives, regulations, and decisions adopted under these acts as well as any future legally binding Union acts conferring tasks on the Authority¹⁴.

An appeal shall not have suspensive effect. However, the Board of Appeal may, if it considers that circumstances so require, suspend the application of the contested decision.

An area of potential doubts should be emphasized here, namely, determining what decision is referred to in Article 60 of the ESA regulations. Is this about a decision in its strict sense or a wide range of this term, and thus each action? As regards the second meaning, a decision would also need to cover quasi-normative results of ESA activities such as soft law – inherent and non-binding acts of the ESA¹⁵. It should be pointed out however that the term „act” used in Article 263, subparagraph 4 (first condition of the reservation) covers all the measures which produce any binding effects for an individual and thus, due to interference into the applicant’s legal condition, may affect its interests through a significant change of its legal condition. It appears to be important that these measures shall not meet the criteria of general regulation providing them with the character of a normative act¹⁶.

¹³ Article 9, paragraph 5 of the ESA regulations.

¹⁴ Judgment of the CJEU (first chamber) of 14 December 2016, *SV Capital*, ECLI:EU:C:2016:947, Item 34 and 35.

¹⁵ M. Fedorowicz, *Nadzór nad rynkiem ...*, p. 438.

¹⁶ K. Scheuring, *Commentary to the Article 263 TFUE*, [in:] A. Wróbel, D. Kornobis-Romanowska, J. Łacny (eds.), *Traktat o funkcjonowaniu Unii Europejskiej. Komentarz. Tom III (art. 223–358)*, Warszawa 2012, s. 312 and cited *T-324/02 McAuley v. Council*, point 28.

At the first stage, the Board of Appeal shall examine whether the appeal is admissible in the formal-legal aspect. This is followed by examining the justifiability of the appeal. In addition, the complainant shall be entitled to submit observations, within a specified deadline, with regard to its own communications or communications from other parties to the appeal proceedings. Parties to the appeal proceedings shall be entitled to make an oral presentation of their viewpoint. A written form is recommended for evidence reasons. The conclusion of the Board of Appeal may adopt two different approaches: to uphold a decision taken by the competent body of the Authority or to remit the case to the competent body of the ESAs. The decision of the Board of Appeal shall be binding for this supervisory authority and shall not have suspensive effect. Consequently, the supervisory authority is obliged to adopt an amended decision regarding the case concerned (Article 60, paragraph 5 of the ESA regulations).

Subsequent doubts may arise during the qualification stage concerning the decision with regard to “direct and individual concern”. Attention should be paid to the CJEU’s position according to which the act applies directly to the applicant, if the entity proves that it is a direct cause of the change in the legal status of the entity, i.e. produces legal effects for the entity without using any other measure¹⁷. Moreover, as indicated in the reference literature, the scope of Article 263 of the CJEU has been determined quite extensively: only European secondary law instruments are subject to judicial review in this mode. European secondary law instruments, including the provisions of the reform and accession treaties shall not comprise the subject of the complaint¹⁸.

¹⁷ 41-44/70 *International Fruit Company v. Commission*, Item 16–18.

¹⁸ K. Scheuring, *Commentary to Article 263 of the TFUE...*; 31/86, 35/86 LAISA p. Council, Item 6; R. Bieber, *Les limites matérielles et formelles à la révision des traités établissant la Communauté européenne*, “Revue du Marché Commun et de l’Union européenne” 1993, p. 343.

4. Actions before the Court of Justice of the European Union

The judicial protection system in union matters shall be established by the CJEU. The term of the Court of Justice of the European Union shall cover the Court of Justice, the court and specialist courts.

The Court of Justice of the European Union (CJEU) interprets EU law to make sure it is applied in the same way in all EU countries, and settles legal disputes between national governments and EU institutions. It can also, in certain circumstances, be used by individuals, companies or organisations to take action against an EU institution, if they feel it has somehow infringed their rights. As part of its mission, the Court of Justice of the European Union:

- reviews the legality of the acts of the institutions of the European Union,
- ensures that the Member States comply with obligations under the Treaties, and
- interprets European Union law at the request of the national courts and tribunals.

