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Quo vadis, Boards of Appeal?

The Evolution of EU Agencies' Boards of Appeal and the Future of the EU System of Judicial Protection

EDITED BY JACOPO ALBERTI

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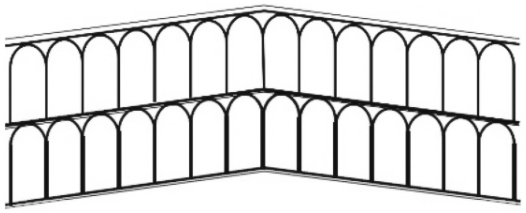
EDITED BY MASSIMO CONDINANZI AND CHIARA AMALFITANO



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Special Volume

Quo vadis, Boards of Appeal?
The Evolution of EU Agencies' Boards of Appeal and the Future of the EU System of Judicial Protection

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of the Jean Monnet Module on EU Specialized Judicial Protection
held at the University of Ferrara on February 8th and 9th 2024

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EDITOR-IN-CHIEF
Massimo Condinanzi

EDITORIAL COMMITTEE
Via Festa del Perdono, 7 – 20122 Milan
redazione@europeanlitigation.eu
direttivo@europeanlitigation.eu
www.europeanlitigation.eu

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TABLE OF CONTENTS

INTRODUCTION

p.

J. ALBERTI, *A Call for a New Approach in the Study (and Management) of EU Agencies' Boards of Appeal*..... **1**

PART I
HORIZONTAL STUDIES ON EU AGENCIES' BOARDS OF APPEAL

p.

C. BURELLI, *Private Applicants' Locus Standi Before the Boards of Appeal*..... **17**

I. ANRÒ, *Third Parties Intervention Before the Boards of Appeal*..... **49**

G. AGRATI, *Procedural Guarantees in the Litigation Before the Boards of Appeal*..... **65**

M. ORZAN, *Interim Measures Adopted by the Boards of Appeal*..... **83**

S. OOSTERHUIS, *More than EU Courts, Less than EU Agencies: Intensifying the Boards of Appeal's Standard of Review After* Aquind..... **105**

R. TORRESAN, *Filtering the Appeals over Decisions Originally Taken by the Boards of Appeal: Rationale, Impact and Possible Evolution of Article 58a of CJEU Statute*..... **129**

P. G. SILVESTRI, *The Activity of EU Agencies' Boards of Appeal and Their Impact on the Judicial System: an Empirical Research*..... **161**

PART II
BOARDS OF APPEAL, STANDARD OF REVIEW AND THE RIGHT TO AN EFFECTIVE JUDICIAL PROTECTION

p.

G. HUMPHREYS, *Standard of Review and the Right to an Effective Judicial Protection: a Reflection From the EUIPO's Perspective*..... **185**

M. NAVIN-JONES, *Ramifications of the* Aquind *Judgements for 'non-permanent' Boards of Appeal*…….. **197**

M. SANCHEZ RYDELSKI, *The* Aquind *Judgements and Their Impact on the Work of the EASA Board of Appeal*..... **209**

A. BUCHET, *The Board of Appeal of the European Chemicals Agency. Structure and Power of Review*..... **221**

M. PREK, *Selected Contemporary Questions from the Activities of the ACER Board of Appeal*..... **239**

M. SIRI, *Hard Questions, Short Time: Who is Brave Enough to Sit in a Board of Appeal?*..... **251**

M. LAMANDINI, D. RAMOS MUÑOZ, Aquind *and the Standard of Review of the ESAs Joint Board of Appeal and the SRB Appeal Panel*..... **261**

M. VERSLYPE, *The Scrutiny Performed by the ERA Board of Appeal: Some General and Operational Remarks Waiting for a Settled Practice*..... **275**

PART III
EU AGENCIES' BOARDS OF APPEAL AND THE FUTURE OF THE EU SYSTEM OF JUDICIAL PROTECTION

p.

T. LUKÁCSI, *EU Agencies' Boards of Appeal and the Future of the EU System of Judicial Protection. A Perspective from the European Parliament*..... **283**

C. ZADRA, *Possible Future Developments of the Legal Framework of the Boards of Appeal: a Short Analysis From the Perspective of the Council of the European Union*..... **293**

P. STANCANELLI, A. MENÉNDEZ FERNÁNDEZ, *Role and Perspectives of the Boards of Appeals of EU Agencies in the Light of the Reform of the Statue of the Court of Justice*..... **305**

CONCLUDING REMARKS

p.

J. ALBERTI, *EU Agencies' Boards of Appeal:* victimes de leur succès?..... **323**

INTRODUCTION

A CALL FOR A NEW APPROACH IN THE STUDY (AND MANAGEMENT) OF EU AGENCIES' BOARDS OF APPEAL

Verso un nuovo approccio allo studio (e alla gestione) delle commissioni di ricorso delle agenzie dell'Unione europea

Un appel pour une nouvelle approche dans l'étude (et la gestion) des chambres de recours des agences de l'Union européenne

JACOPO ALBERTI*

TABLE OF CONTENTS: 1. Introduction. – 2. The age of maturity of EU Agencies' Boards of Appeal. – 3. The lack of a political vision as to the future of EU Agencies' Boards of Appeal. – 4. Taking the 'quasi-judicial' dimension seriously. – 5. An overview of the Volume. – 6. Caveats and methodology.

1. Introduction

Since their establishment more than 30 years ago, EU Agencies' Boards of Appeal have attracted growing attention in legal and, to a lesser extent, political debates.

As happens when new kids come on the block, the Boards of Appeal were first studied individually, in a very sector-based approach[1], by

* Associate Professor of EU Law at the University of Ferrara and Coordinator of the Jean Monnet Module *EU Specialized Judicial Protection*.

[1] See, *ex multis* and in addition to the Authors mentioned in the footnotes below, E. GASTINEL, *Community Trade Mark and the OHIM Boards of Appeal*, in *European business law review*, 1998, p. 176; D. T. KEELING, *The decisions of the OHIM Boards of Appeal*, in *Revue des Affaires Européennes*, 1998, p. 360; A. VON MÜHLENDAHL, *The Office for Harmonization in the internal market and its boards of appeal: registrability of Community trade marks*, in *Intellectuele Eigendom & Reclamerecht*, 1999, p. 95; T. MARGELLOS, *La pratique du règlement négocié auprès des Chambres de recours de l'Office de l'Harmonisation dans le Marché Intérieur*, in *Revue des Affaires Européennes*, 2013, p. 299; D. THOMAS, *European Chemical Agency Board of Appeal decisions in Honeywell and Dow Chemicals*, in *Maastricht journal of European and comparative law*, 2013, p. 609; M. CLARICH, *Il riesame amministrativo delle decisioni della BCE*, in *Rivista Italiana di Diritto Pubblico Comunitario*, 2015, p. 1513; M. NAVIN-JONES, *A legal review of EU boards of appeal in particular the European Chemicals Agency Board of Appeal*, in *European Public Law*, 2015, p.

scholars addressing their peculiarities and their powers. Studies have since also covered them as a group, so as to assess their differences and similarities[2] and to identify their nature, also by looking at the experience of their national counterparts[3]. At a managerial level, the sector-based

143-168; L. BOLZONELLO, *Independent administrative review within the structure of remedies under the treaties : the case of the Board of Appeal of the European Chemicals Agency*, in *European Public Law*, 2016, p. 569-581; C. BRESCIA MORRA, *The Administrative and Judicial Review of Decisions of the ECB in the Supervisory Field*, in *Quaderni di Banca d'Italia*, n. 81, 2016; A. CASSATELLA, *Il ricorso dinanzi all'agenzia europea per la sicurezza aerea*, in *Rivista Italiana di Diritto Pubblico Comunitario*, 2016, p. 1373; N. LA FEMINA, *Rimedi amministrativi e tecniche alternative di risoluzione delle controversie nell'Ufficio dell'Unione europea per la proprietà intellettuale*, in *Rivista Italiana di Diritto Pubblico Comunitario*, 2016, p. 1409; G. LIGUGNANA, *I procedimenti giustiziali nei confronti delle decisioni dell'ECHA*, in *Rivista Italiana di Diritto Pubblico Comunitario*, 2016, p. 1311; A. MAGLIARI, *I rimedi amministrativi nel settore della vigilanza finanziaria europea : modelli a confronto*, in *Rivista Italiana di Diritto Pubblico Comunitario*, 2016, p. 1331; E. MITZMAN, *I rimedi amministrativi nello spazio di libertà, sicurezza e giustizia*, in *Rivista Italiana di Diritto Pubblico Comunitario*, 2016, p. 1689; B. MARCHETTI (ed.), *Administrative Remedies in the European Union. The Emergence of a Quasi-Judicial Administration*, Turin, 2017; Banca d'Italia, Quaderni di Ricerca Giuridica della Consulenza Legale, *Judicial review in the Banking Union and in the EU financial architecture*, n. 84, 2018. M. EKVAD, *The Functioning of the Community Plant Variety Office Board of Appeal*, in C. GEIGER, C. A. NARD, X. SEUBA (eds.), *Intellectual Property and the Judiciary*, Cheltenham, 2018; M. CHAMON, A. VOLPATO, *Sketching out the role and function of the ECHA Board of Appeal: Germany v ECHA and BASF v ECHA*, in *European Law Review*, 2020 p.840.

[2] A. DAMMANN, *Die Beschwerdekammern der Europäischen Agenturen*, Frankfurt am Main, 2004; E. SCHMIDT-AßMANN, *Rechtsschutz gegen Europäische Agenturen: vor einem neuen Aufbruch?*, in *Privatrecht, Wirtschaftsrecht, Verfassungsrecht: Festschrift für Peter-Christian Müller-Graff zum 70. Geburtstag*, 2015, p. 1322; C. TOVO, *Le agenzie decentrate dell'Unione europea*, Naples, 2016; M. CHAMON, *EU Agencies. Legal and Political Limits to the Transformation of EU Administration*, Oxford, 2016; J. ALBERTI, *Le agenzie dell'Unione europea*, Milan, 2018; S. PUGLIESE, *I meccanismi di revisione degli atti delle agenzie come veicoli di partecipazione: verso un'amministrazione europea aperta, efficace e trasparente*, in *Il diritto dell'Unione europea*, 2018, p. 715; G. GRECO, *Le commissioni di ricorso nel sistema di giustizia dell'unione europea*, Milan, 2020.

[3] Particularly interesting in this regard are A. TÜRK, *Oversight of Administrative Rulemaking: Judicial Review*, in *European Law Journal*, 2013, p. 126; L. DE LUCIA, *I ricorsi amministrativi nell'Unione europea dopo il Trattato di Lisbona*, in *Rivista trimestrale di diritto pubblico*, 2013, p. 323; P. CHIRULLI, L. DE LUCIA, *Tutela dei diritti e specializzazione nel diritto amministrativo europeo. Le commissioni di ricorso delle agenzie europee*, in *Rivista Italiana di Diritto Pubblico Comunitario*, 2015, p. 1305; J. DAVID, *Les recours administratifs contre les actes des agences européennes*, in *Revue Trimestrielle de Droit Européen*, 2016, p. 275; L. PARONA, *L'appeal nelle agenzie federali statunitensi*, in *Rivista Italiana di Diritto Pubblico Comunitario*, 2016, p. 1719; M. CHAMON, A. VOLPATO, M. ELIANTONIO (eds.), *Boards of Appeal of EU Agencies. Towards Judicialization of Administrative Review?*, Oxford, 2022. With specific regard to the banking and finance Boards of Appeal, see W. BLAIR, *Board of appeal of the European supervisory authorities*, in *European Business Law Review*, 2013, p. 165; M. LAMANDINI, *The Esa's Board of Appeal as a Blueprint for the Quasi-Judicial Review of European Financial Supervision*, in *European Company Law*, 2014, p. 290; M. LAMANDINI, D. RAMOS MUÑOZ, *Law and practice of financial appeal bodies (ESAS`s board of appeal, SRB appeal panel): a view from the inside*, in *Common market*

approach is still predominant. Indeed, neither the European Commission, nor the Council, nor the European Parliament have a working unit dedicated to these bodies as a whole – not even within the office or the working group dedicated to the Court of Justice of the European Union – since the monitoring (if any) of these bodies takes place within the offices dealing with the policy field in which the Board concerned operates.

However, after a while, even newcomers become part of the settled institutional landscape and the attention – of both scholars and practitioners as well as, above all, the EU legislator – has to shift from a micro perspective, aimed at discussing what these bodies are, to a macro perspective, which is focused on assessing what they are bringing to the EU judiciary and how the latter is evolving thanks to their presence[4].

This Volume aims exactly to address these latter issues and proposes a new approach for the study and management of EU Agencies' Boards of Appeal, for three main reasons.

2. The age of maturity of EU Agencies' Boards of Appeal

First, the Boards of Appeal have entered their age of maturity, enhancing their status and role in the EU system of judicial protection.

A wind of change started to blow for the Boards of Appeal a few years after the entry into force of the Lisbon Treaty, with the never explained[5], yet consistently replicated[6], choice of the EU legislator to

law review, 2020, p. 119; M. LAMANDINI, D. RAMOS MUÑOZ, *Finance, law, and the courts: financial disputes and adjudication*, Oxford, 2023.

[4] For some preliminary examples of this new wave of studies on Boards of Appeal, in addition to some publications already mentioned at footnote 2, see J. ALBERTI, *Verso un sistema giurisdizionale a 'specializzazione decentrata'? Brevi note sulle forme di specializzazione del sapere giudiziario dell'Unione all'indomani della riforma del Tribunale*, in *Il diritto dell'Unione europea*, 2018, p. 23; L. DE LUCIA, *The shifting state of rights protection vis-à-vis EU agencies: a look at article 58a of the Statute of the Court of Justice of the European Union*, in *European Law Review*, 2019, p. 809; J. ALBERTI, *The draft amendments to CJEU's Statute and the future challenges of administrative adjudication in the EU*, in *Federalismi.it*, 2019, p. 2; J. ALBERTI, *A new era for EU Agencies' Boards of Appeal? A Preliminary Assessment of the Recent Reform of CJEU's Statute and its Implication on EU Administrative Adjudication*, in M. CONTICELLI, M. DE BELLIS, G. DELLA CANANEA (eds), *EU Executive Governance: Agencies and Procedures*, Turin, 2019, p. 204.

[5] See on this point L. DE LUCIA, *L'evoluzione della tutela dei diritti nei confronti delle agenzie europee*, in *Rivista Italiana di Diritto Pubblico Comunitario*, 2019, p. 352.

[6] The choice of depriving the Boards of Appeal of this power of substitution has been applied since 2010 both when new Boards of Appeal have been established (see what will be hereinafter called 'SRB Regulation', namely Regulation (EU) n. 806/2014 of the European Parliament and of the Council of 15 July 2014, in *OJ* L225, 30.7.2014, p. 11, at Article 85(8) and 'ERA Regulation', namely Regulation (EU) n. 2016/796 of the

progressively deprive the Boards of Appeal of their power of substitution, as well as with the increasing decline of the principle of functional continuity[7] between the latter and their Agencies. The two recent reforms[8] of the Statute of the Court of Justice (hereinafter, the 'CJEU Statute') have since confirmed an evolutionary trend. Indeed, in 2019 and 2024 the role and the responsibilities of these bodies were further enhanced, by strengthening (unfortunately, only on paper)[9] their independence and by stating that, under specific circumstances, the decisions originally taken by the Boards of Appeal can be exempt from the scrutiny of the Court of Justice. Lastly, with the recent *BASF* and, above all, *Aquind* judgments[10], there have been further signals of the dawn of a new era for EU Agencies' Boards of Appeal. Indeed, in those judgments the Court of Justice explicitly imposed on the Boards of Appeal a duty to perform an in-depth review of the acts undertaken by EU agencies so as to supplement the limited scrutiny carried out by EU Courts as regards complex technical and economic assessments. Those who may deem these judgments as trifles of a purely technical nature would prove them wrong. Indeed, in these decisions the Court of Justice further stated (admitted?) that if Boards of Appeal were not to perform such deep scrutiny, the EU

European Parliament and of the Council of 11 May 2016, in *OJ* L138, 26.05.2016, p. 1, at Article 62(3)), as well as when the regulations establishing the existing Boards have been substantially revised after that date (see, in particular what will be hereinafter called 'EASA Regulation', namely Regulation (EU) n. 2018/1139 of the European Parliament and of the Council of 4 July 2018, in *OJ* L 212, 22.08.2018, p. 1, at Article 113 and 'ACER Regulation', namely Regulation (EU) n. 2019/942 of the European Parliament and of the Council of 5 June 2019, in *OJ* L 158, 14.06.2019, p. 22, at Article 28(5)). Therefore, at present, only the Boards of Appeal of EUIPO, CPVO and ECHA retain this power of substitution, whereas all the others do not. The former is the only exception to the rule, probably because of the specificities of the trademark sector and its litigation. As for the latter two, it must be noted that their respective founding regulations, adopted well before 2010, have not been subject to any substantial revision since then.

[7] See on this point J. ALBERTI, *The Position of Boards of Appeal: Between Functional Continuity and Independence*, in M. CHAMON, A. VOLPATO, M. ELIANTONIO (eds.), *Boards of Appeal of EU Agencies. Towards Judicialization of Administrative Review?*, *cit.*, p. 247-248.

[8] See Regulation (EU, Euratom) 2019/629 of the European Parliament and of the Council of 17 April 2019, in *OJ* L 111, 25.04.2019, p. 1 and Regulation (EU, Euratom) 2024/2019 of the European Parliament and of the Council of 11 April 2024, in *OJ* L, 12.08.2024.

[9] For a deeper discussion on this point, see J. ALBERTI, *The draft amendments to CJEU's Statute and the future challenges of administrative adjudication in the EU*, *cit.*, p. 4-11 and 26-27 as well as the article by C. ZADRA in this *Volume*, p. 293.

[10] General Court, September 20th 2019, case T-125/17, *BASF Grenzach* v *ECHA*, ECLI:EU:T:2019:638 (not appealed before the European Court of Justice) and General Court, November 18th 2020, case T-735/18, *Aquind* v *ACER*, ECLI:EU:T:2020:542 (subsequently confirmed by the European Court of Justice with the judgment of March 9th 2023, C-46/21 P, *ACER* v *Aquind*, ECLI:EU:C:2023:182).

judiciary as a whole "would fail to offer the guarantees of effective judicial protection to undertakings"[11].

Therefore, the Boards of Appeal are no longer internal bodies tasked with reviewing some decisions of certain EU agencies and, *in casu*, replacing them with new ones that could subsequently be challenged before a perhaps-to-be-established specialised tribunal[12] or directly before the EU Courts. They have *de facto* replaced – in functional and not institutional terms, of course – the specialised tribunal provided for under Article 257 TFEU and they have become fully part – at least in functional terms – of the EU judicial machinery, since a failure in their scrutiny over the acts of EU agencies can prevent EU Courts from respecting the principle of effective judicial protection.

3. The lack of a political vision as to the future of EU Agencies' Boards of Appeal

Two consequences follow from the new role assigned to the Boards of Appeal in the last few years.

Firstly (and pragmatically), the model of EU Agencies' Boards of Appeal, which was conceived and replicated (albeit with relevant differences) in the 'age of youth' of these bodies, needs to be reconsidered and reevaluated in light of the different role and responsibilities now given to them.

Despite being labelled as 'independent' under the aforementioned reforms of CJEU Statute, the Boards of Appeal still retain features that, as has already been debated extensively in the legal literature, fit poorly with that principle[13]. The examples of the heterogenous levels of independence are, unfortunately, manifold; they have already been discussed by legal scholars and they will be referred to here only to the extent strictly necessary[14]. First of all, only the Boards of Appeal of EUIPO and CPVO

[11] Court of Justice, March 9th 2023, C-46/21 P, *ACER* v *Aquind*, *cit.*, para 67.

[12] It is worth highlighting that, on the margins of the signing of the Treaty of Nice, the Government of Luxembourg declared that it would not claim the seat of the Boards of Appeal of the Office for Trade Marks and Designs (namely, those now called as EUIPO Boards of Appeal) if they were to become specialised courts attached to the General Court (see Declaration n. 1 annexed to the Treaty of Nice, in *OJ* C 80, 10.03.2001, p. 1). This suggests that, at least in its original intentions, there was a path of evolution of the Boards of Appeal from an internal dimension within the agency to another well rooted within the Court of Justice of the European Union.

[13] See J. ALBERTI, *The Position of Boards of Appeal: Between Functional Continuity and Independence*, in M. CHAMON, A. VOLPATO, M. ELIANTONIO (eds.), *Boards of Appeal of EU Agencies. Towards Judicialization of Administrative Review?*, *cit.*, pp. 252-264.