Proceedings may be brought before the Court of Justice of the European Union, in accordance with Article 263 TFEU¹⁹, contesting a decision taken by the Board of Appeal or, in cases where there is no right of appeal before the Board of Appeal, by the Authority (Article 61. 1 of the ESA regulations). Also (as a direct contestation to the CJEU) in accordance with Article 263 TFEU, of the decision taken by the Authority, which can be adopted by Member States and the Union institutions, as well as any natural or legal person (Article 61, paragraph 2 of the ESA regulations). This power is conferred to national supervisory authorities and supervised entities, including the broadly comprehended financial institutions.

In the event that the Authority has an obligation to act and fails to take a decision, proceedings for failure to act may be brought before the Court of Justice of the European Union in accordance with Article 265

¹⁹ The Treaty on the Functioning of the European Union, consolidated version – OJ C 326, of 26.10.2012, p. 47 et seq.

TFEU. The Authority shall be required to take the necessary measures to comply with the judgment of the Court of Justice of the European Union.

According to the recital 58 in the preamble to the ESA regulations: “It is necessary to ensure that the parties affected by decisions adopted by the Authority may have recourse to the necessary remedies. To protect effectively the rights of parties, and for reasons of procedural economy, where the Authority has decision-making powers, parties should be granted the right of appeal to a Board of Appeal. For reasons of efficiency and consistency, the Board of Appeal should be a joint body of the ESAs, independent from their administrative and regulatory structures. The decisions of the Board of Appeal should be subject to appeal before the Court of Justice of the European Union”. Therefore, an entity shall be entitled to appeal against a decision which adversely affects that entity.

In accordance with the general principles (Article 6 of the TFEU), there can be identified two layers concerning the protection of individuals’ rights:

- the Union layer: based on the Charter of Fundamental Rights and the General Principle,
- the European layer: through EU accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950, OJ of 1993, No. 61, Item 284).

The Union legislator has intended the possibility of lodging an appeal against a decision within financial supervision to the Board of Appeal, then to the Court of Justice of the European Union²⁰. The protection of rights is meeting here the right to good administration, for example, in the form of the Charter of Fundamental Rights (the CFR). It should be pointed out that the provision of Article 41 of the CFR has been significantly developed in *the European Code of Good Behaviour*. Secondly, the Court of Justice of the European Union “shall ensure respect for the law in the interpretation and applications of treaties” (Art. 19, paragraph 1, sentence 2 of the ESA regulations). The main function of the CJEU is to ensure the uniform interpretation of EU law in all Member States as well as

²⁰ Recital 58 in the preamble to the ESAs regulations.

the observance of EU law by EU countries and institutions. The Court of Justice declares the Union acts void indirectly or declares that there has been

a failure to act, in which case the institution at fault is required to take the necessary measures to comply with the Court's judgment (Article 266 TFEU).

In the first case, this is about prejudicial questions while in the second one about direct appeal referred to in Article 263 of the TFEU.

The principle of double instance provides a party's right to examine and settle the matter twice²¹.

Therefore, an appeal may be lodged to the CJEU in the following cases:

- against a decision adopted by the Board of Appeal,
- if a party is not entitled to appeal to the Board of Appeal – against the decision taken by the ESA,
- according to Article 263 of the TFEU (Art. 61, paragraph 1 of the ESA regulations),
- if the EFSA shall take a decision but fails to act, proceedings for failure to act may be brought (Art. 265 of the TFEU, Art. 61, paragraph 3 of the ESA regulations),
- proceedings concerning an action for damages for an unlawful decision taken by the Union legislator (Art. 340 of the TFEU).