[14] *Ibidem*.

have a mechanism for removing members that involves the Court of Justice as a guarantee[15]. The members of the other Boards can be removed either by the European Commission (after hearing an opinion from the Agency)[16], or even directly by the agency itself (i.e. by the supervised entity!)[17]. Moreover, from a financial point of view, all the Boards of Appeal are dependent on their Agency's budget: thus, their financial resources are decided by the entity they are called upon to control. Furthermore, all the Boards of Appeal except those of the EUIPO and ECHA are, as will be extensively discussed elsewhere[18], *de facto* non-permanent bodies. This has relevant implications for the status of their members (who are not always officials of the agency or of the EU and thus do not enjoy the privileges and immunities set forth by Protocol 7 annexed to the Treaties), the remuneration of their members (often set case by case and just for a specific number of hours, defined *ex ante*, allocated to the case concerned) and the internal structure of the Board itself (with a Registry that is sometimes entrusted to a person who is not dedicated to the Board on a full-time basis, but still partly answers to the agency that the Board is expected to control).

In order to tackle these issues it is crucial, as a second and more theoretical step, to stop treating the Boards of Appeal (only) as monads, or as a group of monads, and to shift the legal and political debates from the sector-based approach mentioned above into a new dimension.

In particular, the Boards of Appeal now clearly deserve to be studied also as an institutional model and their analysis should be combined with

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[15] See what will be hereinafter called 'EUIPO Regulation', namely Regulation (EU) n. 2017/1001 of the European Parliament and of the Council of 14 June 2017, in *OJ* L 154, 16.06.2017, p. 1, at Article 166(1) and 'CPVO Regulation', namely Council Regulation (EC) n. 2100/94 of 27 July 1994, in *OJ* L 227, 1.09.1994, p. 1, subsequently amended, at Article 47(5).

[16] See Article 106(5) of EASA Regulation and what will be hereinafter called 'ECHA Regulation', namely Regulation (EC) n. 1907/2006 of the European Parliament and of the Council of 18 December 2006, in *OJ* L 396, 30.12.2006, p. 1, as subsequently amended, at Article 90(4).

[17] See Article 26(2) of ACER Regulation; Article 56(2) of SRB Regulation; Article 58(5) of what will be hereinafter called 'ESAs Regulation', namely the three Regulations (whose Articles have almost the same numbers) establishing the three authorities operating in the field of micro-prudential supervision (i.e. the European Banking Authority, the European Insurance and Occupational Pensions Authority and the European Securities and Markets Authority, known all together as the European Supervisory Authorities, ESAs, which have a Joint Board of Appeal regulated in Regulations (EU) n. 1093,1094,1095/2010 of the European Parliament and of the Council of 24 November 2010, as subsequently amended, in *OJ* L 331, 15.12.2010, p. 12, 48, 84).

[18] M. NAVIN-JONES, in this *Volume*, p. 197.

that of the EU judiciary as a whole. In other words, the debates on the Boards of Appeal should now also focus on how they could (or should) develop to better fit into the general system of judicial protection and how the EU judiciary itself is evolving (or should further evolve) to better interact with those bodies.

The wiser observers of the EU system of judicial protection will immediately argue that such an aim is at least hindered by the lack of any official project for the future of the EU judiciary. Consequently, proposals for the evolution of one part (the Boards of Appeal) may well be made on the basis of certain legal or political biases regarding how the whole (the EU system of judicial protection) should evolve.

Such an argument certainly has some merits. However, this Volume argues that the current reforms have already gone too far and with too little discussion, meaning that debates on the matter cannot be further postponed. The recent reforms of the CJEU Statute were not adopted on the basis of thorough discussion[19] or with a clear vision as to how the EU judiciary should evolve and in what direction[20]. And there have been even fewer debates with regard to the position of EU Agencies' Boards of Appeal: just by way of example, the recent extension of the filter mechanism to all the Boards of Appeal as provided for by Article 58a of the CJEU Statute did not receive a single proposal for amendment throughout its negotiation and the provision was adopted exactly as proposed by the Court of Justice.

Also in light of this lack of political vision and public debate, academics and practitioners are called upon to fill those gaps and bring the discussion on EU Agencies' Boards of Appeal a step forward by highlighting not only what these bodies are, but also what they are (silently) becoming and how they should further evolve to better perform the functions that they have recently been tasked with.

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[19] It is worth highlighting that during the hearing organised on March 9th, 2024 by the JURI committee of the European Parliament, the President of the Court of Justice has called on the EU legislator to adopt the reform of the CJEU Statute "in the weeks to come, not in the two years to come" (recording available at multimedia.europarl.europa.eu/en/webstreaming/committee-on-legal-affairs_20230509-1500-COMMITTEE-JURI; see, in particular, at 11:48:00). For a further debate on the negotiations of CJEU Statute, see T. LUKÀCSI, in this *Volume*, p. 283.

[20] Conversely, the Court of Justice had rejected multiple times and in the very recent past that the transfer of preliminary rulings was an appropriate measure to be taken: see, on this point, the careful analysis by C. AMALFITANO, *Il futuro del rinvio pregiudiziale nell'architettura giurisdizionale dell'Unione europea*, in J. ALBERTI, G. DE CRISTOFARO (eds.), *Il rinvio pregiudiziale come strumento di sviluppo degli ordinamenti*, Pisa, 2023, in particular at pp. 27-40.

4. Taking the 'quasi-judicial' dimension seriously

Finally, this Volume calls for a reconsideration of the 'quasi' stigma that for a long time has hindered studies on EU Agencies' Boards of Appeal.

Indeed, according respectively to the settled and to the most recent case-law of the Court of Justice, Boards of Appeal are "quasi-judicial" bodies[21] or "administrative revision bodies […] performing a quasi-judicial function".[22] Thus, outside the realm of specialised studies, the Boards of Appeal have always been considered as bodies performing tasks that are certainly important within their specific policy field, yet not really relevant for those interested in the broader picture. The general feeling, at both the academic and institutional levels, is that the real game of protecting individual' rights is played elsewhere in the EU legal order. The 'quasi' nature of these bodies has often resulted in an equally halved attention to their activity.

It goes without saying that the centrality and the overwhelming importance of the Court of Justice and, to a lesser extent, of the General Court in ensuring the protection of fundamental rights and the evolution of EU integration cannot be questioned. This is a pivotal element that has characterized the EU legal order since its creation and will certainly (and hopefully) keep marking it in the future.

However, the judicial system emerging from the recent reforms calls for a new approach towards EU Agencies' Boards of Appeal and highlights the importance of bringing their case-law into the analyses of the settled principles of EU litigation.

Classic studies on EU judicial protection, such as those on private parties' legal standing, interim protection, third-party participation in proceedings, the principle of effective judicial protection and the intensity of scrutiny over complex technical and economic assessments can no longer be fully and properly addressed without also considering the activity of EU Agencies' Boards of Appeal.

Even though the Court of Justice will clearly continue to have the last word on the implementation of these principles (and the main influence

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[21] General Court, September 18th 2012, joined cases T-133/08, T-134/08, T-177/08 and T-242/09, *Ralf Schräder* v *CPVO*, ECLI:EU:T:2012:430, paras 137 and 190. See also AG Bot Opinion of November 28th 2013, case C-530/12 P, *OHIM* v *National Lottery Commission*, ECLI:EU:C:2013:782, para 93.

[22] Court of Justice, March 9th 2023, case C-46/21 P, *ACER* v *Aquind*, *cit.*, para 59. See, on the distinction between 'quasi-judicial bodies' and 'administrative revision bodies performing a quasi-judicial function' also M. PREK, in this *Volume*, p. 239.

over their evolution), those who are interested in understanding their day-to-day application as well as foreseeing how they could (or should) evolve now also have to consider the activity of the Boards of Appeal. Regardless of the judicial or administrative nature of these bodies, they now explicitly support the EU judiciary in ensuring respect for Article 47 of the Charter of Fundamental Rights and take decisions that in 99% of cases are reviewed only by the General Court, thus escaping the oversight of the Court of Justice[23]. Thence, they now fully contribute to shaping the fundamental principles of EU litigation and affect how the General Court and, subsequently, the Court of Justice will deal with them.

Furthermore, including the case-law of these bodies in the study of the classic topics of EU litigation is relevant also for the purpose of monitoring the Boards' activity and assessing whether and to what extent an internal coherence is maintained in respect of these principles despite the various policy fields in which (and the various entities by which) they are applied. Indeed, national experiences with administrative adjudication show that mechanisms of review like those provided for the Boards of Appeal may lead to a certain degree of sectoral isolation and fragmentation in the system of rights' protection. Given their technical function and their institutional position, these bodies might potentially develop a sectoral case-law, characterized by a technical jargon different from the judicial language used by EU Courts and/or other Boards of Appeal, hypothetically undermining the overall coherence of the EU legal order[24].

Even though there is no signal so far that any such events have occurred over recent years, the growing relevance of these bodies clearly implies a need for greater attention to their activity.

5. An overview of the Volume

In order to develop the innovative approach mentioned above, this Volume has been divided into three parts, supported by a concluding chapter.

The first part is made up of a set of different horizontal studies which revisit classic issues of EU litigation law in light of the activity of EU agencies' Boards of Appeal. In particular, Camilla Burelli discusses the locus standi of so-called non-privileged applicants before the Boards of Appeal, focusing in particular on the lack of reviewability of regulatory acts. Ilaria Anrò deals with the intervention of third parties in litigation

[23] See the articles by R. TORRESAN and P. SILVESTRI in this *Volume*, p. 129 and 161.

[24] P. CHIRULLI, L. DE LUCIA, *Tutela dei diritti e specializzazione nel diritto amministrativo europeo. Le commissioni di ricorso delle agenzie europee*, *cit.*, in particular p. 1343-1344 and R. E. LEVY, R. L. GLICKSMANN, *Agency Specific Precedents*, in *Texas Law Review*, 2011, p. 500.

before the Boards of Appeal, highlighting differences and similarities among them and, above all, the EU Courts, questioning the consequences of those discrepancies. Giulia Agrati starts off by examining the settled principle according to which Boards of Appeal fall within the scope of application of Article 41 of the EU Charter of Fundamental Rights and then goes on to discuss whether this approach still makes sense and to assess whether and to what extent these bodies already respect the classic procedural guarantees set forth in Article 47 thereof. Massimo Orzan evaluates the power of (certain) Boards of Appeal to adopt interim measures, assesses their case-law, comparing it with that of EU Courts, and discusses whether and how those powers could be improved and/or better harmonised with those of the EU Courts. Sofie Oosterhuis looks at the standard of review used by Boards of Appeal when reviewing technical acts, evaluating the impact of the most recent case-law of the Court of Justice and, in particular, the *Aquind* case. She assesses differences and similarities among the various Boards of Appeal and compares their case-law with that of the EU Courts. Riccardo Torresan discusses the most recent reforms of the CJEU Statute, assessing in particular how the new filter on the appeals over decisions originally taken by Boards of Appeal has been applied so far by the Court of Justice and examining its implications. Finally, Paolo Silvestri enriches the debates on EU Agencies' Boards of Appeal with something that, paradoxically enough, is never put at the core of the discussion: namely, data on their activity from 2018 to 2023, considering in particular the sheer number of decisions taken, appeals before the EU Courts, the number of appeals upheld and dismissed, the length of the proceedings and their impact on the ones before the EU Courts.

The second part of this Volume is dedicated to the most relevant challenge that Boards of Appeal have been recently asked to address, namely that of enhancing their scrutiny over complex technical and economic assessments so as to perform a full review that supports the limited one offered by EU Courts. This issue, tackled in the chapter by Sofie Oosterhuis in theoretical terms, is discussed here in pragmatic and institutional terms, with contributions from Gordon Humphreys, Marcus Navin-Jones, Michael Sanchez Rydelski, Antoine Buchet, Miro Prek, Michele Siri, Marco Lamandini, David Ramos Muñoz and Marcel Verslype (Presidents, Vice-Presidents or distinguished members of all the Boards of Appeal established so far)[25], who participated in a roundtable organised to discuss the impact of *Aquind* on the Boards' activity and its sustainability

[25] For a discussion of the bodies included in the present study as well as of the reasons why some have been excluded, see below, § 6.

in the long run. Each author discusses this issue from the specific perspective of the Board of Appeal to which he belongs, presenting not only the most recent practice in this regard, but also the institutional and practical consequences of the new challenges posed by this judgment. The texts are as similar as possible to the original speeches, with only minor editorial changes and footnotes, in order to convey to readers the spirit of the roundtable and its capability to combine intensity and ease in the debates.

The same applies for the third part, in which Tamas Lukàcsi, Carlo Zadra, Paolo Stancanelli and Alejandro Menéndez Fernández discuss – from the perspectives of the Legal Services of the European Parliament, of the Council and of the European Commission – the future of EU Agencies' Boards of Appeal and of the EU system of judicial protection as a whole. Needless to say, the opinions expressed in the latter two parts do not represent the official position of, nor are in any way binding for, the agencies or the institutions to which the authors belong.

Finally, a concluding chapter by the Volume's editor summarizes the main findings of the research, sketches out an agenda for further studies in the field and enumerates the most urgent interventions that the EU legislator should consider to make Boards of Appeal more efficient, untap their potential and adapt these bodies to the current judicial landscape.

6. Caveats and methodology

Before entering into the reading of this Volume, a few caveats and some methodological clarifications are warranted.

This publication is the final product of the Jean Monnet Module on EU Specialised Judicial Protection, a three-and-a-half year (2020-2024) research project financed by the European Commission under the Erasmus+ Programme of the European Union (621097-EPP-1-2020-1-IT-EPPJMO-MODULE) and coordinated by this Volume's Editor. One of its aims was to connect different professional communities and to enrich academic research with the perspectives of those who, on a day-by-day basis, work and steer the activities of the bodies which are the main focus of the study. Therefore, the Editor is extremely grateful to everyone from academia, EU Agencies' Boards of Appeal, EU Institutions and the national administrations that has participated in the conferences, roundtable, seminars, and workshops organised throughout the whole project.

A special thanks obviously goes to the European Education and Culture Executive Agency (EACEA) established by the European Commission for believing in and financing this project and to those who

have constantly supported the scientific coordinator in its implementation, namely Cristiana Fioravanti, Samuele Barbieri, Marcella Cometti, Riccardo Torresan, Tolindo Fina and Paolo Silvestri.

From a methodological perspective, the research covers the Boards of Appeal established until now within agencies of the European Union (i.e., in order of creation, those of EUIPO, CPVO, EASA, ECHA, ACER, the ESAs, SRB and ERA). The Administrative Review Board established within the ECB under the Single Supervisory Mechanism[26] as well as the Administrative Board of Review within the brand new (and not yet operative) Authority for Anti-Money Laundering and Countering the Financing of Terrorism[27] fall outside the scope of this study since they do not have binding powers, but only the possibility of suggesting to the authorities to which they belong that they should adopt a different decision, advice which the latter may, however, disregard.

The horizontal studies discussed in the first part of this Volume have been made possible thanks also to the creation of the Common Database of EU Agencies' Boards of Appeal, namely a brand-new search engine, created within the framework of the same research project that generated this Volume, and which brings together all the documents (namely decisions, corrigendum, orders, judgments, opinions) stemming from the Boards of Appeal as well as from the General Court and the Court of Justice (when they have intervened by way of appeal in cases originally decided by a Board of Appeal) from January 1st 2018 to the present. Indeed, before the creation of this database, the possibility of searching among the decisions of all the Boards of Appeal and, therefore, of conducting horizontal studies, was largely hindered by the lack of a one-stop search engine, as well as by the fact that only a few Boards of Appeal have a database for their decisions (namely, EUIPO, CPVO and ECHA), whilst the other Boards simply upload their decisions to their agency's website as a list of PDFs.

With the aim of fostering horizontal studies and helping academics, practitioners and EU institutions to monitor EU Agencies' Boards of Appeal, this database has now been made available to the general public at https://boa.europeanlitigation.eu/ and it is regularly updated.

Being based on the Common Database, the horizontal studies in Part I cover the same time frame as the former. Unless otherwise specified by

[26] See Council Regulation (EU) n. 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, in *OJ* L 287, 29.10.2013, p. 63, Article 24(7).

[27] See Article 74(3) of Regulation (EU) 2024/1620 of the European Parliament and of the Council of 31 May 2024, in *OJ* L, 19.6.2024.

each author, their analysis covers decisions taken from January 1st 2018 to April 1st 2024.

It bears noting that this study aims in no way to support a one-size-fits-all approach to the study and the evolution of EU Agencies' Boards of Appeal. These bodies have been successful over the years precisely because they have left the EU Legislator the option of adapting the model of these Boards to the technical and political peculiarities of each sector. Therefore, the peculiarity of each Board should be preserved and respected; their evolution should take place progressively through ad-hoc amendments, duly tailored to the needs of each sector.

PART I

HORIZONTAL STUDIES ON EU AGENCIES' BOARDS OF APPEAL

PRIVATE APPLICANTS' LOCUS STANDI BEFORE THE BOARDS OF APPEAL

La legittimazione ad agire dei privati dinanzi alle commissioni di ricorso

La qualité pour agir des particuliers devant les chambres de recours

CAMILLA BURELLI*

TABLE OF CONTENTS: 1. Introduction: delimitation of the field of investigation. – 2. Research methodology. – 3. The conditions for access to BoAs' 'justice' and the scope of their review. – 4. The application of the conditions of admissibility pursuant to Article 263(4) TFEU as interpreted by the Court of Justice in the 'case law' of the BoAs: general considerations. – 4.1. The interest in bringing proceedings. – 4.2. The individual interest. – 4.3. The direct interest. – 4.4. Regulatory acts which are of direct concern to the applicant and do not entail implementing measures. – 5. Concluding remarks.

1. Introduction: delimitation of the field of investigation

The institution of *legitimatio ad causam* is at the heart of EU procedural law. Studying the locus standi and, in particular, private applicants' locus standi means to investigate and reconstruct some of the most relevant rights and principles around which the EU project is built: from the *droit au juge* to the principle of effective judicial protection. It is not surprising that the scientific literature has dealt extensively with the issue of natural and legal persons' ability to bring a legal action to the EU Courts and, in particular, with the limits they encounter in doing so[1]. Much less attention,

* Assistant Professor of EU Law at the University of Milan.

1 See, without claiming to be complete, A. BARAV, *Direct and Individual Concern: An Almost Insurmountable Barrier to the Admissibility of Individual Appeal to the EEC Court*, in *Common Market Law Review,* 1974, p. 191 ff.; A. ARNULL, *Private applicants and the action for annulment under article 173 of the EC Treaty*, in *Common Market Law Review*, 1995, p. 7 ff.; R. BARATTA, *Un 'nuovo' limite al controllo giurisdizionale degli atti comunitari incidenti sulla sfera giuridica dei singoli*, in *Giustizia civile*, 1995, p. 632 ff.; C. AMALFITANO, *La protezione giurisdizionale dei ricorrenti non privilegiati nel sistema comunitario*, *Il Diritto dell'Unione europea*,

however, has been dedicated to another configuration of the same topic, namely the private individuals' locus standi before the Boards of Appeal[2].

2003, p. 13 ff.; F. ALICINO, *Il ricorso di annullamento delle persone fisiche e giuridiche. Passato, presente e possibile futuro: pregi e difetti di una ricostruzione giurisprudenziale*, in *Diritto pubblico comparato ed europeo*, 2006, p. 968 ff.; S. BALTHASAR, *Locus standi rules for challenges to regulatory acts by private applicants: the new Art. 263(4) TFEU*, in *European Law Review*, 2010, p. 542 ff.; V BARNARD, O. ODUDU, *Regulatory Acts within Article 263(4) TFEU – A dissonant Extension of Locus Standi for Private Applicants*, in *The Cambridge Yearbook of European Legal Studies*, 2011, p. 328 ff.; A. ALBORS-LLORENS, *Sealing the fate of private parties in annulment proceedings? The General Court and the new standing test in Article 263(4) TFEU*, in *The Cambridge Law Journal*, 2012, p. 52 ff.; M. ELIANTONIO, V BACKES, R. VAN RHEE, T. SPRONKEN, A. BERLEE, *Standing up for your right(s) in Europe: a comparative study on legal standing (locus standi) before the EU and Member States' Courts*, *European Union Publications*, 2012, p. 36 ff.; B. BERTRAND, J. SIRINELLI, *Le principe du droit au juge et à une protection juridictionnelle effective,* in J. DUTHEIL DE LA ROCHÈRE (sous la direction de), *Traité de droit administratif européen*, Bruxelles, 2014, p. 565 ff.; R. MASTROIANNI, A. PEZZA, *Striking the right balance: limits on the right to bring an action under Article 263 (4) of the Treaty on the Functioning of the European Union*, in *American University International Law Review*, 2015, p. 743 ff.; V C. BURELLI, *Le misure di esecuzione ex articolo 263, quarto comma, TFUE a dieci anni da Lisbona. Effettivo ampliamento della legittimazione a impugnare dei soggetti privati?*, in *Federalismi.it*, 2020, p. 301 ff.; R. CARANTA, *Knock, and it shall be opened unto you: standing for non-privileged applicants after Montessori*, in *Common Market Law Review*, 2021, p. 163 ff.

[2] To date, there are no organic and/or systematic studies on the matter. The issue of private applicants' locus standi before the BoAs has been addressed on a one-off basis in the context of more general investigations. See, for instance, G. LIGUGNANA, *I procedimenti giustiziali nei confronti delle decisioni dell'ECHA*, in *Rivista Italiana di Diritto Pubblico Comunitario*, 2016, p. 1311 ff.; A. CASSATELLA, *Appeals Before the European Aviation Safety Agency*, in A. MARCHETTI (ed.), *Administrative Remedies in the European Union. The Emergence of a Quasi-Judicial Administration*, Torino, 2017, p. 21 ff.; A. MAGLIARI, *Administrative Remedies in European Financial Governance. Comparing Different Models*, in A. MARCHETTI (ed.), *cit.*, p. 99 ff.; M. CHAMON, D. FROMAGE, *Between Added Value and Untapped Potential: The Boards of Appeal in the Field of EU Financial Regulation*, in M. CHAMON, A. VOLPATO, M. ELIANTONIO (eds.), *Boards of Appeal of EU Agencies*, Oxford, 2022, p. 8 ff., at p. 21-24; D. HANF, *The Trailblazers: The Boards of Appeal of EUIPO and CPVO*, in M. CHAMON, A. VOLPATO, M. ELIANTONIO (eds.), *cit.*, p. 59 ff., at 71; M. SIMONCINI, M. VERISSIMO, *The EASA BoA in Search of Identity: An Effective Filter between Administration and Courts?*, in M. CHAMON, A. VOLPATO, M. ELIANTONIO (eds.), *cit.*, p. 103 ff., at pp. 107-109; C. TOVO, *The Boards of Appeal of Networked Services Agencies: Specialized Arbitrators of Transnational Regulatory Conflicts?*, in M. CHAMON, A. VOLPATO, M. ELIANTONIO (eds.), *cit.*, p. 34 ff., at p. 43 and pp. 54-55; A. VOLPATO, E. MULLIER, *The BoA of the European Chemicals Agency at a Crossroads*, in M. CHAMON, A. VOLPATO, M. ELIANTONIO (eds.), *cit.*, p. 84 ff., at p. 94; L. MUZI, *Who Litigates before the Boards of Appeal?*, in M. CHAMON, A. VOLPATO, M. ELIANTONIO (eds.), *cit.*, p. 221 ff., at pp. 235-237. What is also missing is a comparative examination of the attitude of the Boards of Appeal with respect to the conditions of admissibility of appeals. In any case, more generally, on the BoAs, in addition to the contributions already mentioned and those that will be mentioned, see also L. DE LUCIA, *I ricorsi amministrativi nell'Unione europea dopo il Trattato di Lisbona*, in *Rivista trimestrale di diritto pubblico*, 2013, p. 323 ff.; P. CHIRULLI, L. DE LUCIA, *Tutela dei diritti e specializzazione nel diritto amministrativo europeo: le commissioni di ricorso delle agenzie europee*, in *Rivista italiana di*

Investigating this other aspect is nothing more than a different approach to achieve the same result: to assess whether – and to what extent – the aforementioned *droit au 'juge'* (although atypical[3]) and the principle of effective judicial protection are effectively satisfied in the EU judicial system. Observing this aspect also allows to understand another and broader issue, namely the role of the BoAs in the EU judicial protection system. This is because, if it is true that the 'ordinary' appellants before these 'atypical judges' are individuals, then it is equally true that it is through the study of their access to those 'judges' that we can effectively understand the relevance, the potential and the weaknesses of their work. In addition, BoAs' review is – apart from the SRB – mandatory: having carried out the stage before the BoA is a condition of admissibility of the appeal before the General Court. Moreover, the analysis made by the BoAs affects the revision that the General Court can do, because what is asked to the judge depends, upstream, on what has been asked to (and what has been stated by) the BoA. On the basis of settled case law, the General Court's power to reform is limited to situations in which, after reviewing the assessment made by the BoA, it "is in a position to determine, on the basis of the matters of fact and of law as established, what decision the BoA was required to take"[4], nor may it carry out an assessment on which that BoA has not yet ruled. This is even more true when it comes to assessing highly complex scientific and technical factual elements. Indeed, with regard to such assessments, the EU Courts are limited to checking whether they are vitiated by a manifest error, a misuse of powers or whether the decision-maker manifestly exceeded the limits

diritto pubblico comunitario, 2015, p. 1305 ff.; C. TOVO, *Le agenzie decentrate dell'Unione europea*, Napoli, 2016, p. 323 ff.; J. ALBERTI, *Le agenzie dell'Unione europea,* Milano, 2018, p. 205 ff.; G. GRECO, *Le commissioni di ricorso nel sistema di giustizia dell'Unione europea*, Milano, 2020.

[3] See M. NAVIN- JONES, *A Legal Review of EU Boards of Appeal in Particular the European Chemicals Agency BoA*, in *European Public Law*, 2014, p. 143 ff., at p. 144; A. VOLPATO, E. MULLIER, *The BoA of the European Chemicals Agency at a Crossroads*, *cit.*, at p. 95. See also, for instance, Court of Justice, May 21st 2015, case C-546/12 P, *Schräder* v *CPVO*, ECLI:EU:C:2015:332, para 73; Court of Justice, July 16th 2021, case C-46/21 P, *ACER* v *Aquind*, ECLI:EU:C:2023:182, para 59. See also Opinion of Advocate General Campos Sánchez-Bordona, October 31st 2019, case C-281/18 P, *Repower AG* v *EUIPO*, ECLI:EU:C:2019:426, para 42.

[4] See General Court, December 8th 2015, case T-583/14, *Giand Srl* v *OHMI*, ECLI:EU:T:2015:943, para 70: General Court, July 7th 2018, case T-72/17, *Gabriele Schmid* v *EUIPO*, ECLI:EU:T:2018:335, paras 25 and 62; General Court, September 20th 2018, case T-266/17, *Kwizda Holding GmbH* v *EUIPO*, ECLI:EU:T:2018:569, para 85; General Court, October 24th 2019, case T-498/18*, ZPC Flis sp.j.* v *EUIPO*, ECLI:EU:T:2019:763, para 129; General Court, March 16th 2022, case T-281/21, *Nowhere Co. Ltd* v *EUIPO*, ECLI:EU:T:2022:139, para 47.

of its power of review[5]. On the other hand, the review by the BoAs of scientific assessments contained in a decision of an Agency is not limited to the verification of the existence of manifest errors[6]. By relying on the legal and scientific competences of its members, the BoAs must examine whether the arguments put forward by the applicant are capable of demonstrating that the considerations on which that decision of the Agency is based are vitiated by error. Moreover, the Court recently reiterated that, in order to ensure compliance with the principle of effective judicial protection, the BoA should be given a power of in-depth scrutiny over the decisions of the Agency, in view of the 'restricted' control exercised by the EU Courts[7]. This declaration has been useful in clarifying how the BoAs help to enforce Article 47(1) of the EU Charter of Fundamental Rights: the exercise of in-depth administrative review is essential to ensure, before the EU Courts, an effective remedy. A different and opposite approach would entail the risk of preventing the General Court, which exercises a 'restricted' control, from ensuring effective judicial protection[8].

Therefore, studying the *droit au juge* without assessing how the access to the BoAs works is simply partial, at least in all those fields in which, to have access to the EU Courts, it is necessary to consult the BoAs first.

This study aims, therefore, to carry out an analysis of individuals' legal standing before BoAs, in order to verify how it is shaped within *each* BoA and *among* the various BoAs. It will also be fundamental to assess whether – and to what extent – there is a common or homogeneous approach between the different BoAs or whether, on the contrary, their attitude is uneven. Indeed, at least *prima facie*, the BoAs – which tend to quote their own decisions a lot, as if they were a real 'case law'[9] – tend, conversely, not to take into consideration the decisions of the other BoAs. Nevertheless, the truth is that, although there are many aspects that make each BoA unique and incomparable (primarily the subject they deal with) on a regulatory level there are also a lot of elements that unite them that would justify some 'contaminations' between them. Among these there is

[5] See, *ex plurimis* and more recently, General Court, November 22nd 2023, case T-656/20, *Symrise AG* v *ECHA*, ECLI:EU:T:2023:737, para 125, and the case law cited.

[6] See General Court, September 20th 2019, case T-125/17, *BASF Grenzach* v *ECHA*, ECLI:EU:T:2019:638, para 89.

[7] See Court of Justice, July 16th 2021, case C-46/21 P, *ACER* v *Aquind*, *cit*., para 65.

[8] On the matter, see, in this *Volume*, G. AGRATI, *Procedural guarantees in the litigation before the Boards of Appeal*, p. 65.

[9] See M. CHAMON, D. FROMAGE, *Between Added Value and Untapped Potential: The Boards of Appeal in the Field of EU Financial Regulation*, *cit*., at p. 18.

undoubtedly the legal standing (except for EUIPO, which notoriously works differently[10]).

To this end, this paper firstly outlines the research methodology (§ 2). Subsequently, the main provisions of the relevant Regulations will be introduced and discussed, as well as, briefly, the scope of the jurisdiction of the BoAs (§ 3, even though the issue of the justiciability of acts with no legal effect will not be addressed). Then, each condition of admissibility, as interpreted and applied by the BoAs, will be discussed (§§4, 4.1, 4.2 and 4.3): the interest in bringing proceedings, the individual and direct interest and the regulatory acts which are of direct concern to the applicant and do not entail implementing measures, which formally cannot be challenged, but still deserve attention having been the subject of two interesting cases.

2. Research methodology

In order to investigate how the individuals' legal standing is shaped in the 'case law' of the BoAs, and to assess whether and to what extent the *droit au 'juge'* and the principle of effective judicial protection are effectively satisfied in this peculiar context, the following steps have been taken. First of all, all the decisions adopted starting from 1 January 2018 were collected, that is the date from which the *Common Database of EU Agencies' Boards of Appeal database*, edited by Prof. Jacopo Alberti, starts. This database was used as main 'basin' to get the decisions (corrigendum were excluded, for obvious reasons). However, regarding EUIPO, the Agency's own database was also used, collecting Prof. Jacopo Alberti's database only the decisions of EUIPO Grand Board, which, to date, has not adopted relevant decisions to our purposes. The analysis, therefore, covers a period of six years. Regarding the previous years, the research has relied mainly on the reconstruction carried out by the scientific literature. For each decision, the following elements were analyzed, where present: interest in bringing proceedings, individual and direct interest and direct interest and absence of implementing measures.

The BoAs taken into consideration are those established at: EUIPO, EASA, ACER, SRB, CPVO, ECHA, ESAs, ERA. Starting from the last Board mentioned, the decisions rendered starting from 1st January 2018 are 2, both relevant for our purposes. With regard to the ESAs Joint BoA, the decisions rendered, in the same period, were 14, 7 relevant for the purposes of this work. In the previous period, the decisions were 12. Moving on to ECHA, the decisions (excluding procedural ones and

[10] See, on this regard, *amplius*, *infra*, § 3.

including only definitive ones) are 68. Only 9 decisions deal with the issue of individual's legal standing. Before 1st January 2018, as highlighted, "in its more than ten years of experience in dealing with appeal cases, the ECHA BoA has managed to develop a considerable corpus of decisions"[11], precisely 87. Referring to the BoA of CPVO, over the past six years it has adopted 14 decisions, only 2 relevant for our purposes. From its establishment to 2018, "the CVPO BoA has received less than 250 appeals"[12]. With regard to the SRB Appeal Panel, from 1st January 2018 to date 53 cases have been decided, of which only 7 deal with the topic of locus standi. Before 2018, the SRB Appeal Panel decided 88 cases. The BoA of ACER rendered 33 decisions, 25 of which dealt, more or less in detail, with the issue of the admissibility of the application. Before 1st January 2018, ACER's BoA decided only 4 cases. The EASA BoA has decided, in the period considered by the Prof. Jacopo Alberti's database, 7 cases, of which only 1 has analyzed the admissibility of the appeal. EUIPO is a very peculiar case because, as mentioned, the configuration of the right to bring proceedings before its BoA (*rectius*, its BoAs) is, at the regulatory level, significantly different from the other BoAs. Moreover, the volume of cases handled and decided annually by these bodies is very high[13] and makes it difficult to carry out a comprehensive analysis, which would probably require an autonomous space. However, a few dozen 'sample' decisions were taken into consideration. They are adequately useful in understanding how the EUIPO BoAs approach the issue. Note that the EUIPO Grand Board has not been addressed, at least in the last six years, with issues relating to the admissibility of appeals.

Alongside this merely empirical and quantitative analysis, there was a more purely qualitative one based on the study of the (limited) scientific literature and the case law of the EU Courts.

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[11] See A. VOLPATO, E. MULLIER, *The BoA of the European Chemicals Agency at a Crossroads*, *cit.*, at p. 84.

[12] See D. HANF, *The Trailblazers: The Boards of Appeal of EUIPO and CPVO*, *cit.*, at p. 62.

[13] D. HANF, *The Trailblazers: The Boards of Appeal of EUIPO and CPVO*, *cit.*, at 62, writes that the procedure for registering trademarks and designs is a 'mass business' and this, evidently, has consequences in terms of the volume of appeals. For instance, "In 2019, EUIPO examined almost 160,000 EUTM applications and more than 95,000 RCD applications. Close to 11 per cent of EUIPO first-instance decisions were appealed before the Boards of Appeal and amounted to almost 3,000 appeals. The Boards of Appeal (nineteen members including five chairpersons) closed 2,500 appeal procedures, confirming the decisions under appeal in around three-quarter of the cases. Two hundred and sixty- nine decisions of the Boards of Appeal (approximately 9 per cent of the decisions taken by the Boards of Appeal) were challenged before the General Court".

3. The conditions for access to BoAs' 'justice' and the scope of their review

Before focusing on the BoAs' 'case law', it seems useful to outline the essential features of the conditions for access to this 'justice' in their Founding Regulations. The same applies, albeit briefly, with regard to the extension of their 'jurisdiction', which is evidently closely connected to the locus standi.

Apart from EUIPO, which will be discussed further below, all the relevant provisions contained in the Agencies' Founding Regulations reproduce almost textually Article 230(4) TEC (current Article 263(4) TFEU)[14]. Article 230(4) TEC provided that any natural or legal person could bring an appeal against decisions which, while appearing to be a Regulation or a decision addressed to another person, was of direct and individual concern to the former. The Treaty of Lisbon, taking in the amendments made by the Treaty establishing a Constitution for Europe, under the fourth paragraph of Article 263 TFEU, relaxed the conditions of admissibility of actions for annulment brought by individuals against acts of the European Union by adding a third limb to that provision: without subordinating the admissibility on the assumption of individual interest, it also makes possible legal actions against regulatory acts which do not entail implementing measures and are of direct concern to the applicant[15]. Like Article 230 TEC, and unlike Article 263 TFEU, no founding Regulation provides for the appeal against regulatory acts. The reason, at least initially, could had lie in the rather banal fact that these Agencies, except for ESAs and SRB, had been established with Regulations entered into force before the Treaty of Lisbon (even if, sometimes, only slightly, as in the case, for instance, of ACER). However, although the founding Regulations of these Agencies have been amended, wholly or partly, following the entry into force of the Treaty of Lisbon, they still do not provide for the reviewability of 'regulatory acts'. The reason behind this absence, then, could lie in the fact that (historically) the Agencies could not adopt acts of general application, at least by virtue of

[14] Even the Regulation establishing AMLA, which is not yet in force, incorporates the wording of Article 230 TEC: see Article 62 of the proposal for a Regulation of the European Parliament and of the Council establishing the Authority for Anti-Money Laundering and Countering the Financing of Terrorism and amending Regulations (EU) n. 1093/2010, (EU) 1094/2010, (EU) 1095/2010, (COM(2021)0421 – C9-0340/2021 – 2021/0240(COD)).

[15] For a reconstruction see, *ex multis*, S. BALTHASAR, *Locus standi rules for challenges to regulatory acts by private applicants: the new Art. 263(4) TFEU*, *cit.*, p. 542 ff.; see also, *ex plurimis*, Court of Justice, February 27th 2014, case C-132/12 P, *Stichting Woonpunt e altri* v *Commission*, ECLI:EU:C:2014:100, para 43.

the *Meroni* case law or of its (perhaps debatable?) interpretation by the European Commission and, subsequently, by the vast majority of legal and political scholarship[16] (indeed, partially outdated). Acts of general application obviously also include regulatory acts. In fact, since the order of the General Court of 6 September 2011, *Inuit Tapiriit Kanatami v Commission*[17], confirmed by the Court with ruling of 3 October 2013[18], regulatory acts are acts of general application of a non-legislative nature. Therefore, if Agencies were not empowered to issue acts of general application, it would have been illogical to provide for the possibility of challenging regulatory acts which, by their very nature, the Agencies could not adopt. In addition, Article 263(5) TFEU – which is the legal basis for the establishment and operation of the BoAs[19] – acknowledges that the acts setting bodies may "lay down specific conditions and arrangements concerning actions brought by natural or legal persons", thereby allowing for a differentiation in the way the rights of individuals must be protected *vis-à-vis*, *inter alia*, Agencies. However, it is known that the Court of Justice, in the *ESMA Short Selling* ruling of 22 January 2014[20], concerning the extension of the intervention powers of ESMA, clarified that the institutional framework established by the Treaty on the functioning of the Union – in particular Articles 263(1) TFEU and 277 TFEU – expressly allows bodies, offices and Agencies of the Union to adopt acts of general application. Article 277 TFEU governs the exception of invalidity (also) in relation to an act of general application adopted by a "body, office or Agency of the Union", while Article 263(1) TFEU mentions generically of "acts of the bodies, offices or Agencies of the Union" and not of individual decisions. Accordingly, at least potentially, the Agencies could be competent, certainly in circumscribed circumstances, to adopt regulatory acts.

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[16] See Court of Justice, June 13th 1958, case 9/56, *Meroni*, ECLI:EU:C:1958:7. See, *amplius*, M. CHAMON, *EU Agencies: between Meroni and Romano or the devil and the deep blue sea*, in *Common Market Law Review*, 2011, p. 1055 ff.

[17] General Court, September 6th 2011, case T-18/10, *Inuit Tapiriit Kanatami* v *Commission*, ECLI:EU:T:2011:419, paras 42-45.

[18] See Court of Justice, October 3rd 2013, case C-583/11 P, *Inuit Tapiriit Kanatami* v *Commission*, ECLI:EU:C:2013:625, para 60.

[19] See, *amplius*, for instance, L. MUZI, *Who Litigates before the Boards of Appeal?*, *cit.*, at p. 222.

[20] Court of Justice, January 22nd 2014, case C-270/12, *United Kingdom* v *Parliament and Council*, ECLI:EU:C:2014:18, para 65. See also the comment by M. CHAMON, *The Empowerment of Agencies Under the Meroni Doctrine and Article 114 TFEU: Comment on United Kingdom* v *Parliament and Council (Short-Selling) and the Proposed Single Resolution Mechanism*, in *European Law Review*, 2014, p. 380 ff.

Therefore, if, in the light of a literal and systematic interpretation of the Treaties, the Boards of Appeal are entitled to adopt acts of general application, it is possible to argue, then, that the reason behind the impossibility of challenging them ultimately derives, not by 'system' or institutional reasons, as more by reasons of 'legislative opportunity': the powers of the BoAs have evidently always been thought as referring to a specific group of decisions which, as a proof of this, is always indicated more or less precisely in the founding Regulation of the various Agencies. Therefore, if it is excluded upstream that the BoAs have an all-encompassing competence, it is clear that, downstream, there is no need to confer on them a generic competence (as would be that against unspecified 'regulatory acts').