The essence of the right to a trial in matters resulting from public administration activity is the possibility of initiating proceedings before the court, granted to the addressee of an act or of a decision within public administration, to verify the activity of public administration in terms of compliance with the law²². If the ESA shall take a decision, but fails to act, proceedings for failure to act may be brought in accordance with Art. 265 of the TFEU before the CJEU (Art. 61, paragraph 3 of the ESA regulations). The Union legislator has obliged the Authorities to adopt neces-

²¹ W. Sawczyn, *Związanie kasacyjnym orzeczeniem Naczelnego Sądu Administracyjnego*, Warsaw 2014, p. 28.

²² M. Wiącek, *Komentarz do art. 175–187* [in:] M. Safjan, L. Bosek (eds.), *Konstytucja. Komentarz, t. II*, Warsaw 2016, p. 1093.

sary measures in order to comply with the judgment of the CJEU (Art. 61, paragraph 4 of the ESA regulations). If the national supervisory authority fails to comply with the judgment before the CJEU, proceedings for breach of treaty obligations may be brought, concerning a complaint about declaring the Union acts on financial markets void, including binding *technical standards* and about the Union institution's failure to act.

Moreover, proceedings may be initiated in the Court of Justice of the European Union concerning an action for damages for an unlawful decision taken by the Union legislator in accordance with Article 340 of the TFEU and appeal proceedings on the decision adopted by the ESA.

If a party is not satisfied with the decision of the Board of Appeal, it may take action before the EU court. It should be emphasized that the Court of the European Union shall in the first place raise, *ex officio*, the issue of the jurisdiction of the authority whose act has been contested before the Court, even if neither of the parties has taken such an action. The absence of competence of the Authority adopting an adverse measure shall be a definite procedural obstacle which not only may, but should be raised *ex officio*²³. In accordance with the case-law of the Court of Justice, the issue of jurisdiction of the authority adopting a measure shall be examined by the court of its own motion, even if neither of the parties has taken such an action²⁴.

Lack of clear and adequate legal regulations within admissibility should be taken into account as well. One of the key questions is whether clients or the financial institution itself may bring a claim against the ESA under allegations of failure to act in the situation, where the Authority is supposed to adopt a decision. One may also question whether the national supervisory authority's responsibility can be considered along with the ESA's responsibility.

²³ Judgment of the CJEU (First Chamber) of 14 December 2016, SV Capital, ECLI:EU:C:2016:947, Item 32.

²⁴ Similar judgments: of 30 September 1982, *Amylum v. Council*, 108/81, EU:C:1982:322, Item 28; and of 13 July 2000, *Salzgitter/Commission*, C-210/98 P, EU:C:2000:397, Item 56 and the case-law cited.

Furthermore, only in the case of the European Securities and Markets Authority, the competence of the Court of Justice of the European Union has been additionally extended to jurisdiction in respect of appealing against these decisions, which may include cancellation, decreasing, or increasing of an imposed fine or periodic penalty payment.

5. Proceedings pursuant to Art. 265 of the TFEU

In accordance with the amended Article 51 in connection with Art. 54 of the statute of the Court of Justice, the Court of Justice, as a rule, shall have exclusive competence to consider actions brought under Article 265 by EU institutions and Member States (except as permitted by Art. 51, subparagraph 1, letter a of the statute of the Court of Justice and jurisdiction of this Court specified in Art. 51, subparagraph 1, letter b of the statute of the Court of Justice). The Court shall have exclusive competence to consider actions brought under Article 265 by any private entities. If an application or other procedural document addressed to the General Court is lodged by mistake with the Registrar of the Court of Justice, it shall be immediately transmitted to the Registrar of the General Court. Likewise, if an application or other procedural document addressed to the Court of Justice is lodged by mistake with the Registrar of the General Court, it shall be immediately transmitted to the Registrar of the Court of Justice. When the General Court finds it does not have jurisdiction to hear and determine an action in respect of which the Court of Justice has jurisdiction, it shall refer that action to the Court of Justice. When the Court of Justice finds that the action is within jurisdiction of the General Court, it shall refer it to the General Court which may not decline jurisdiction²⁵.