Anyway, in the light of a transversal analysis of the relevant decisions of the BoAs, it can be affirmed that, like proceedings before the General Court and the Court of Justice pursuant to Article 263 TFEU, also before the BoAs, locus standi and the interest in bringing proceedings are distinct conditions of admissibility. These conditions must be fulfilled cumulatively.

With regard to the interest in bringing proceedings – whose configuration in the decisions of the BoAs will be better analyzed below, § 4.1 – it is sufficient to mention here that it is not formally required in any basic Regulation. Except for EUIPO, in fact, the Regulations do not formally require the appeal to be 'supported' by an interest. A rather rare occurrence is that the EU Trademark Regulation, at Article 67, seems to 'codify' the burden of demonstrating an interest in the action by providing that "any party to proceedings *adversely affected by a decision may appeal*" (emphasis added)[21]. Aside from that provision, however, as anticipated, the founding Regulations of the other Agencies (including the Rules of Procedure), do not regulate the interest in bringing proceedings, as is also the case with regard to proceedings before the EU Courts.

The interest in bringing proceedings, therefore – as it will be better seen below – is required by virtue of a BoAs' consolidated case law and not by virtue of legislative provisions. However, it could be argued that if there is no regulatory obligation to demonstrate an interest in the action (except in that specific case before the EUIPO BoAs), then it should not necessarily be proved. In fact, although the regulatory provisions replicate those of the treaties, it is also true that the BoAs essentially represent administrative remedies and not (*stricto sensu*) judicial ones and the interest in bringing proceedings, arising from an alleged injury, is typical only of

[21] As rightly observed by G. GRECO, *cit.*, at p. 249, the Article recalls Article 56(2) of the State of the Court, which provides that "[…] an appeal may be brought by any party which has been unsuccessful, in whole or in part, in its submissions".

litigation disputes and, normally, jurisdictional ones[22]. It is therefore a questionable fact that, as it will be seen, the BoAs totally replicate the case law of the EU Courts.

Finally, few words on the configuration of the individuals' legal standing before the EUIPO BoAs, which, as anticipated, has some very peculiar features[23]. The proceedings before EUIPO concern, in summary, the registration and cancellation of exclusive intangible property rights: EU trademarks and community designs. These proceedings include *inter partes* and *ex parte* proceedings. In the former, the applicant for a trademark or the owner of a trademark or community design faces an opposition or a request for cancellation filed by another party. The EUIPO is therefore limited to adjudicating the dispute between these parties. In the latter, there is only one applicant who addresses a request to the EUIPO for the registration of a trademark or a Community design, with the consequence that the requester is the only party of the procedure. Clearly, in terms of legal standing, *ex parte* proceedings do not pose particular problems: it will only be necessary to verify the existence of the interest in bringing proceedings. The situation is not very different for *inter partes* proceedings. Again, direct interest and individual interest do not 'get in the game': interest in bringing proceedings is the only relevant condition. After all, Articles 66 and 67 of Regulation (EU) n. 2017/1001 on the EU trade mark clearly limit the locus standi to the easily identifiable "parties to the proceedings". This configuration of private applicants' locus standi before is, at least formally, more restrictive than the others, because it is limited

[22] The topic would deserve an autonomous space for its breadth and complexity. In any case, suffice it to say that, irrespective of the nature of the proceedings (civil, criminal, administrative), interest in bringing proceedings is typically a condition of jurisdictional actions. On the other hand, administrative procedures tend to require only a 'legitimate position', which, although it must be legally protected, must not necessarily assume the form of a subjective right or a legitimate interest. See, in the Italian literature, M. PROTTO, *Il rapporto amministrativo*, Milan, 2008; M. MAGRI, *L'interesse legittimo oltre la teoria generale. Neutralità metodologica e giustizia amministrativa. "Per una piena realizzazione dello Stato di diritto"*, Rimini, 2017; E.N. FRAGALE, *Le posizioni legittimanti nel processo amministrativo e il ruolo dei diritti costituzionali*, in *Diritto Pubblico*, 2023, p. 395 ff. In the foreign literature, see also A. SCALIA, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, in *Suffolk University Law Review*, 1983, p. 881 ff.; M. SCHMIDT-PREUß, *Kollidierende Privatinteressen im Verwaltungsrecht*, Berlin, 1992.

[23] Article 66 (1) and (2) of Regulation (EU) n. 2017/1001 states that "An appeal shall lie from decisions of any of the decision-making instances of the Office listed in points (a) to (d) of Article 159. […] A decision which does not terminate *proceedings as regards one of the parties* can only be appealed together with the final decision, unless the decision allows separate appeal" (emphasis added). Article 67 provides that "Any *party to proceedings* adversely affected by a decision may appeal. *Any other parties to the proceedings* shall be parties to the appeal proceedings as of right" (emphasis added).

to the qualification of 'party': third parties cannot access to EUIPO's BoAs, unless as interveners, as discussed elsewhere in this Volume[24]. Nevertheless, third parties who did not participate in the administrative procedure could have an interest (direct and individual) in challenging a decision of EUIPO before the BoAs (such as, for instance, third parties who have submitted observations on the application for registration of a trade mark which, however, pursuant to Article 45(1) of Regulation n. 2017/1001, do not become party to the proceedings before the Office[25]). Accordingly, to be entitled to certainly challenge an Office's decision, it necessary to establish a procedure that attributes the status of 'party', *de facto* imposing a further and different 'stage of proceeding' which, if not initiated or not correctly initiated (for instance, because it is not activated before the registration of someone else's trademark), it prevents the subsequent judicial protection[26].

4. The application of the conditions of admissibility pursuant to Article 263(4) TFEU as interpreted by the Court of Justice in the 'case law' of the BoAs: general considerations

Before analyzing each condition of admissibility as interpreted and applied by the BoAs, it seems useful to summarize how the case law of the Court of Justice on Article 263(4) TFEU has been accepted and implemented by these bodies. After all, as anticipated, the founding Regulations tend to almost textually replicate, if not precisely Article 263(4) TFEU, at least the previous Art. 230 TEC. Therefore, it is interesting to verify whether, and to what extent, the BoAs have applied the classical case law of the General Court and the Court of Justice on the matter[27].

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[24] See, in this *Volume*, I. ANRÒ, *Third parties' intervention before Boards of Appeal*, p. 49.

[25] The example is given by G. GRECO, *cit.*, at p. 256.

[26] See, *amplius*, *ibidem*, at 257. However, note that there is at least one case in which a EUIPO BoA also used, in its reasoning, the classic criteria of individual and direct interest. See *infra*, § 4.1.

[27] See, without claiming to be complete, A. ARNULL, *Private Applicants and the Action for Annulment Under Article 173 of the EC Treaty*, *cit.*; A. ARNULL, *Private Applicants and the Action for Annulment Since Codorniu*, *cit.*; V KOCH, *Locus Standi of Private Applicants Under the EU Constitution: Preserving Gaps in the Protection of Individuals Right to an Effective Remedy*, in *European Law Review*, 2005, p. 511 ff.; R. MASTROIANNI, A. PEZZA, *Striking the Right Balance: Limits on the Rights to Bring an Action Under Article 263(4) of the Treaty on the Functioning of the European Union*, *cit.*; M. KUCHO, *The Status of Natural or Legal Persons According to the Annulment Procedure Post-Lisbon*, in *LSE Law Review*, 2017, p. 101 ff.; C. AMALFITANO, *Standing (Locus Standi). Court of Justice of the European Union (CJEU)*, in *Max Planck Encyclopedia of International Procedural Law*, 2021.

From a 'horizontal analysis' of the decisions of the BoAs, it emerges that these bodies tend to apply the EU Courts' case law in an essentially dogmatic and uncritical way, usually by analogy. This is no surprise[28]. However, what is surprising is the occasional obsequious attitude with which this is done. Sometimes the Court's restrictive attitude in interpreting access to justice requirements has been noted, resulting in a quasi-passive adjustment[29], sometimes it has been expressly stated that, quite simply, the relevant provisions contained in the founding Regulations "should be interpreted in accordance with case law concerning [Article 263(4)TFEU]"[30]. This conclusion is required, for the BoA, not only by the identity of the textual element, but also by a teleological and systematic approach to the interpretation of the relevant provisions (although this is true up to a certain point, but not with regard, for example, to the regime of regulatory acts). "The interests and rights being protected are exactly the same as those protected by Art. 263(4) TFEU, meaning that it would be unjustified for one provision to have a broader scope than the other"[31]. The Court itself – certainly with reference to the extension of the scope of Article 60 of the ESAs Regulations and, in any case, in the context of a proceeding against EBA's decision not to initiate 'infringement' proceedings under Article 17 of the ESAs Regulations – has basically made it clear that, at the very least, that article has to be interpreted narrowly[32]. The consequence is that the BoAs as well, when they have to rule on the admissibility, are generally restrictive. Appeals are declared admissible, in the vast majority of cases, because the

[28] It is well known that Boards of Appeal are rarely critical of the case law of the EU Courts. See C. TOVO, *The Boards of Appeal of Networked Services Agencies: Specialized Arbitrators of Transnational Regulatory Conflicts?*, *cit*., at p. 43, who writes "[…] a similarity with the judicial proceedings before the CJEU is particularly evident and further enhanced by the decision-making practice of the BoAs, often relying on an application of ECJ case law by analogy".

[29] See decision of ACER BoA of 16 July 2020 in case A-003-2020, *TenneT TSO B.V., Vereniging Energie-Nederland v ACER*, para 82, where the BoA accepts that: "The requirements for the existence of a 'direct and individual concern' in Art. 263(4) TFEU have, since *Plaumann*, been systematically and thoroughly clarified by the CJEU in a restrictive manner, even dismissing the GCEU's efforts to limit those requirements and expand the universe of entities which can seek annulment of an act of an EU Institution or Agency". In another case it was expressly stated that the BoA *must follow* (emphasis added) the settled case law of the CJEU on *locus standi* (decision of ESAs Joint BoA of 13 September 2019 in case D-2019-05, *Creditreform Rating AG* v *EBA*, para 64).

[30] ACER BoA, *TenneT TSO B.V.*, *Vereniging Energie-Nederland* v *ACER*, *cit*., para 62.

[31] *Ibidem* para 62.

[32] General Court, September 9th 2015, case T-660/14, *SV Capital* v *EBA*, ECLI:EU:T:2015:608, paras 42-50.

appellants are the addressees of the decision, which is an appealable decision (*ergo* the appeal is admissible).

It is worth mentioning a few numbers, albeit decontextualized and taking into consideration only decisions adopted as of 1st January 2018.

With regard to ERA BoA, the 2 aforementioned appeals were both declared admissible insofar as they were aimed at reviewing an appealable decision addressed to the appellant, inadmissible, on the other hand, insofar as they were brought against another decision that was not appealable (because it was not listed in Article 11 of the Regulation (EU) n. 2018/867 laying down the Rules of Procedure of the Board(s) of ERA). Regarding the ESAs Joint BoA, among the 14 examined applications – including also 5 applications to suspend the execution of the contested decision under Article 60(3) of the ESAs Regulations – 10 were dismissed, 7 because inadmissible. Concerning the ECHA BoA, regardless of the merits, among the 69 cases handled as of 1st January 2018, 5 have been dismissed due to the withdrawal of the action, 3 were declared partially inadmissible (but not on grounds of standing, rather on grounds of formal deficiencies), 7 were declared inadmissible (generally on grounds of lack of jurisdiction), and the remaining 54 cases were declared admissible. However, the appellants were generally the addressees of the contested decisions. None of these decisions addressed the issue of standing in 'broader' terms. With reference to the SRB Appeal Panel, 53 cases have been decided since 1st January 2018. Among these cases, 22 were declared admissible, 14 inadmissible (often for different procedural reasons than legal standing[33]), 16 partially admissible, and 1 case was closed because 'put into rest'. The BoA of ACER rendered 33 decisions (including 3 corrigendum). Among these 30 cases, 18 were admissible; 3 partially admissible; 7 inadmissible, while 3 decisions simply closed the case. The EASA BoA decided 7 cases, only 1 of which analyzed the conditions of admissibility: it was declared inadmissible. With regard to the other 6, 2 were declared partially admissible, 4 admissible. EUIPO BoAs' decisions are not equally quantifiable and, in any case, as anticipated, the relevant provisions have a more 'restrictive' regulatory configuration than the other Agencies.

As it can be seen, in purely numerical terms, the cases declared admissible tend to be the majority. As mentioned above, these are cases that posed no problems in terms of locus standi. However, when BoAs have to decide on the locus standi of private applicants (who obviously

[33] Note that the ESAs JBoA, as well as the SRB AP, are empowered to review refusals of requests for access to documents, differently from the BoAs of all other Agencies. Many of these cases concern access to documents.

are not the addressees of the decision), then the attitude tends to be particularly restrictive.

4.1. The interest in bringing proceedings

As anticipated above, § 3, the basic Regulations – except for EUIPO – and the Rules of Procedure do not govern in any way the interest in bringing proceedings, which, therefore, at least at the regulatory level, is not strictly required. However, from a transversal analysis of the case law of the BoAs, it emerges clearly that the interest to act is demanded also before these bodies. Moreover, it is required in the same terms as before the EU Courts, whose case law is actually widely quoted. In other words, the notion of interest in bringing proceedings offered by the BoAs is equal to that of the EU Courts and, overall, is equal between the various BoAs.

Once again it is worth recalling that, in the end, since the BoAs have long been very different from the EU judges (and still are different, even if one can reason on their 'jurisdictionalization'), it would have been likely to expect that the interest in bringing proceedings before the BoAs was different from that before the EU Courts. On the contrary, the BoAs have applied EU case law without originality and, generally speaking, there is a certain homogeneity between the various BoAs.

First of all, locus standi and the interest in bringing proceedings are distinct conditions of admissibility. These conditions must be fulfilled cumulatively [34].

The interest in bringing proceedings presumes that the annulment of the contested act may produce legal consequences and that the appeal may, by its outcome, confer an advantage on the party who has brought it. The interest must exist, having regard to the subject-matter of the appeal, at the time of its submission, otherwise it would be inadmissible, and it must continue until the BoA has delivered its decision[35]. Interest in

[34] In the CJEU's case law see, for instance, Court of Justice, May 28th 2013, case C-33/14 P, *Mory and Others* v *Commission*, ECLI:EU:C:2015:609, para 62. In the BoA's case law see, without claiming to be exhaustive, decision of ESAs JBoA of 19 July 2023 in case BoA-D-2023-02, *Euroins Insurance Group AD* v *EIOPA*, para 55; decision of CPVO BoA of 1 July 2023 in case A018/2021, *House Foods Group Inc* v *CPVO*, para 13.6.

[35] In the CJEU's case law see, for instance, Court of Justice, May 28th 2013, case C-239/12 P, *Abdulrahim* v *Council and Commission*, ECLI:EU:C:2013:331; General Court, September 23rd 2015, case T-245/11, *ClientEarth and International Chemical Secretariat* v *ECHA*, ECLI:EU:T:2015:675, paras 114-115. In the BoAs' case law see, for example, decision of EUIPO Fourth BoA of 30 May 2018 in case R 1030/2017-4, *Damandis, S.A* v *Penpe Bilikçi and a.*, paras 19 ff.; decision of ACER BoA, *TenneT TSO B.V.; Vereniging Energie-Nederland* v *ACER*, *cit.*, para 64; decision of SRB Appeal Panel of 14 April 2022 in case 1/2022, *BNP Paribas S.A., BNP Paribas Personal Finance and BGL BNP Paribas* v

bringing proceedings is therefore the essential and preliminary condition for any action before the BoAs. The interest in bringing proceedings is a condition that must exist not only when the appeal is filed, but throughout the whole procedure[36]. Moreover, the BoAs endorsed the general point of EU Law for which, generally, an irregularity in the preparatory act may be raised in challenging the final act, and that, indeed, preparatory acts are usually only subject to appeal when appealing the final decision they relate to[37].

As already anticipated, then, the interest must persist throughout the proceedings, under penalty of inadmissibility of the appeal. It has been argued that from the necessary presence of an interest in bringing proceedings, the subjective nature of the appeal can be deduced and, more generally, the existence of a real 'litigation', closer to judicial proceedings than to administrative ones (which require, for their activation, more than an interest *stricto sensu*, a 'legitimizing position')[38]. It follows, therefore, the almost obvious applicability (*rectius*, application) by the BoAs of the classic case law of the Court of Justice, for which it must be an appeal that is capable, if successful, of procuring an advantage to that party[39] and evidence of its existence must be provided by the appellant, but its deficiency can be detected *ex officio*, being the admissibility is a matter of public policy[40].

SRB, para 93.

[36] See, for instance, decision of ECHA BoA of 17 November 2020 in case A-006-2019, *Sharda Europe B.V.B.A* v *ECHA*, para 29; decision of ACER BoA of 28 May 2021 in case A-001-2021, *Polskie Sieci Elektroenergetyczne S.A. and others* v *ACER*, para 80.

[37] See, for instance, decision of EASA BoA of 30 April 2013 in case AP/03/2012/LUCK, *Stephen Luck* v *EASA*, para 51; decision of ACER BoA of 6 August 2019 in case A-004-2019, *Hungarian Energy and Public Utility Regulatory Authority and a.* v *ACER*, para 45; decision of ESAs JBoA, *Creditreform Rating AG* v *EBA*, *cit.*, para 64; decision of SRB Appeal Panel of 29 June 2022 in case 1/2022, para 58, where it is written: "although, within the current state of case law there is yet no specific guidance in the SRMR on whether the admissibility of an appeal by the Appeal Panel should be guided by this distinction between 'preparatory' and 'final' acts, in the Appeal Panel's view the distinction is inspired by weighty reasons that, all relevant normative aspects being here considered, should be followed also in this context".

[38] See G. GRECO, *cit.*, at p. 250.

[39] See decision of CPVO BoA, *House Foods Group Inc* v *CPVO*, *cit.*, para 13.6; decision of ESAs BoA, *Euroins Insurance Group AD* v *EIOPA*, *cit.*, para 55.

[40] See decision of ESAs BoA of 19 July 2023 in case BoA-D-2023-02, *Euroins* v *EIOPA*, para 52; *Euroins Insurance Group AD* v *EIOPA*, *cit.*, para 52; October 23rd 2023 in case BoA-D-2023-03, *Dubai Commodities Clearing Corporation* v *ESMA*, para 16; decision of SRB AP, *cit.*, para 65; *BNP Paribas S.A., BNP Paribas Personal Finance and BGL BNP Paribas* v *SRB*, *cit.*, para 94; decision of ECHA BoA of 28 February 2023 in case A-013-2021, *GruberChem GmbH* v *ECHA*, para 16; 28 February 2023 in case A-014-2021, *GruberChem GmbH* v *ECHA*, para 26. Before the EU Courts see, *ex multis*, Court of

Finally, the peculiar revocation and invalidity procedure before the EU Intellectual Property Office, governed by Article 63(1)(a) of the EU trade mark Regulation, deserves to be mentioned. This procedure, which evidently does not take place before the BoAs, is interesting because it expressly provides that it can be activated by "any natural or legal person and any group or body set up for the purpose of representing the interests of manufacturers, producers, suppliers of services, traders or consumers, which, under the terms of the law governing it, has the capacity in its own name to sue and be sued", without having to demonstrate any particular reason, interest or motive for filing the request[41]. Paragraph 3 of the Article only states that the application shall be "inadmissible where an application relating to the same subject matter and cause of action, and involving the same parties, has been adjudicated on its merits, either by the Office or by an EU trade mark court […] and the decision of the Office or that court on that application has acquired the authority of a final decision". However, the Grand BoA of EUIPO clarified – applying the *Emsland-Stärke*[42] and *Kratzer*[43] case law – that *formal* compliance with the relevant legislation, *i.e.* the fact that no interest has to be demonstrated, cannot, however, obviate the need for a check on possible abuse of law, the violation of which 'prevails' over formal compliance with the Article 63(1)(a) EUTMR. In fact, the notion of abuse of law or process is, for the Grand BoA, entirely independent of the rules on the right to bring a request for cancellation, regardless the need to demonstrate (or not to demonstrate) an interest in bringing the request[44].

The need to strike a balance between a procedure that does not provide for any activation limit with the need for no artificial proceedings to be instituted makes this case law particularly interesting, because it shows how the BoAs, where necessary, make virtuous use of the Court's case law, showing themselves capable of balancing mutually interdependent principles, rights and norms.

Justice, October 6th 2020, case C-134/19 P, *Bank Refah Kargaran* v *Council*, ECLI:EU:C:2020:793, para 25.

[41] See, *amplius*, General Court, July 8th 2008, case T-160/07, *Color Edition*, ECLI:EU:T:2008:261, paras 22-26; General Court, May 30th 2013, case T-396/11, *Ultrafilter International*, ECLI:EU:T:2013:284, para 24.

[42] Court of Justice, December 14th 2000, case C-110/99, *Emsland-Stärke*, ECLI:EU:C:2000:695, para 52.

[43] Court of Justice, July 28th 2016, case C-423/15, *Kratzer*, ECLI:EU:C:2016:604, para 39.

[44] See, for instance, decision of EUIPO Grand BoA of 11 February 2020 in case R 2445/2017-G, *Fashion TV Brand Holdings VV*. v *CBM Creative Brands Marken GmbH*, paras 32 ff.

4.2. The individual interest

According to the famous *Plaumann* test[45], persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed. This case law, and its well-known narrow application[46], has made and makes it particularly difficult for private applicants to access EU Courts. It is therefore interesting to see whether the same picture has emerged before the BoAs, which, as anticipated, tend to apply, without originality, the teachings of the Kirchberg.

First of all, it should be noted that the occasions on which the BoAs have thoroughly examined the individual interest condition, especially since January 2018, are indeed not many (see above, § 2). With regard to the BoAs of EUIPO, the reasons are self-evident: as pointed out *supra*, § 3, those who are not 'parties to the proceedings' before the Agency (and, therefore, are not the addressees of its decisions) are not formally entitled to bring the action. However, even when the Agencies' founding Regulations provide for this possibility – that is in all other cases – the Boards have rarely 'fathomed' the requirement thoroughly. In fact, as already mentioned, litigation before such bodies is, in any case, mainly activated by the addressees of the decisions rather than by third parties who may be affected.

However, some decisions are worth mentioning. First of all, those that, albeit timidly, attempted to challenge, to some extent, the 'rigid' *Plaumann* test. The well-known decision of the Joint BoA of the ESAs of

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[45] Court of Justice, July 15th 1963, case 25-62, *Plaumann & Co.* v *Commission*, ECLI:EU:C:1963:17.

[46] See, for instance and without claiming to be exhaustive, Court of Justice, July 25th 2002, case C-50/00 P, *Unión de Pequeños Agricultores* v *Council*, ECLI:EU:C:2002:462; and the latest , Court of Justice, March 25th 2021, case C-565/19 P, *Carvalho and Others* v *Parliament and Council*, ECLI:EU:2021:252; Court of Justice, July 15th 2021, case C-453/19, *Deutsche Lufthansa* v *Commission*, ECLI:EU:C:2021:608; Court of Justice, January 31st 2023, case C-284/21 P, *Commission* v *Braesch and Others*, ECLI:EU:2023:58. On the adequacy and rightness of the *Plaumann* test, see J. MOITINHO DE ALMEIDA, *Le recours en annulation des particuliers (article 173, deuxième alinéa, du traité CE) : nouvelles réflexions sur l'expression "la concernent...individuellement"*, in *Festschrift fur Ulrich Everling*, 1995, p. 849 ff.; K. LENAERTS, *The Legal Protection of Private Parties under the EC Treaty: A Coherent and Complete System of judicial Review?*, in VV. AA., *Scritti in onore di Giuseppe Federico Mancini*, Milano, 1998, p. 591 ff.; more recently, a proposal of reviewing the test, in particular with regard to cases relating to the Rule of Law, was made by T. BOEKESTEIN, *Plaumann and the Rule of Law*, in *Verfassungsblog*, 12 November 2021.

24 June 2012, case BoA-2013-008, *SV Capital OU* v *EBA*, regarding the appeal of a decision that rejected the request to open an investigation procedure against a National Authority, is one of the first decisions where a BoA has partially departed from the 'plastered' case law of the Court of Justice. Indeed, the BoA embraced a more relaxed interpretation of the standing requirement and declared as admissible the appeal filed by a legal person that was not party of either the entities, expressly indicated by Article 17(2) of Regulation n. 1093/2010, that may submit a request to EBA to initiate an investigation, or the Banking Stakeholders' Group, established under Article 37 of the same Regulation n. 1093/2010, to facilitate consultation with interested parties in the areas of EBA's competence. Nevertheless, the General Court, then 'reset' the issue in the usual terms, ruling out standing both before the BoA and before the EU Court[47], and, in fact, the BoAs then changed its approach accordingly.

Another decision that it is worth highlighting is the SRB AP's decision of 29 June 2022, case 1/2022, regarding the appeal of a decision that set the minimum requirement for own funds and eligible liabilities ('MREL') as agreed by the SRB. In this capacity, the SRB had established a resolution college, which was responsible for, among other things, developing the group resolution plan and determining the MREL to be met by the applicant as a resolution entity on a consolidated basis for the group. To argue that the contested decision, which was also sent to the appellant, was not 'addressed' to him, the SRB relied on the argument that the decision was not intended to have 'binding external effects' and was sent to the appellant for information purposes only. Yet, for the SRB AP, the contested decision had binding effect and it had been communicated to the appellant not out of mere deference or to keep him informed but pursuant to Article 45h of Directive 2014/59/EU (the Bank Recovery and Resolution Directive) and Article 92 of Commission Delegated Regulation n. 2016/1075. "This legal requirement [was] a pre-condition to 'ensure compliance with Articles 45e and 45f BRRD' (Article 45h(1) BRRD), and [was] imposed in order to monitor the application of the decision". The contested decision, therefore, had to be considered 'addressed' also to the appellant, according to the reasons behind its communication to him. Moreover, according to the AP, even if the contested decision should not have been deemed 'addressed' to the appellant, since it actually was a communication sent by the national resolution authority in implementation of the SRB's instructions, the appellant would still have been directly and individually affected by it. Indeed, in this case, "the facts

[47] See General Court, September 9th 2015, case T-660/14, *SV Capital* v *EBA cit.*

[left] no doubt as to the fulfilment of these condition"[48]. Not only Article 45h(7) of the BRRD, in fact, does provide that the contested decision binds the authorities, but the content of the contested decision clearly stated what the MREL levels should be for group entities, including the appellant. Therefore, for the AP, the only conclusion was that the appellant was directly and individually affected by the contested decision.

Two other decisions, admittedly less interesting, deserve to be mentioned, at least to show cases where the requirement was 'canonically' fulfilled. The first one, ACER BoA case A-003-2019 dated 11 July 2019, concerned ACER's decision on the Core CCR TSOs' proposals for the regional design of the day-ahead and intraday common capacity calculation methodologies. In this case, the BoA, after determining that the appellant was not one of the addressee of the decision, found that, being a national regulatory authority concerned in the Core region, it had a direct and individual interest in the outcome of the case[49]. Similar is the case A-002-2018 of 14 February 2019, that regarded ACER's decision establishing the capacity booking platform to be used at 'Mallnow' Interconnection Point and 'GCP' Virtual Interconnection Point. Also in this case, ACER BoA, after having checked that the appellant was not an addressee of the decision, still stated that he was directly and individually concerned thereby, being one of tenderers in the proceeding which resulted in the contested decision[50]. In fact, in both cases, the admissibility of the appeal was not contested by the Agency.

Lastly, among the decisions that have attempted to 'soften' a little the conditions for access to BoAs, a decision of the Second BoA of EUIPO of 18 February 2011 must be mentioned, case R 197/2010-2, *ECP* v *edp Gás*. As anticipated, in cases before the BoAs of EUIPO, the appeal is limited to the parties of the administrative procedure. However, according to the BoA, in the case at stake it could not be excluded that, in certain circumstances, another natural or legal person could be considered as "a party to the proceedings"[51]. The appeal had been filed on behalf of a company that was not the formal addressee of EUIPO's decision, but it was the owner of the earlier mark. Although the applicant was the licensee of the addressee of the decision and although it belonged to the same corporate group, it was nevertheless a different legal entity from the formal "party to the proceeding". In assessing the appellant's legal standing, the BoA was openly inspired by the case law on Article 173 EEC

[48] Decision of SRB Appeal Panel, *BNP Paribas S.A., BNP Paribas Personal Finance and BGL BNP Paribas* v *SRB*, *cit.*, para 33.

[49] *Ibidem* para 33.

[50] *Ibidem* para 36.

[51] *Ibidem* para 32.

Treaty (current Article 263 TFEU) and thus applied, although it had no counterpart in the legislative datum, the criteria of direct and individual interest. With specific regard to individual interest, the BoA, applying the classic case law of the CJEU, ruled that since the appellant was the owner of the earlier CTM, his status differentiated him from all other parties and, in particular, from all other operators in the relevant market. For this reason, the Board considered the appellant individually affected by the contested decision. No other similar decisions were found.

It is equally interesting to also show some decisions that, on the contrary, applied *Plaumann* without any originality.

A first one is the decision rendered by the ACER's BoA on 16 July 2020 in case A-003-2020 with regard to the Agency's decision on the methodology to determine prices for the balancing energy that results from the activation of balancing energy bids. This decision is particularly interesting not only because it clearly highlights the restrictive attitude, but also because it explains the rationale behind it, i.e. preventing the *actio popularis*, which would allow non-privileged applicants to challenge *ad libitum* all the Agency's acts[52]. Regardless of the merits, in fact, the BoA established that, even if the contested decision had direct legal consequences for the appellant (in particular 'appellant II'), such legal consequences would be derived from a regulatory act with consequences for all current and potential commercial operators on the electricity markets, thus producing effects on a category of subjects determined by objective factors, *i.e.* any electricity operator participating in the regulated electricity balancing markets electric energy. The Board added, therefore, that if a different interpretation prevailed, this would have meant that, whenever an Institution or Agency adopts an abstract and general legal provision or a regulatory act that increases the costs of all EU undertakings active in a specific economic sector, any undertaking or group of

[52] It is common ground that this is the reason behind the Court's limits on access to justice. In this regard, G. Caggiano wrote: "[s]i può dire che la Corte abbia a lungo ponderato l'ampliamento del diritto di accesso alla tutela giudiziaria dell'Unione. La sua preoccupazione costante è stata quella di tenere lontano ogni possibile scivolamento verso forme mascherate di actio popularis", G. CAGGIANO, *La legittimazione ad agire per annullamento di un atto regolamentare da parte di soggetti che dimostrino un interesse individuale: il caso Montessori/Ferracci in materia di aiuti di Stato e le esenzioni fiscali ICI/IMU agli enti ecclesiastici*, in *Eurojus*, 2018, p. 1 ff., at p. 8; see also K. LENAERTS, K. GUTMAN, J. TOMASZ NOWAK, *EU Procedural Law*, Oxford, 2023, at p. 326, where it is written: "the justification for the restriction lies in the far-reaching consequences of the annulment of a Union act. Annulment applies erga omnes and is retroactive. To make the action for annulment generally available might mean permanent litigation on Union acts of general application and open the way to an actio popularis". In the case law see, in that regard, order, General Court, November 22nd 2017, case T-670/16, *Digital Rights Ireland* v *Commission*, ECLI:EU:T:2017:838, para 50.

undertakings within a Member State active in that economic sector would be entitled to challenge the EU act or decision. "This is contradicted by the interpretation of the legal requirements of locus standi set out in the CJEU's case law, and would allow a broad range of appeals of EU acts under Article 263(§4) TFEU in a manner which has explicitly been refused by the CJEU throughout its history"[53].

Another interesting decision is, for instance, the ESAs Joint BoA's decision of 14 April 2021, case D-2021-03, concerning a decision of EIOPA and the Romanian National Supervisory Authority (the *Autoritatea de Supraveghere Financiară*, 'ASF') of conducting a balance sheet review exercise of Romanian insurance companies. This was, more specifically, EIOPA's communication to the *Autoritatea de Supraveghere Financiară* in which EIOPA accepted the Authority's invitation to conduct this balance sheet review exercise and offered its cooperation. In this context, the ESAs Joint BoA ruled, among other things, that neither individual nor direct interest were satisfied. Regarding the individual interest, the Joint BoA stated that, although EIOPA had participated in the balance sheet review exercise, this operation was, and remained, a decision of the National Authority, which had already been challenged by the appellant before the competent national Court. It added that, if the ASF had to adopt supervisory measures against a specific insurance company at the end of the balance sheet review operation, such individual measures could have been challenged by the addressee before the relevant national Court. The appellant, who was not the addressee of EIOPA's decision to participate in the balance sheet review, had therefore not demonstrated that this participation concerned it individually (and directly). In addition, the Joint BoA recalled that, if the applicant and/or the national court before which the decision of the National Authority was challenged had to consider (*i*) that a question of the validity of EIOPA's decision to participate in the balance sheet review was relevant for the decision of the national Court on the validity of the decision of the National Authority and (*ii*) that EIOPA's participation in the balance sheet review could have been an ultra vires act with respect to the scope of EIOPA's action and powers, this issue could have been referred to the Court of Justice under Article 267 TFEU.

Finally, it is worth highlighting a 'jurisprudential' strand – under which the aforementioned *SV Capital v EBA* ruling also falls – that concerns the power of the three ESAs to initiate, under Article 17 of the three founding Regulations, proceedings aimed at stopping the behavior

[53] Decision of ACER BoA, *TenneT TSO B.V.; Vereniging Energie-Nederland* v *ACER*, *cit.*, para 91. On the matter, see also July 22nd 2022, case C-348/20 P, *Nord Stream 2* v *Parliament and Council*, ECLI:EU:C:2022:548.

of a National Authority that is contrary to EU law. This task, is, indeed, a 'power' and, as such, is left to the discretion of the Agencies themselves. However, regardless of this interesting topic, what is relevant here is the ('rigid') Joint BoA's position on individual interest. In the ESAs Joint BoA's decision of 21 July 21 2022, case D-2022-01 (similar is also the earlier decision of 2 March 2021, case D-2021-02) regarding the EBA's decision to not open an investigation under Article 17 of the founding Regulation, the Joint BoA considered that there were no grounds to depart from the *SV Capital* and *Jakeliūnas*[54] rulings, as well as from the Joint BoA's precedents. Indeed, even when an appellant's interest in the opening of an investigation by the EBA was recognized, it remained crucial, for the Joint BoA, to determine whether or not such a decision fell within the scope of Article 60 of the Founding Regulation (which governs the appeal and the limits to its activation). Although the Joint BoA had recognized the appellant's interest in EBA initiating an investigation in light of the *SV Capital* and *Jakeliūnas* judgments, it was nonetheless of the opinion that the EBA's decision not to initiate an investigation did not fall within the scope of Article 60. The competence of the Joint BoA under Article 60 regarding Article 17 decisions is limited to decisions: (*i*) concerning the initiation of an investigation following a request from an NCA, the European Parliament, the Council, the Commission, and the Banking Stakeholder Group and addressed to those entities; and (*ii*) following any subsequent action by the EBA in which an investigation is undertaken, either (*a*) recommendations to NCAs or the Commission, or (*b*) decisions addressed to financial institutions. None of these assumptions had been met. The Joint BoA acknowledged that, since the adoption of the 2019 Regulation, the difference between those who can actually appeal Article 17 decisions and those who can only suggest to the Agency to act (as it was in this case) had decreased, increasing the chances of appeal, but at the same time acknowledged that the case law of the General Court and the Court of Justice had not changed and, therefore, declared the appeal inadmissible, taking a highly dogmatic approach to the case law of the EU Courts.

4.3. The direct interest

The notion of direct concern presumes the joint fulfilment of two premises: the EU act must affect the legal situation of the person concerned directly and the EU act must leave no discretion to the addressees that are responsible for its implementation, making the

[54] General Court, August 10th 2021, case T-760/20, *Jakeliūnas* v *ESMA*, ECLI:EU:T:2021:512.

implementation of the act automatic, and without the involvement of intermediate rules[55]. BoAs, as a rule, follow the 'classic' approach: before assessing the existence of direct interest, they tend to examine the existence of individual interest. After all, it is common ground that satisfying the latter is much more difficult than satisfying the former. Therefore, also for reasons of procedural economy, the judges (and the BoAs) prefer to immediately examine the individual interest, thus avoiding proceeding further if it is not satisfied. The consequence of this approach is that there are not many cases that have examined the direct interest, precisely because, being the individual interest immediately examined, and being quite rare that it is satisfied, there are not the chances to assess the direct interest.

A decision that 'broke' this rule and examined, first and foremost, the direct interest was the already mentioned decision of the BoA of ACER of 16 July 2020, case A-003-2020, concerning ACER's decision on the methodology to determine prices for the balancing energy that results from the activation of balancing energy bids. One of the appellants was an association registered with the Dutch Chamber of Commerce. It described itself as a collective representative association of energy producers, traders and retailers in the Netherlands, and its members were almost all entities producing, supplying and trading electricity, gas and heat in the Netherlands. The contested decision, however, had a precise list of its addressees, who were all TSOs (transmission system operators), *i.e.* regulated national bodies that manage the security and stability of cross-border electricity flows in the EU. The appellant was certainly not included. The BoA, as to the existence of a 'direct interest', concluded that the appellant had not demonstrated that the contested decision directly affected its members. In fact, the contested act did not create binding obligations on its addressees either. The act would have been capable of producing effects against the appellant to the extent that the addressees had actually implemented the contested decision, there being "nothing automatic, therefore, as regards the impact that the realization of those effects might have on the legal position of the applicant for leave to intervene"[56]. The Board further observed that, even if the contested act had been binding, it would have left its addressees a margin of discretion regarding its implementation. However, the appellant had not provided

[55] General Court, October 12th 2016, case T-669/15, *Lysoform and others* v *ECHA*, ECLI:EU:T:2016:610, para 33; and Court of Justice, May 5th 1998, case C-386/96 P, *Dreyfus* v *Commission*, ECLI:EU:C:1998:193, paras 43 and 44.

[56] Decision of ACER BoA, *TenneT TSO B.V.; Vereniging Energie-Nederland* v *ACER*, *cit.*, para 85, quoting expressly General Court, June 29th 2017, case T-63/16, *E-Control* v *ACER*, EU:T:2016:644, para 20.

evidence capable of demonstrating that the negative consequences he invoked in the appeal "would, necessarily, actually and directly follow as a result of such implementation"[57]. Finally, the BoA recalled that, in any case, even if a direct interest had existed, quod non, only if it had been established that the members of the association were also directly and individually interested, then the appellant's appeal would have been admissible[58].

A second decision that followed the same 'pattern', *i.e.* analyzing the direct interest first, is that of the ECHA BoA of 27 October 2020, case A-024-2018, concerning the ECHA's decision on the sharing of data and costs for the registration of the substance 3-phenylpropan-1-o. The Contested Decision was addressed to the data claimant with the appellant in copy. The BoA, adopting a rather formalistic approach and applying the classical notion of direct interest, ruled that the appellant had not demonstrated that his legal situation would be affected by the decision and, therefore, he was not directly concerned by it, without giving further reasons.

Another quite interesting (and old) case is the decision of the EASA BoA of 30 April 2013, case AP/03/2012, concerning the appeal of a EASA's letter in response to a request for information from the applicant. In this case, the BoA sharply ruled that the contested act could not be challenged. It also added that, since it was a confirmatory act, even if it were a challengeable act, it did not directly concern the appellant: the appeal should have been directed towards the original act and not the confirmatory act.

As can be seen from this brief, yet illustrative, 'roundup', direct interest is also rarely satisfied. However, there has been cases where, on the contrary, it has been considered existing. Among these, significant is the decision of the SRB AP of 29 June 2022, case 1/2022, on the SRB decision which set the MREL, already examined above with reference to individual interest. In this case, the AP considered both individual interest and direct interest satisfied. It worth recalling that the SRB had in fact established a resolution college, which had the task, among other things, of developing the group resolution plan and determining the MREL to be

[57] Decision of ACER BoA, *TenneT TSO B.V.; Vereniging Energie-Nederland* v *ACER*, *cit.*, para 85, always quoting General Court, *E-Control v ACER*, *cit.*, para 22.

[58] Decision of ACER BoA, *TenneT TSO B.V.; Vereniging Energie-Nederland* v *ACER*, *cit.*, para 87. Also in this case, the BoA applied the classical EU Courts' case law, in particular that establishing that an association has locus standi when it represents the interests of its members and these are themselves directly and individually concerned (see, for instance, Court of Justice, October 4th 2983, case 191/82, *FEDIOL* v *Commission*, ECLI:EU:C:1983:259, para 28). See, *amplius*, I. ANRÒ, *Il difficile accesso alla giustizia ambientale per le ONG e la riforma del Regolamento di Aarhus*, in *Federalismi.it*, p. 1 ff.

respected by the appellant as a resolution entity on a consolidated basis for the group. But even if the contested decision should not have been deemed to the appellant, since it was a communication sent by the national resolution authority in implementation of the SRB's instructions to that effect, the appellant would still have been directly and individually affected. In this case, in fact, the contested decision clearly indicated what were the MREL levels for group entities, and the SRB's decision was, concerning the MREL part, identical to the contested decision, leaving no margin for discretion. Therefore, according to the BoA, it could only be concluded that the applicant was directly concerned by the contested decision.