²⁵ K. Scheuring, *Commentary to the Article 265 TFEU* [in:] A. Wróbel, D. Kornobis-Romanowska, J. Łacny (eds.), *Traktat o funkcjonowaniu Unii Europejskiej. Komentarz...*, s. 355.

6. Case-law conclusions

The case of *SV Capital v EBA* illustrates the practical application of the procedures discussed herein²⁶. This matter was not considered by the Court of Justice of the European Union *ad meritum*. With regard to the adopted decision, the following should be taken into account:

1. The need to raise by the Union Court, *ex officio*, the question of jurisdiction of the authority whose act has been contested before it, even if neither of the parties has taken such an action, as the absence of competence of the Authority adopting an adverse measure shall be a definite procedural obstacle which not only may, but should be raised *ex officio*. In accordance with the case-law of the Court of Justice, the issue of the jurisdiction of the authority adopting a measure shall be examined by the General Court of its own motion, even if neither of the parties has taken such an action²⁷.
2. The Court of Justice of the European Union has found that in order to appeal to the Board of Appeal against a decision of the ESA, it must be either one of the decisions referred to in Art. 17–19 of the ESA regulations or a decision adopted in accordance with the Union acts mentioned in Art. 1, paragraph 2 of the ESA regulations.
3. The Court maintained its view that the “time-limit for lodging an appeal is absolutely binding and the Union Court shall on its own motion verify if that time – limit has been met”²⁸. Besides, the application of the Union regulations concerning procedural deadlines can be derogated from only in absolutely exceptional circumstances, where circumstances are either unforeseeable, or amount to force majeure pursuant to Art. 45, second sub-paragraph of the statute of the Court of Justice of the European Union, because strict application of

²⁶ See the judgment of the CJEU (First Chamber) of 14 December 2016, *SV Capital*, ECLI:EU:C:2016:947.

²⁷ See similar decisions: of 30 September 1982, *Amylum v. Council*, 108/81, EU:C:1982:322, Item 28; and of 13 July 2000, *Salzgitter v. Commission*, C-210/98 P, EU:C:2000:397, Item 56 and the case-law cited.

²⁸ See the Decision of 5 September 2013, *ClientEarth v. Council*, C-573/11 P, not published, EU:C:2013:564, Item 20 and the case-law cited.

these standards complies with the requirements of legal certainty and the need to prevent any discrimination or arbitrary treatment in the justice system²⁹.

4. With regard to formal requirements, the Court of Justice of the European Union rightly pointed out that an appeal must specify in detail the questionable parts of the contested judgment and arguments in support of the actions to have the judgment under appeal contested or else an appeal or its allegation shall be deemed unacceptable³⁰.

7. Conclusion

When establishing the European System of Financial Supervision, the Union legislator addressed incredibly difficult, but unavoidable needed, challenges. The studies conducted for the purpose of this paper lead to the conclusion that there are no regulations concerning the jurisdiction of the Court of Justice of the European Union within the scope of the ESA matters as illustrated in the primary legislation of the EU in relation to the European Central Bank. Within the scope of this study, certain doubts have arisen with regard to the procedure before the Board of Appeal. The first experiences of the verification of decisions adopted by the ESAs suggest that the Court of Justice of the European Union has not examined the matter substantively so far. It has referred only to procedural issues.

Therefore, a certain doubt should be stressed here as to whether the Court of Justice of the European Union will only verify, as with respect to the European Central Bank, if the procedure laid down in the ESA regulations has been followed. Or can the CJEU conduct a substantive verification with regard to the court examination of the ESA decision? It seems that the CJEU will act according to the first method.

²⁹ Decision of 16 November 2010, *Internationale Fruchtimport Gesellschaft Weichert v. Commission*, C-73/10 P, EU:C:2010:684, Item 41 and the case-law cited.

³⁰ See: Judgment of 10 July 2014, *Telefónica & Telefónica de España v. Commission*, C-295/12 P, EU:C:2014:2062, Item 29; and the Decision of 12 February 2015, *Meister v. Commission*, C-327/14 P, not published, EU:C:2015:99, Item 12.

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