4.4. Regulatory acts which are of direct concern to the applicant and do not entail implementing measures

Lastly, it is interesting to verify whether and to what extent the BoAs have dealt with the possibility of challenging regulatory acts. As anticipated, no founding Regulation contemplates appeals against such acts, as there is no provision, upstream, for appeals against acts of general application. EU Agencies – both *de jure* and on the basis of the aforementioned case law of the CJEU – are empowered to adopt acts of general application; however, the internal review bodies of these Agencies do not have jurisdiction to declare their legality (or illegality). Nevertheless, there have been two cases in which two different BoAs have dealt with this issue. Adopting a rather formalistic approach, the BoAs concluded that they had no competence to rule (and, therefore, that the appeals were inadmissible). However, just the fact that they have analyzed in depth the ground for appeal, assessing the legal nature of the act (is it regulatory or not?), the existence of a direct interest, and the absence of implementing measures is in itself quite significant (and, perhaps, symptomatic of the fact that, to some extent, the BoAs, net of what the founding Regulations state, are aware that these acts, perhaps, should be challengeable).

A first, interesting case concerns the decision of the ESAs' Joint BoA of 13 September 2019, case D-2019-05. The appellant had filed an appeal challenging the adoption by EBA of certain draft implementing technical standards under Article 15 of the ESAs Regulations. The appealed draft implementing technical standards have been adopted in the form of a final report titled "*Draft implementing technical standards amending Implementing Regulation (EU) 2016/1799 on the mapping of ECAIs' credit assessments under Article 136(1) and (3) of Regulation (EU) No 575/2013*". More specifically, the appealed draft implementing technical standards provided, in a specific annex, certain changes in the correspondence of the appellant long-term

corporate rating 'BBB', 'BB' and 'B'. The annex to the draft implementing technical standards essentially downgraded the appellant's rating. Therefore the appellant has appealed to the Joint BoA pursuant to Article 60(1) of the EBA Regulation which provides for appeals against certain decisions of EBA. In this context, the Joint BoA recognized that, although the appeal referred to an act of general application (a draft implementing technical standard under Article 15 of the ESAs Regulations, evidently a regulatory act), "in the instant case the amendment of Annex III would be a decision of individual and direct concern to the appellant under the so called *Plaumann* test"[59]. Then, it pointed out that the implementing standards did not require any further implementing measures and, at the same time, its Annex made specific references to the applicant, which, in this way, differed from all other credit rating Agencies: a sufficient finding, according to the Joint BoA, to consider, in this perspective, the appeal admissible pursuant to Article 263 TFEU and to recognize the appellant's locus standi. In the Joint BoA's view, the principle that locus stand may be granted not only to the addressee of a decision, but also to an entity other than the addressee which is directly and individually concerned, also applies in the context of appeals before the Joint BoA, although the wording of Article 263(4) TFEU is not identical to that of Article 60 of the ESAs Regulations. It then clarified that the difference between the two provisions, while offering a useful indication that, for legislative purposes, regulatory acts drawn up by the ESAs are not challengeable acts and are not individual decisions (as correctly argued by EBA), "is not such as to prevent a person who is not the addressee of a decision from appealing a decision which is of direct and individual concern to the appellant"[60]. However, it concluded that the appeal was inadmissible because the contested act did not constitute a challengeable decision pursuant to Article 60 of the ESAs Regulation. It was a mere preparatory act with no immediate legal effects on the appellant. However, it is interesting that the Joint BoA, having ascertained the 'regulatory' nature of the act, without a specific provision to refer to, 'traced' its reasoning back to the following test: direct interest, but more importantly, individual interest. In other words, it did not take up the CJEU's case law on regulatory acts, nor did it hermetically brand the appeal as inadmissible for lack of competence, but applied to the regulatory act the conditions of admissibility of individual decisions addressed to third parties. It is curious, however, that the Joint BoA has spent many paragraphs of its decision to assess, first and fore-most, the regulatory nature of the act, and then concluded

[59] Decision of ESAs JBoA, *Creditreform Rating AG* v *EBA*, *cit.*, para 55.
[60] *Ibidem* para 59.

anyway that it was a preparatory act, which was an almost obvious circumstance considering that it is essentially provided in by Article 15 of the EBA Regulation.

One might wonder whether the Joint BoA wants (at least abstractly) to declare admissible appeals against regulatory acts, even if Article 60 of the EBA Regulation does not provide for this. The key point in this decision is paragraph 59, which is a little contradictory: "The textual difference [between Article 60 of the EBA Regulation e Article 263(4) TFEU], whilst it offers a useful indication that in the legislative intent regulatory acts drafted by the ESAs are not contemplated as the subject-matter of an appeal to the BoA and are not considered decisions addressed to a specific person or another person (as correctly argued by the EBA), is not such as to prevent a person who is not the addressee of a decision from appealing a decision which is of direct and individual concern to the appellant". This paragraph is questionable because, on the one hand, it confirms that the difference in the wording of the two Articles seems to suggest that the regulatory acts cannot be contested, but, on the other hand, it seems to mean that this difference could not prevent the appeal to be examinated on the basis of the ordinary test, namely the direct and individual interest.

Partially different is the approach embraced by the ACER BoA in its decisions of 9 December 2022, cases A-002-2022 and A-003-2022. The cases concerned the appeal of Decision n. 03/2022 by which ACER changed the methodology for pricing balancing energy and interzonal capacity used for the exchange of the same energy. This decision was expressly addressed to the aforementioned TSOs (transmission system operators). The two applicants, on the other hand, were, in short, balancing energy providers.

First, the BoA, after stating that the requirement of individual interest was not met[61], ruled that the act directly affected the two companies because, in essence, the aforementioned TSOs enjoyed zero discretion in implementing it. This is relevant because the General Court, more than once, has ruled that "the criterion of being directly affected is identical in the second and third conditions laid down in the fourth paragraph of Article 263 TFEU"[62], and the BoA has considered the two hypotheses as

[61] See, *amplius*, C. BURELLI, *La legittimazione dei privati ad impugnare atti regolamentari: breve nota a margine di due decisioni della commissione di ricorso di ACER del 9 dicembre 2022*, in *Rivista del Contenzioso Europeo*, 2023, p. 1 ff.

[62] See order, General Court, March 13th 2015, case T-673/13*, European Coalition to End Animal Experiments v ECHA*, ECLI:EU:T:2015:167, para 67; General Court, June 9th 2016, case T-276/13, *Growth Energy e Renewable Fuels Association v Consiglio*, ECLI: EU:T:2016:340, para 65; General Court, April 12th 2019, case T-492/15, *Deutsche*

overlapping. After that, the BoA recalled that the form in which the acts or decisions are adopted is, in principle, irrelevant to the possibility of challenging them through an action for annulment[63]. It then stated that the contested act, of a non-legislative nature, had general application and, for that reason, had to be regarded as a regulatory act. The BoA, however, declared itself incompetent to decide on the dispute (and one might then wonder why it felt the need to analyze the nature of the act if it already knew that it would have rejected the appeal of lack of competence). Adopting a very formalistic approach (in spite of its own statement in para 54), the Board in fact recalled that "it must exercise its prerogatives within its constitutional boundaries" and is bound by the ACER Regulation, which establishes its powers and, as anticipated, does not provide for the possibility of challenging regulatory acts under Article 263(4) TFEU. In applying this formalism to this case, the BoA recalled what was affirmed in a recent judgment of the General Court, *MEKH* v *ACER*: "from the legislative and judicial system established by the FEU Treaty that the EU Courts alone are entitled […] to rule that an act of general application is unlawful and to draw the consequences of the inapplicability which results from that with regard to the act of individual scope contested before them, the EU institution, body, office or Agency providing for the internal remedies not being afforded such competence by the Treaties"[64].

The attitude of the two BoAs could seem, at least *prima facie*, quite different: the ESAs Joint BoA referred to the 'classical' test (individual and direct interest), ruling that the appeal was inadmissible because the act was a preparatory act, while the BoA of ACER applied the case law of the EU Courts on regulatory acts, then stating that the appeal was inadmissible on the ground of lack of competence. As a matter of fact, however, on closer inspection, only the procedural and factual contexts in which the decisions were made seem different. The Joint BoA had before it a clearly preparatory act; *ergo* it had an 'easy' 'way out' to declare the appeal inadmissible. ACER's BoA had not the same 'exit strategy' and, perhaps, the only 'chance' it had was to approach the issue in terms of 'constitutional boundaries'. Both, however, analyze in depth some aspects related to the regulatory nature of the act. The attitude, therefore, is similar: in both cases they seem to want to attract to their competence the

Lufthansa AG v Commission, ECLI:EU:T:2019:252, para 211.

[63] See, for both decisions, decision of ACER BoA of 9 December 2022 in cases A-002-2022, *RWE Supply & Trading GmbH* v *ACER*, para 52. See also, for instance, Court of Justice, June 3rd 2021, case C-650/18, *Hungary* v *Parliament*, ECLI:EU:C:2021:426, para 37.

[64] See General Court, March 16th 2022, cases T-684/19 and T-704/19, *MEKH* v *ACER*, ECLI:EU:T:2022:138, para 50.

regulatory acts, but without succeeding. In addition, if the BoAs had established that the act was a regulatory one and they had annul it, the Agencies – in virtue of Article 60(5) with regard to EBA and Article 28(5) with regard to ACER – they could not challenge the decision. The best way to 'raise the question', therefore, was to declare the appeal inadmissible, 'hoping' that the applicant – as actually done in the ACER case – challenged the decision before the General Court.

From this point of view, it seems quite clear the will of the BoAs (at least of ACER and the ESAs) to expand their competence.

Instead, from the perspective of the General Court, it should, in these circumstances, address the issue of the locus standi as follows. If it considers that the provisions of the Agencies' Regulations should be interpreted extensively, giving the BoAs the power to rule on acts such as regulatory acts, then the case should be referred to the BoAs for a decision on the merits (in virtue of the case law cited above, § 1, footnote 4). On the other hand, if the General Court considers that the BoAs have no jurisdiction to hear the cases on the legality of the regulatory acts, then it should rule on the merits by either accepting or rejecting the applications.

5. Concluding remarks

The above examination leads to some concluding remarks. First of all, it is worth asking whether there is consistency within each BoA and between the various BoAs. The answer tends to be positive. Although there have been cases which have, albeit timidly, attempted to slightly broaden the scope of access to justice, or at least have 'called into question' the case law of the EU Courts regarding individuals' locus standi, the truth is that these cases remain isolated and do not fit into a real case law, nor do they suggest an evolution of it. There is, therefore, a tendency towards consistency both within the single BoA and among the different BoAs, thus emerging, albeit perhaps causally, a common and homogeneous approach. This approach tends to be narrow with regard to each condition of admissibility of the appeal.

Naturally, these considerations have to take into account the different 'nature' or 'perception' of each BoA. Think of ERA, for example, which, as it was written, "is seen as a facilitator more than as an arbitrator or an adjudicator"[65]. Or think of ACER, which, on the contrary, is the protagonist of an "expansive trend, both in terms of the number of cases handled and the complexity and relevance of such cases"[66]. This diversity

[65] See C. TOVO, *The Boards of Appeal of Networked Services Agencies: Specialized Arbitrators of Transnational Regulatory Conflicts?*, *cit.*, at p. 45.

[66] *Ibidem* at 45.

involves two sets of considerations. First of all, possible evolutions in terms of extension of the locus standi are easier to hypothesize before BoAs which are developing a wide 'litigation', rather than before BoAs whose case law is almost non-existent. On the other hand, one could argue that, precisely because of a lighter workload, it is before the latter that there is a concrete possibility of successful access to justice. After all, as written above, the rationale behind the restrictive attitude is, also for the BoAs, to prevent an *actio popularis*.

A second consideration is that, since the number of the decisions is very different from BoA to BoA, what could be common ground for EUIPO, for instance, or ECHA, which have a broader case law, can be a controversial point for BoAs with fewer decisions, which have a database too small to identify real trends.

In any case, it should not be forgotten that, in the majority of cases, appeals are inadmissible not because the appellant is not directly and individually concerned by the contested decision, but because of other procedural aspects (for example, delay in filing of the appeal), or because of lack of interest in bringing proceedings, or, again and above all, because of the fact that applicants tend to challenge non-contestable acts, for instance because they do not fall within the list of challengeable acts, or because they are preparatory acts, or because they are not productive of binding legal effects. This can naturally create some problems in terms of jurisdictional protection: it is not certain that an act which cannot be challenged before the BoAs will then be included in the judicial review of the EU Courts. This, according to the BoA of EASA, "makes good sense as there is no indication in the Regulation that the objective of instituting a BoA procedure has been to enlarge the field of challengeable acts that can ultimately be submitted to the review of the Union judicature"[67]. However, *a fortiori*, the issue of the extension of judicial protection granted to individuals remains. This problem is particularly clear with regard to regulatory acts, for example. And here some another questions arise: if a BoA declares itself incompetent after the time limit to bring an action before the General Court has expired (or vice versa), what are the safeguards for the private applicant? For this reason, "in some cases applicants have had to file appeals before the two fora in parallel pending a clear determination of competence"[68]. Second, if a benefit of the BoAs is (also) to reduce the workload of the General Court[69] as well as helping

[67] Decision of EASA BoA, *Stephen Luck* v *EASA*, *cit.*, para 44.

[68] A. VOLPATO, E. MULLIER, *The BoA of the European Chemicals Agency at a Crossroads*, *cit.*, at p. 87.

[69] See, for instance, J. ALBERTI, *The Position of Boards of Appeal: Between Functional Continuity and Independence*, in M. CHAMON, A. VOLPATO, M. ELIANTONIO (eds.), *cit.*, p.

to ensure compliance with Article 47 of the Charter, thanks to their in-depth control[70], then one may wonder what is the rational behind the fact that there are acts that can be challenged directly before the General Court bypassing the BoAs.

Generally speaking, these figures are problematic in themselves: the real benefit of a body such as a BoA should lie in the ease with which appeals can be lodged, the speed of the procedure and the more thorough and expertise-based review[71]. At the same time, it could be argued that, considering that the intervention of the BoAs constitutes a first (sometimes mandatory) step before the intervention of the EU Courts, it could be logical that they follow the (narrow) interpretations provided by these Courts. This also contributes to the coherence of the EU remedies system. This, obviously, is closely connected to how the BoAs should be seen. If the destiny of the BoAs is the 'jurisdictionalization', then it is clear that an approach consistent with the attitude of the EU Courts is not only reasonable, but even appropriate. If, on the contrary, they are considered as typically administrative bodies to which more typically administrative functions are given (or given back, as in the case of ACER[72]), such as reviewing not only the legality but also the substance of the Agencies' decisions, then one might expect a more extensive and open attitude towards the requirements for access to their 'justice'[73]. After all, the added value of the BoAs with respect to the correct functioning of the EU judicial remedies system lies precisely in ensuring in-depth control of the merits of the Agencies' decisions, which, as atypical implementing acts of a technical nature, are necessarily subject to limited judicial review before the CJEU. The risk of a different scenario, more in line with the *status quo*, is that private applicants no longer trust and use these bodies, and that, therefore, they ultimately lose relevance.

However, it is also necessary to face the reality of the facts. Often the decision-making process is a secondary activity of the Agencies (*i.e.* they often adopt preparatory acts and advisory opinions)[74] and this, obviously,

245 ff., at p. 271.

[70] *Ibidem* at 271. On the matter, see also the considerations made *supra*, § 1.

[71] See M. LAMANDINI, D. RAMOS MUÑOZ, *Law and practice of financial appeal bodies (ESAs' BoA, SRB Appeal Panel): a view from the inside*, in *Common Market Law Review*, 2020, p. 119 ff., at p. 131.

[72] C. TOVO, *The Boards of Appeal of Networked Services Agencies: Specialized Arbitrators of Transnational Regulatory Conflicts?*, *cit.*, at p. 54.

[73] *Ibidem* at pp. 54-55; and M. SIMONCINI, M. VERISSIMO, *The EASA BoA in Search of Identity: An Effective Filter between Administration and Courts?*, *cit.*, at p. 121, support this thesis.

[74] See, in this regard,. TOVO, *The Boards of Appeal of Networked Services Agencies: Specialized Arbitrators of Transnational Regulatory Conflicts?*, *cit.*, at p. 36.

affects the number of disputes managed by their BoAs, which, for this very reason, have limited economic and human resources (think of ACER, ERA, EASA or CPVO). Limited resources also mean difficulties in increasing the BoA's capacity to examine large numbers of appeals and the content of decisions. However, one might ask whether, on a general level, the current numbers justify such an expansion. As written above, generally speaking, litigation before the BoAs is mainly initiated by the addressees of the decisions rather than by third parties who may be interested in challenge them.

While it is true that, at a close glance, the principle of effective judicial protection of individuals' rights do not always seem satisfied, and the orientation is generally restrictive, at a more detached glance, it is also true that the analysis carried out so far shows that cases in which, more or less openly, the BoAs have attempted to extend the private applicants' locus standi exist and should not be, at from a theoretical perspective, underestimated.

THIRD PARTIES' INTERVENTION BEFORE THE BOARDS OF APPEAL

L'intervento di terzi nel contenzioso dinanzi alle commissioni di ricorso

L'intervention des tiers devant les chambres de recours

ILARIA ANRÒ*

TABLE OF CONTENTS: 1. Introduction. – 2. A 'variable geometry' intervention before the BoAs. – 2.1 BoAs which prevent third parties from intervening in the proceedings. – 2.2 BoAs which provide for third parties' intervention. – 3. Do we really need a right of intervention before the BoAs?

1. Introduction

The figure of the third party has always generated definitional uncertainties in different procedural contexts (included the EU judicial system): it has always been considered a subject different from the main parties, but still with an own interest (personal or, in some cases, general) to defend within the trial. It has been stated that the difficulty of understanding the figure of the third party in the administrative trial seems to depend largely on that sort of definitional apriorism which, by contrasting third parties with the parties, that is, with the subjects – other than the judge – who animate the process, leads to consider the third party as someone alien to the procedural event[1].

The third party's intervention before the Court of justice of the European Union (CJEU) is provided by Art. 40 of the Statute. This rule, in its first paragraph, provides that Member States and institutions may always intervene in disputes before the CJEU, thus without the need to demonstrate a particular interest in bringing proceedings. On the

* Associate Professor of EU Law at the University of Milan.

[1] See M. OCCHIENA, *Processo amministrativo e terzi*, in C. AMALFITANO, Z. CRESPI REGHIZZI, S. VINCRE (eds.), *I terzi nei processi nazionali e sovranazionali: poteri e tutele*, Turin, 2023, p. 117.

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contrary, the second paragraph of Art. 40 of the Statute provides that: "[t]he same right shall be open to the bodies, offices and Agencies of the Union and to any other person which can establish an interest in the result of a case submitted to the Court". Therefore, for all other parties (other than Member States and institutions) the possibility of intervening is conditional on the demonstration of a specific interest, qualified by the Court's case law as "a direct, existing interest in the ruling on the forms of order sought, and not as an interest in relation to the pleas in law or arguments raised"[2]. In addition to that, Art. 40 specifies that "natural or legal persons shall not intervene in cases between Member States, between institutions of the Union or between Member States and institutions of the Union": therefore, irrespective of the interest in the resolution of the dispute, these categories of 'non-privileged' entities are completely precluded from intervening in these kind of cases which have a 'constitutional' nature (or, to put it mildly, that involve parties with exclusively public interests)[3].

In any case, Art. 40 of the Statute specifies that "[a]n application to intervene shall be limited to supporting the form of order sought by one of the parties", limiting the powers of this kind of participants to the trial.

It is worth remembering that Art. 40 of the Statute only apply to direct actions, while the third parties before the ECJ in the context of a preliminary ruling may join the trial in Luxembourg only if they are already a party within the national one or if they are the subjects included in Art. 23 of the Statute list (namely, States or institutions)[4].

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[2] See, *ex multis*, Court of Justice, March 10th 2023, case C-611/22 P, *Illumina* v *Commission*, ECLI:EU:C:2023:205, para 6 and case law cited.

[3] For an in-depth analysis of the institution of intervention in proceedings before the CJEU see: D. ADAMO, *L'intervento di terzi nel processo dinanzi ai giudici dell'Unione europea*, Naples, 2012; R. MASTROIANNI and A. MAFFEO, *Art. 23 Statuto*, in C. AMALFITANO, M. CONDINANZI, P. IANNUCCELLI (eds.), *Le regole del processo dinanzi al giudice dell'Unione europea,* Naples, 2017, p. 125; F. PILI, *Art. 40 Statuto*, in C. AMALFITANO, M. CONDINANZI, P. IANNUCCELLI (eds.), *cit.,* p. 197; M. CONDINANZI, *Artt. 96 e 97 Reg. proc. Corte giust.*, in C. AMALFITANO, M. CONDINANZI, P. IANNUCCELLI (eds.), *cit.,* p. 606; F. PILI, *Artt. 129 – 132 Reg. proc. Corte giust*., in C. AMALFITANO, M. CONDINANZI, P. IANNUCCELLI (eds.), *cit.,* p. 738 and ID., *Artt. 142-145 Reg. Proc. Trib.,* in C. AMALFITANO, M. CONDINANZI, P. IANNUCCELLI (eds.), *cit.,*p. 1288; M. LATERZA, *Il ruolo delle parti diverse da quelle principali nel processo davanti al giudice dell'Unione europea*, in C. AMALFITANO, M. CONDINANZI (eds.), *La Corte di giustizia dell'Unione europea oltre i Trattati: la riforma organizzativa e processuale del triennio 2012-2015*, Milan, 2018, p. 199; D. DOMENICUCCI, *Riflessioni su alcuni aspetti problematici dell'attuale disciplina della partecipazione dei terzi al processo dinanzi al giudice dell'Unione europea*, in C. AMALFITANO, M. CONDINANZI (eds.), *cit.*, p. 233; A. MAFFEO, *I 'terzi' nel rinvio pregiudiziale e la durata ragionevole del processo*, in C. AMALFITANO, M. CONDINANZI (eds.), *cit.*, p. 263; D. DOMENICUCCI, *L'intervento di terzi nei ricorsi diretti dinanzi al giudice dell'Unione: questioni scelte*, in *Review of European Litigation*, 1/2023, p. 17.

[4] See P. DE PASQUALE, *Il ruolo delle parti nel rinvio pregiudiziale: problemi vecchi e nuovi,*

In the end, it must be remembered that the CJEU does not allow any intervention of third parties acting as *amicus curiae*[5]. The *amicus curiae* is a peculiar figure of participant in the proceedings that must be distinguished from the third party intervener in the technical sense. In general, *amicus curiae* can be considered as a subject that, although not a party to the trial, voluntarily chooses to participate with the aim of providing support to the adjudicating body. This figure differs from the more traditional institution of the third party intervener, who participates to defend its own right or interest that might be prejudiced by the outcome of pending litigation between other parties. In the practice of supranational jurisdictions, however, these figures tend to overlap and be confused, the *amicus curiae* being more and more often the bearer of significant interests, albeit diffuse, coinciding with those of one of the parties or independent from them, so much so that Scholars have spoken of a 'litigating *amicus curiae*'[6]. The main difference between the third party and the *amicus curiae* is that the former usually becomes an actual party to the case, while the latter remains an external figure with the task of providing additional information to the judges.

As far as the Boards of Appeal (BoAs) of the Agencies are concerned, it is possible to observe a great variety of solutions for third parties' intervention within their proceedings.

In some cases, third parties are completely prevented from intervening in proceedings before the BoAs: this is the case of the European Union Intellectual Property Office (EUIPO) (with a peculiar exception), the Community Plant Variety Office (CVPO), the European Union Aviation Safety Agency (EASA), the Single Resolution Board (SRB), European Supervisory Authorities (ESAs) whose Rules of Procedure (as reported in the following) do not contain any norms on the intervention[7].

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in *Review of European Litigation*, 2/2023, p. 1.

[5] See I. ANRÒ, *L'*amicus curiae *presso la Corte di giustizia dell'Unione europea: qualche riflessione per l'apertura delle porte del Kirchberg*, in *Review of European Litigation*, 1/2023, p. 62.

[6] See M. K. LOWMAN, *The litigating amicus curiae. When does the party begin after the friends leave?*, in *American University Law Review,* 1992, p. 1243 ff. and L. CREMA, *Testing Amici Curiae in International Law: Rules and Practice*, in *Italian Yearbook of International Law,* 2012, p. 91 ff., pp. 131-132.

[7] The BoAs Rules of Procedure are included in soft law documents published on the relevant website: for EUIPO see Rules of Procedure of the Boards of Appeal, Decision 2020-1 of 27 February 2020 of the Presidium of the Boards of Appeal on the Rules of Procedure before the Boards of Appeal, as amended on 12 December 2023 (Presidium decision 2023-22); for CVPO see information on the website https://cpvo.europa.eu/en/about-us/law-practice/board-appeal; for EASA see Rules of Procedure of the Boards of Appeal, Decision 2020-1 of 27 February 2020 of the Presidium of the Boards of appeal on the Rules of Procedure before the Boards of

In other cases, this is possible, as long as a "direct and existing interest in the result of the case"[8], as in the case of the Agency for the Cooperation of Energy Regulators (ACER) or just "an interest in the result of the case", as in the case of the European Chemical Agency (ECHA)[9] or a "legitimate interest in the result of the proceedings", as in the case of the European Union Agency for Railways (ERA)[10] is established.

This paper will briefly analyse the BoAs' intervention rules in the context of the specificities of each Agency, in order to assess whether the current rules are sufficient to allow third parties' interests to be duly taken into account, distinguishing between general and specific interests. Finally, some possible solutions are outlined to improve the position of third parties before the BoAs.

2. A variable geometry intervention before the Boards of Appeal

As previously mentioned, the Rules of Procedure of the BoAs do not prescribe a single model of intervention. Instead, there are various norms and options available for involving third-party interests: it is therefore possible to speak of a 'variable geometry intervention' in the context of the BoAs.

In certain cases, third parties may not have the opportunity to intervene before the BoAs, but this does not imply that they are entirely excluded from the process. In other cases, intervention is possible, but only if a qualified interest is demonstrated.

Appeal, as amended on 12 December 2023 (Presidium decision 2023-22); for SRB Appeal Panel of the Single Resolution Board see Rules of Procedures entered into force on 7 September 2020; for ESAs see Board of Appeal of the European Supervisory Authorities Rules of Procedure (BoA 2020 01). On third parties and BoAs see G. GRECO, *Le commissioni di ricorso nel sistema di giustizia dell'Unione europea*, Milano, 2020, p. 286. See also A. MONICA, *Il 'terzo' nei procedimenti amministrativi europei*, in D. FROMAGE (ed.), *Jacques Ziller, a European Scholar*, Firenze, 2022, p. 120. For a recent study on the Boards of Appeal see M. CHAMON, A. VOLPATO, M. ELIANTONIO (eds.), *Boards of Appeal of EU Agencies,* Oxford, 2022.

[8] Art. 11 of Rules of Organisation and Procedure of the Board of Appeal of the European Union Agency for the Cooperation of Energy Regulators, A10-BoR-01-03.

[9] Art. 8 of Commission Regulation (EC) n. 771/2008 of 1 August 2008 laying down the Rules of Organisation and Procedure of the Board of Appeal of the European Chemicals Agency, in *OJ* L 206, 2.08.2008, p. 5.

[10] Art. 15 Commission implementing Regulation (EU) 2018/867 of 13 June 2018 laying down the Rules of Procedure of the Board(s) of Appeal of the European Union Agency for Railways, in *OJ* L 149, 14.06.2018, p. 3.

2.1 BoAs which prevents third parties from intervening in the proceedings

The majority of the BoAs Rules of Procedure do not provide for the possibility for third parties to intervene in the pending proceedings: as anticipated, this is the case of EUIPO, CPVO, EASA, SRB, ESAs, whose Rules of Procedure are silent on this point. This does not mean that third parties' interests are completely disregarded in the context of the Agency's works, but they may be raised (and considered) in different stages of the administrative (that is the proceedings before the Office) and quasi-judicial path (that is before the BoAs)[11].

The case of EUIPO is emblematic. In the EUIPO Rules of Procedure[12] there is no general rule allowing the participation of third parties before the BoAs (not even for the sole purpose of submitting written or oral observations), so that the BoAs proceedings doors are closed. In fact, the parties before the BoAs are the same that have participated in the administrative phase before the Office[13].

It needs to be considered that, before the EUIPO BoAs, the Office as author of the first-instance decision is not a party to the proceedings as well.

The EUIPO Rules of Procedure provides, instead, for limited possibilities to introduce general interests' observations. The first one is provided by Art. 23 of the Rules of Procedure that states that "a group or body representing manufacturers, producers, suppliers of services, traders or consumers, invoking an interest in the result of a case before the Grand Board may, pursuant to Article 37(6) EUTMDR[14], file written observations in the language of proceedings within two months following the publication in the Official Journal of the referral to the Grand Board".

Art. 37(6) of the Commission Delegated Regulation (EU)2018/625 supplementing Regulation (EU) 2017/1001 on the European Union

[11] ECJ confirmed BoAs' quasi-judicial features in its judgement: Court of Justice, March 9th 2023, case C-46/21 P, *Aquind,* ECLI:EU:C:2023:182, para 59.

[12] See Rules of Procedure of the Boards of Appeal, decision 2020-1 of 27 February 2020 of the Presidium of the Boards of Appeal on the Rules of Procedure before the Boards of Appeal, as amended on 12 December 2023 (Presidium decision 2023-22).

[13] As stated by Art. 67 Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trademark, in *OJ* L 154, 16.06.2017, p. 1 ff.

[14] Commission delegated Regulation (EU) 2018/625 of 5 March 2018 supplementing Regulation (EU) 2017/1001 of the European Parliament and of the Council on the European Union trademark, and repealing Delegated Regulation (EU) 2017/1430, in *OJ* L 104, 24.04.2018, p. 1.

trademark, and repealing Delegated Regulation (EUTMDR)[15], in fact, states that "[g]roups or bodies representing manufacturers, producers, suppliers of services, traders or consumers which can establish an interest in the result of a case on appeal or a request for a reasoned opinion brought before the Grand Board, may submit written observations within two months following the publication in the Official Journal of the Office of the decision of referral or, as the case may be, the request for a reasoned opinion. They shall not be parties to the proceedings before the Grand Board and shall bear their own costs". Therefore, only before the EUIPO Grand Board it is possible to introduce third parties' considerations of general interest. Technically, this is not an intervention, as the group or body representing manufacturers, producers, suppliers of services, traders or consumers does not become a party and it can only file written observations, so that it could almost be considered an *amicus curiae* brief. It could also be interpreted as the contribution of a qualified subject similar to the one in the context of the preliminary ruling according to Art. 23 CJEU Statute[16]: it is anyway required by Art. 37(6), to have "an interest in the result" of the case, that is, instead, a typical requirement for genuine third parties.

Probably because of these restrictions, the praxis shows a moderate use of this possibility, while it entails some useful perspective as well. In 2022, in a proceeding concerning the appeal against the EUIPO decision that declared invalid the mark 'Iceland' registered in 2002 by a company, the Iceland Foods Limited, some associations presented their observations: the Fisheries Iceland and the Swiss Association Against the Misuse of Swiss Indications of Source supported the contested decision, maintaining that it is not possible to register a country name as trademark. The International Trade Mark Association (INTA), instead, presented a more general position, recalling that fundamental principles of public international law do not recognise an exclusive right of states to geographic terms, including country names, and therefore they are registrable (under the Paris Convention and TRIPS) inasmuch as they are distinctive, inviting the BoA to carry a detailed, reality-based assessment of each type of product and services is necessary in order to assess the validity of the 'Iceland' registration[17]. The final decision of the BoA does

[15] Commission delegated Regulation (EU) 2018/625 of 5 March 2018 supplementing Regulation (EU) 2017/1001 of the European Parliament and of the Council on the European Union trade mark, and repealing delegated Regulation (EU) 2017/1430 (EUTMDR), in *OJ* L 104, 24.4.2018, p. 1 ff.

[16] Cfr. P. DE PASQUALE, *Il ruolo delle parti nel rinvio pregiudiziale: problemi vecchi e nuovi*, in *Review of European Litigation*, 2/2023, p. 1.

[17] See decision of the EUIPO Grand Board of 15 December 2022 in case R

not contain any comment or reply to these observations, while they reveal anyway a useful tool to get information and data.

In another case, *Zoraya*, INTA provided an opinion to demonstrate the trend of the beverage industry to switch to non-alcohol drinks, which was referred to by the EUIPO Grand Board, demonstrating the usefulness of such input to the proceedings[18]. The other way to get input from sources/subjects not already involved in the BoA's proceedings is linked to Art. 29 of EUTMDR which provides that "[t]he Board of Appeal may, on its own initiative or upon the written, reasoned request of the Executive Director of the Office, invite the Executive Director to comment on questions of general interest which arise in the course of proceedings pending before it. The parties shall be entitled to submit their observations on the Executive Director's comments". In this context, it may be quite controversial as it is questionable whether the Executive Director is a third party (even if EUIPO is not part of the proceedings). The BoAs case law shows little use of this instrument and limited to the inquiry on the Office's practice[19].

Although it is clear from the above that third parties cannot intervene, this does not mean that third parties' interests are completely neglected in the whole EUIPO's system[20]. First of all, it is necessary to distinguish: (a) third parties that have a direct and actual interest in the proceedings from (b) third parties who act to support collective or general interests.

Concerning the former, the Regulation (EU) 2017/1001 on the European Union trademark (EUTMR)[21] provides for a wide range of subjects that may be involved in the first-instance proceedings to defend their interests and rights. For instance, Art. 46 EUTMR provides that a lot of subjects may give notice of opposition, from the proprietors of earlier trademarks to persons authorized to exercise those rights under national law. Then, they will participate in the following first-instance proceedings. Furthermore, Art. 67 EUTMR provides that "any party to proceedings adversely affected by a decision may appeal. Any other parties to the

1238/2019-G, *Iceland Foods Limited,* spec. para 15. There is also a parallel Decision concerning the figurative mark R 1613/2019-G.

[18] See decision of the EUIPO Grand Board of 13 April 2022 in case R 964/2020-G, *Zoraya*, spec. para 30.

[19] See decision of EUIPO Grand Board of 28 June 2021 in case R 2142/2018-G, *Wolfgang Diesel* v *DIESEL S.p.A.*: the Executive Director was questioned about the interpretation of Art. 10(1) EUTMDR concerning the request for proof of use.

[20] For a comprehensive analisys of the EUIPO and CPVO proceedings see D. HANF, *The Trailblazers: The Board of Appeal of EUIPO and CPVO*, in M. CHAMON, A. VOLPATO, M. ELIANTONIO (eds.), *cit.*, p. 59.

[21] Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark, in *OJ* L 154, 16.06.2017, p. 1 ff.

proceedings shall be parties to the appeal proceedings as of right". These different subjects, like the owner of a previously registered trademark or an entity that maintain that a certain trademark should be declared invalid, may appear to be 'third parties' ('counter-interested') while confronted with the EUIPO and the applicant, but are main parties in the so called *inter partes* proceedings.

Therefore, it appears highly probable that subjects having a direct interest concerning a EUIPO decision are already part of the first-instance proceedings and therefore are part of right in the BoA stage. This participation of the third parties should be framed in the context of Art. 41 of the Charter of Fundamental Rights of the European Union (CFREU), Right to good administration[22], that includes "the right of every person to be heard, before any individual measure which would affect him or her adversely is taken". Therefore, it appears that the EUIPO system is 'satisfied' with the participation of these parties in the administrative phase, not considering to introduce such possibility before the BoA, that, as Scholars say, is a 'quasi-judicial' body (and therefore, apparently, in the middle between the administrative and judicial phases)[23].

Moreover, the EUTMR provides an option to join the proceedings also for third parties with general interests: Art. 45 provides, in this regard, that "[a]ny natural or legal person and any group or body representing manufacturers, producers, suppliers of services, traders or consumers may submit to the Office written observations, explaining on which grounds, under Articles 5 and 7, the trade mark should not be registered *ex officio*" specifying that they "shall not be parties to the proceedings before the Office" and therefore they will not be allowed to join the BoAs procedure, as only the parties to first instance proceedings can be party to the appeal procedure.

Therefore, it appears that, for third parties that have a direct and actual interest in the proceedings there may no need to provide a possibility to intervene before the BoA. In fact, subjects who bear a direct (and personal) interest concerning EUIPO decision have already the possibility to initiate the first-instance procedure according to EUTMR and then to participate in the BoA proceedings. In addition to that, they will be able to challenge the BoA decision before the General Court or at least to meet the requirements to intervene according to Art. 40 of the Statute.

Conversely, third parties that bear general interests should be allowed

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[22] See the comment of P. PIVA, *Art. 41*, in R. MASTROIANNI, O. POLLICINO, S. ALLEGREZZA, F. PAPPALARDO, O. RAZZOLINI (eds.), *Carta dei diritti fondamentali dell'Unione europea*, Milan, 2017, p. 753.

[23] See J. ALBERTI, *The Position of Boards of Appeal: Between Functional Continuity and Independence,* in M. CHAMON, A. VOLPATO, M. ELIANTONIO (eds.), *cit.*, p. 245.

to intervene before the BoA for three main reasons: (i) they are already granted the possibility to join the first-instance procedure according to Art. 45 EUTMR, so that it appears to be inconsistent not to provide the same possibility before the BoAs; (ii) this possibility should be granted in a general way (not only before the Grand Board), to balance the Office Executive Director possibility to present observation on general interests questions; (iii) third parties under the (b) category may be granted the leave to intervene before the General Court if they meet the requirements of Art. 40 of the Statute, so that it is a bottleneck to prevent them to participate before the BoAs.

In the end, it is curious to recall that the 'winning' party before the EUIPO BoA (e.g. the applicant for mark registration when the BoA confirms the Office decision rejecting the opposition)[24] will be an intervener with special powers before the General Court, as there the procedure will be between the Office and the opponent. Art. 173(1) of the General Court's Rules of Procedure provides that "[a] party to the proceedings before the Board of Appeal other than the applicant may participate, as intervener, in the proceedings before the General Court by responding to the application in the manner and within the time limit prescribed", and Art. 173(2) that "before the expiry of the time limit prescribed for the lodging of a response, a party to the proceedings before the Board of Appeal other than the applicant shall become a party to the proceedings before the General Court, as intervener, on lodging a procedural document […]". Art. 173(3) states that he "shall have the same procedural rights as the main parties. He may support the form of order sought by a main party and may apply for a form of order and put forward pleas in law independently of those applied for and put forward by the main parties".

Recently, the General Court has specified that this is a peculiar kind of intervener, with the powers and the responsibilities of a party, and therefore the intervention regime pursuant to Art. 40 Statute does not apply to the other party to the proceedings before the Board of Appeal which, having regard to Art. 173(1),(2) of those rules, has not become timely a party to the proceedings before the General Court[25].

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[24] See as an example: General Court, July 26th 2023, case T-591/21, *Apart sp.z.* v *EUIPO,* ECLI:EU:T:2023:433, where the other party in the proceeding before the BoA, the company S. Tous S.L., who successfully registered the figurative sign of a bear with EUIPO, was an intervener before the General Court.

[25] General Court, February 8th 2024, case T-30/23*, Fly Persia and Barmodeh* v *EUIPO-Dubai Aviation,* ECLI:EU:T:2024:86. See also the comment by K. POCHEC-PILIPAVICIUS, *Le Tribunal clarifie le statut de l'intervenant dans le contentieux en matière de la propriété intellectuelle*, in *Review of European Litigation*, 2/2024.

The Rules of Procedure of CPVO are quite similar to EUIPO's. These rules (that are not even collected in a document, being limited to some guidelines on the CPVO website)[26] do not provide for the possibility of a third party's intervention before its BoA.

Thus, Art. 1 of the Commission Regulation (EC) n. 874/2009 (CPVOIR)[27] provides, as EUIPO's, a variety of subjects that may join the first-instance proceedings: (a) the applicant for a Community plant variety right; (b) the objector, as referred to in Art. 59(2) of Council Regulation (EC) n. 2100/94 on Community plant variety rights (CPVRR)[28], (c) the holder or holders of a Community plant variety right (d) any person whose application or request is a prerequisite for a decision of the Office. In addition to that, the Office may allow other persons to be parties to the proceedings, if they so request in writing and are directly and individually concerned.

Then, according to Art. 68 of CPVRR "[a]ny natural or legal person may appeal, subject to Article 82, against a decision, 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 the former. The parties to proceedings may, and the Office shall, be party to the appeal proceedings".

Differently from EUIPO's, the Office becomes *ex lege* a party of the appeal proceedings so that there is no need to provide for the possibility to ask for its Executive Director's observations.

Pursuant to Art. 47(2) of CPVOIR, the parties may participate in the appeal proceedings if they so request within two months of the notice received. The CPVOIR does not regulate the procedural faculties of these parties, but it is to be assumed that the very request to be a party to the appeal proceedings entails the possibility of submitting defensive pleadings at the same time.

These parties, therefore, may participate in the cross-examination and may defend the act they consider favourable in full autonomy, with different arguments from those of the Office.

Therefore, it is possible to conclude that third parties with a direct interests have a sufficient room to join both the proceedings (before the

[26] See again the information on the website https://cpvo.europa.eu/en/about-us/law-practice/board-appeal.

[27] Commission Regulation (EC) No 874/2009 of 17 September 2009 establishing implementing rules for the application of Council Regulation (EC) No 2100/94 as regards proceedings before the Community Plant Variety Office (recast), in *OJ* L 251, 24.09.2009, p. 3.

[28] Council Regulation (EC) No 2100/94 of 27 July 1994 on Community Plant Variety rights, in *OJ* L 227, 1.09.1994, p. 1.

Agency and before the BoAs), while for third parties who act in the general interests the considerations made for EUIPO apply. Also, before the General Court, Art. 173 of the Rules of Procedures applies to CPVO as for EUIPO.

Concerning the SRB, Art. 85 of Regulation (EU) n. 806/2014 (SRBR)[29] provides that "[a]ny natural or legal person, including resolution authorities, may appeal against a decision of the Board [the Agency] referred to in Article 10(10), Article 11, Article 12(1), Articles 38 to 41, Article 65(3), Article 71 and Article 90(3) which is addressed to that person, or which is of direct and individual concern to that person". All the decisions mentioned by the latter Article, are adopted by the SRB after the consultation of different subjects, mainly the national resolution authorities. It could be deemed that there is sufficient room to allow the SRB to consider general interests. In any case, any third party directly affected by the decision could appeal it before the SRB BoA and in case before the General Court.

Furthermore, it seems that the main litigation before the SRB BoA concerns the minimum requirements for own funds and eligible liabilities, a decision that may not be known by third parties and that implies technical evaluation.

For EASA, Regulation (EU) 2018/1139 (EASAR)[30] provides at Art. 108 that "[a]n appeal may be brought against decisions of the Agency taken pursuant to Article 64, 65, Article 76(6), Article 77 to 83, 85 or 126" and Art. 109, Persons entitled to appeal, that: "[a]ny natural or legal person may appeal against a decision 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 the former. The parties to proceedings may be party to the appeal proceedings". Again, third parties that may have an interest directly connected with the decision adopted by EASA are already in the procedure.

The same considerations apply to the ESAs', where the challengeable

[29] 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, in *OJ* L 225, 30.07.2014, p. 1 ff.

[30] Regulation (EU) 2018/1139 of the European Parliament and of the Council of 4 July 2018 on common rules in the field of civil aviation and establishing a European Union Aviation Safety Agency, and amending Regulations (EC) No 2111/2005, (EC) No 1008/2008, (EU) No 996/2010, (EU) No 376/2014 and Directives 2014/30/EU and 2014/53/EU of the European Parliament and of the Council, and repealing Regulations (EC) No 552/2004 and (EC) No 216/2008 of the European Parliament and of the Council and Council Regulation (EEC) No 3922/91, in *OJ* L 212, 22.08.2018, p. 1 ff.

acts are the decisions referred to in Art. 17, 18, 19 and 72(3) of the Regulation (EU) n. 1093/2010, Regulation (EU) n. 1094/2010 and n. 1095/2010 (ESAs' Regulations)[31] and decisions adopted pursuant to the acts referred to in Art. 1(2) of the ESAs' Regulations and the applicants are natural or legal persons that are addressees of the decisions, or directly and individually concerned[32].

2.2 BoAs which provide for third parties intervention

The ERA, ECHA and ACER Rules of Procedure provide, instead, for the explicit possibility for third parties to join the proceedings before their BoA, even if with some differences.

Concerning ECHA, Art. 8(1) Regulation (EU) n. 771/2008 provides that: "[a]ny person establishing an interest in the result of the case submitted to the Board of Appeal may intervene in the proceedings before the Board of Appeal".

In addition to that, Art. 8 of Regulation (EU) n. 771/2008 does not provide for the distinction between privileged interveners and non-privileged, that is – instead – the rule before the CJUE. This has been clearly stated by the ECHA case law as well: "[t]he Board of Appeal observes that, for the purposes of intervening in proceedings before the Court of Justice of the European Union, the European Union Institutions and the Member States are considered to be privileged applicants and, as such, do not need to establish an interest in the result of the case in which they intervene. The distinction between privileged applicants and non-privileged applicants is not however provided for in the Board of Appeal's Rules of Procedure. As a result, the Board of Appeal considers that, regardless of who submitted an application to intervene, that application has to comply with the requirements of Art. 8 of the Rules of Procedure.

[31] 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, in *OJ* L 331, 15.12.2010, 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, in *OJ* L 331, 15.12.2010, p. 48 ff.; 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, in *OJ* L 331, 15.12.2010, p. 84 ff.

[32] For an overview see M. LAMANDINI, *The ESA's Board of Appeal as a Blueprint for the Quasi-Judicial Review of the European Financial Supervision*, in *European Company Law*, 2014, p. 290.

In particular, any applicant wishing to intervene in a case brought before the Board of Appeal has the obligation to establish that it has an interest in the result of the case"[33].

This rule has an important exception, as with the 2016 reform, the 'privileged' intervention of the State has been introduced for a specific case, modifying Art. 8(2) of Regulation (EU) n. 771/2008, that today states "[b]y derogation to the first paragraph, in cases relating to Title VI Chapter 2 of Regulation (EC) No 1907/2006, the Member State whose competent authority has carried out the substance evaluation may intervene without having to establish an interest in the result of that case", meaning that in all the other cases, Member States have to demonstrate their interest in the result of the case as all the private parties.

ECHA BoA requires to establish that the decision challenged before it has a direct impact on the situation of the intervener, failing that the application for intervene is rejected. According to the BoA case law such interest "must be defined in the light of the precise subject-matter of the dispute and be understood as meaning a direct, existing interest in the ruling on the forms of order sought and not as an interest in relation to the pleas in law and arguments put forward. The expression 'result' is to be understood as meaning the operative part of the final decision of the Board of Appeal"[34].

According to this notion of interest, simply participating in the procedure for the adoption of the contested decision is not sufficient to be granted the leave to intervene as a National Authority[35].

The BoA has a wide conception of the 'interest in the result of the case' as well. It has considered a sufficient interest to the purpose of the intervention the one of a Europe's leading alliance of animal protection organisations: "[a] representative association whose object is to protect its members' interests in cases raising questions of principle liable to affect those members may be granted leave to intervene. More particularly, a representative association may be granted leave to intervene in a case if it represents an appreciable number of those active in the field concerned,

[33] See decision of ECHA Board of Appeal of 13 October 2014 in case A-006-2014.

[34] Decision of ECHA Board of Appeal of 20 December 2017 in case A-005-2017.

[35] *Ibidem*: "The Board of Appeal considers that, by simply stating that it contributed to the decision-making leading to the adoption of the Contested Decision, the Applicant failed to establish an interest in the result of the case as opposed to an interest in the pleas in law put forward (see, by analogy, Court of Justice, case C-186/02 P, *Ramondín and Others* v *Commission*, ECLI:EU:C:2003:141, paras 14 to 17). In particular, the Applicant has not demonstrated that its legal position or economic situation may actually be directly affected by the operative part of the decision of the Board of Appeal (see, by analogy, General Court, December 14th 2010, case T-537/08, *Cixi Santai Chemical Fiber and Others* v *Council*, ECLI:EU:T:2010:514, paras 16 to 17)".

its objects include that of protecting its members' interests, the case may raise questions of principle capable of affecting those interests, and the interests of its members may therefore be affected to an appreciable extent by the judgment to be given (see, by analogy, for example, the Order of the President of the First Chamber of the General Court of 26 February 2007 in case T-125/03 Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v Commission, ECLI:EU:T:2007:57, paragraph 14)"[36]. Therefore, interveners before ECHA are public entities and Non-Governmental Organizations[37].

The interest involved may also be the counterparty's, e.g. the company that has made a joint registration[38].

The application stating the circumstances establishing the right to intervene shall be submitted within three weeks from the date of publication of the announcement of the appeal on the Agency's website: it is to be noted that in the previous version of the Rules of Procedure the time limit for the submission of applications to intervene was two weeks[39]. The extension has been made to facilitate third parties' participation.

The scope of the intervention shall be limited to supporting or opposing, in whole or in part, the form of remedy sought by one of the parties (Art. 8(3)), meaning that the third party has limited powers, just like before the CJEU.

Third parties' intervention is formulated in a similar way in the context of ACER: Art. 11 of its Rules of Procedure[40] provides that "[a]ny person establishing direct and existing interest in the result of the case submitted to the Board of Appeal may intervene in the proceedings before the Board of Appeal".

The ACER BoA is silent on the differences between privileged and non-privileged interveners.

As for ECHA, the intervention is only to support or oppose "in whole or in part, the form of remedy sought by one of the parties" (Art. 11(2)

[36] Decision of ECHA Board of Appeal of 2 June 2014 in case A-001-2014.

[37] See L. MUZI, *Who litigates before the Boards of Appeal?,* in M. CHAMON, A. VOLPATO, M. ELIANTONIO (eds.), *cit.*, p. 221.

[38] Decision of ECHA Board of Appeal of 20 December 2017 in case A-005-2017.

[39] See Commission implementing Regulation (EU) 2016/823 of 25 May 2016 amending Regulation (EC) No 771/2008 laying down the Rules of Organisation and Procedure of the Board of Appeal of the European Chemicals Agency, in *OJ* L 137, 26.05.2016, p. 4 ff.

[40] See rules of organisation and procedure of the Board of Appeal of the European Union Agency for the Cooperation of Energy Regulators https://www.acer.europa.eu/sites/default/files/documents/en/The_agency/Organisation/Board_of_Appeal/BoA_Public_Docs/ACER_BoA_Rules_of_Procedure_2023.pdf.

ACER Rules of Procedure). This wording has been read as giving the intervener greater power than before the CJEU, as Art. 40 of the Statute only allow to support (and not to oppose) one of the parties' conclusions[41].

ACER Rules of Procedure provides also that: "[i]t shall not confer the same procedural rights as those conferred on the parties and, in particular, shall not give rise to any right to request that a hearing be held" (Art. 11(2) ACER Rules of Procedure).

In addition to that, the time limit for the submission of a request of intervention is only limited to two weeks.

The ERA Rules of Procedure provides that "[t]he Board of Appeal may grant any person demonstrating a legitimate interest in the result of the proceedings, the right to intervene in the proceedings before it"[42]. The time limit for the submission of the appeal to intervene is only 10 working days following the publication of the announcement of the appeal on the website of the Agency. As for the ECHA and ACER "[t]he intervention shall be limited to supporting or opposing the remedy sought by one of the parties" (Art. 15(4)).

The limited number of cases decided by ERA does not allow the characterisation of this type of interest to be verified. For sure, the fact that the ERA Rules of Procedure request a 'legitimate interest' seems hinting towards a more administrative (rather than jurisdictional) connotation of the third parties' intervention before ERA BoA.

3. Do we really need a right of intervention before the BoAs?

The variety of possibilities for third parties to intervene before the BoA is indicative of the hybrid nature of these bodies, which lie somewhere between administrative and judicial remedies[43].

The widespread absence of a rule granting general leave to intervene is evidence that the BoAs were originally set up as an administrative review body.

In appeal proceedings where there is no provision for third party intervention, third parties who may appear to have a countervailing

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[41] See G. GRECO, *cit.*, p. 295.

[42] Commission implementing Regulation (EU) n. 2018/867 of 13 June 2018 laying down the Rules of Procedure of the Board(s) of Appeal of the European Union Agency for Railways, in *OJ* L 149, 14.06.2018, p. 3 ff.

[43] See J. ALBERTI, *Le 'attrici non protagoniste' delle riforme dello Statuto: le commissioni di ricorso delle agenzie dell'Unione europea*, in C. AMALFITANO, M. CONDINANZI(eds.), *Il giudice dell'Unione europea alla ricerca di un assetto efficiente e (in)stabile: dall'incremento della composizione alla modifica delle competenze*, Milan, 2022, p. 147 and ID., *The position of the Boards of Appeal: Between Functional Continuity and Independence*, in M. CHAMON, A. VOLPATO, M. ELIANTONIO (eds), *cit.,* p. 248.

interest tend to be already involved in the proceedings before the Office. If they have a direct interest affected by the decision of the BoAs, they can also intervene before the General Court under Art. 40 of the Statute.

Where the right to intervene is expressly provided for, it is based on a model that aims to identify all third parties that have a direct or 'legitimate' interest in the outcome of the case.

Given the nature of typical BoAs litigation, which is aimed at administrative review of the Office's decision, it can be concluded that, as long as third parties directly affected by the Office's decision can intervene in the Office proceedings, there is no need to provide for third party intervention before the BoA.

But is it sufficient to have the possibility to join the 'administrative' stage of the procedure? If the BoAs are only a further step in a non-judicial context, in a unitary conception of the Office and its BoA, the answer is affirmative, and we may assume that compliance with Art. 41 of the CFREU is fulfilled. If, on the other hand, we consider that the model of the BoAs is closer to the judicial than to the administrative character, we should insist on a proper right of intervention for third parties who could prove that they have a direct interest in the outcome of the case, in accordance with Art. 40 of the Statute, in order to comply with the fair trial standards of Art. 47 of the CFREU[44].

In any case, it could be useful to give the BoAs the possibility to acquire the contribution offered by third parties that act in collective or general interest, at least as *amici curiae*. Even without conferring a proper intervention right, it could be provided for the possibility for these subjects to deposit a written brief, to give data and information to the BoAs. Any contribution from the outside could represent an enrichment without interfering with the timing or the procedure of the BoAs.

[44] On the relationship between Art. 47 CFREU to the BoAs see G. GRECO, *EUIPO Boards of Appeal in the Light of the Principle of Fair Trial*, in *European Public Law*, 2022. p. 19; G. AGRATI, *Procedural Guarantees in the Litigation before the Boards of Appeal*, in this *Volume*, p. 65.

PROCEDURAL GUARANTEES IN LITIGATION BEFORE THE BOARDS OF APPEAL

Le garanzie procedurali nel contenzioso dinanzi alle commissioni di ricorso

Les garanties procédurales dans le contentieux devant les chambres de recours

GIULIA AGRATI*

TABLE OF CONTENTS: 1. Introduction. The 'administrative' nature of the Boards of Appeal and their consequent application of Article 41 of the Charter. – 2. Boards of Appeal and Article 47 of the Charter in 'jurisprudence'. – 3. Boards of Appeal and Article 47 of the Charter in light of the procedural guarantees provided in the litigation before them. In particular, the right to a fair trial. – 4. Conclusions.

For the reader's convenience, this preface will provide a brief list of the EU Agencies established with a Board of Appeal. This will also serve to clarify the abbreviations that will be used in the following pages. The Agencies are: (*i*) the European Union Intellectual Property Office (EUIPO)[1], (*ii*) the Community Plant Variety Office (CPVO)[2], (*iii*) the European Chemicals Agency (ECHA)[3], (*iv*) the European Authority for Aviation Safety (EASA)[4], (*v*) the Agency for the Cooperation of Energy

* Research Fellow of EU Law at the University of Milan.

[1] See Regulation (EU) n. 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark, in *OJ* L 154, 16.06.2017, p. 1 ff.

[2] See Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights, in *OJ* L 227, 01.09.1994, p. 1 ff.

[3] Regulation (EC) n. 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) n. 793/93 and Commission Regulation (EC) n. 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC, in *OJ* L 396, 30.12.2006, p. 1 ff.

[4] See Regulation (EU) 2018/1139 of the European Parliament and of the Council of 4 July 2018 on common rules in the field of civil aviation and establishing a European Union Aviation Safety Agency, and amending Regulations (EC) n. 2111/2005, (EC) n.

Regulators (ACER)[5], (*vi*) the European Supervisory Authorities (ESAs)[6], which have established a Joint Board of Appeal, (*vii*) the Single Resolution Board (SRB)[7], and (*viii*) the European Union Agency for Railways (ERA)[8].

1. Introduction. The 'administrative' nature of the Boards of Appeal and their consequent application of Article 41 of the Charter

Dubbed *inbetweeners*[9] by scholars, the Boards of Appeal have appeared, since their establishment, as the result of a continuous ontological tension between administrative and jurisdictional dimensions. On one hand, they are integral parts of their respective Agencies; on the other, they were conceived with the primary task of overseeing the correctness of the

1008/2008, (EU) n. 996/2010, (EU) n. 376/2014 and Directives 2014/30/EU and 2014/53/EU of the European Parliament and of the Council, and repealing Regulations (EC) n. 552/2004 and (EC) n. 216/2008 of the European Parliament and of the Council and Council Regulation (EEC) n. 3922/91, in *OJ* L 212, 22.08.2018, p. 1 ff.

[5] See Regulation (EU) n. 2019/942 of the European Parliament and of the Council of 5 June 2019 establishing a European Union Agency for the Cooperation of Energy Regulators (recast), in *OJ* L 158, 14.06.2019, p. 22 ff.

[6] With regard to the three European Supervisory Authorities see: Regulation (EU) n. 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision n. 716/2009/EC and repealing Commission Decision 2009/78/EC, in *OJ* L 331, 15.12.2010, p. 12 ff.; Regulation (EU) n. 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 n. 716/2009/EC and repealing Commission Decision 2009/79/EC, in *OJ* L 331, 15.12.2010, p. 48 ff., and Regulation (EU) n. 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 n. 716/2009/EC and repealing Commission Decision 2009/79/EC, in *OJ* L 331, 15.12.2010, p. 84 ff.

[7] See Regulation (EU) n. 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) n. 1093/2010, in *OJ* L 225, 30.07.2014, p. 1 ff.

[8] See Regulation (EU) n. 2016/796 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Railways and repealing Regulation (EC) n. 881/2004, in *OJ* L 138, 26.05.2016, p. 1 ff.

[9] J. ALBERTI, *Le 'attrici non protagoniste' delle riforme dello Statuto: le commissioni di ricorso delle agenzie dell'Unione europea*, in C. AMALFITANO, M. CONDINANZI (eds.), *Il giudice dell'Unione europea alla ricerca di un assetto efficiente e (in)stabile: dall'incremento della composizione alla modifica delle competenze*, Milano, 2022, p. 147. The author, using the term with reference to the BoA, notes that the expression was originally coined with reference to the Agencies by M. EVERSON, C. MONDA, E. VOS (eds.), *European Agencies in between Institutions and Member States*, Aaphen an den Rijn, 2014.

Agencies' actions and protecting the rights of individuals who may have been adversely affected by an Agency decision. In this 'limbo', the EU Courts have chosen to emphasize the executive nature of these Boards, coining the concept of their *functional continuity* with respect to their Agencies[10]. This concept refers to the power granted to some of[11] the BoAs to stand in for the Agencies, that is, to directly replace an Agency's challenged decision with one of its own (if necessary), during an appeal process before them. As a result, appeals before the Boards are generally considered an integral part of the decision-making process. According to EU Courts, these considerations highlight the operational interpenetration between the Boards and the Agencies, making it difficult to attribute a strictly judicial nature to the former.

Despite the recent trend of the legislature taking away the BoAs' powers of substitution[12], many factors still support classifying them as administrative entities. The first is a formal element, namely, the fact that the Boards as EU are not recognized as judicial bodies under Article 19 TEU. The article only mentions the Court of Justice, the General Court, and specialized courts[13]. Additionally, Article 263(5) TFEU allows for the

[10] The principle of functional continuity was first affirmed with reference to EUIPO in General Court, June 8th 1999, case T-163/98, *The Procter and Gamble Company* v *OHIM (Baby-Dry)*, ECLI:EU:T:1999:145, para 38, due to the appointment and removal procedures of the members of the Boards. Subsequently, it was extended to the other BoA, see *inter alia* (EASA) General Court, December 11th 2014, case T-102/13, *Heli-Flight*, ECLI:EU:T:2014:1064, para 27; (ACER) General Court, November 18th 2020, case T-735/18, *Aquind*, ECLI:EU:T:2020:542, para 32.

[11] Since 2010, with the only exception of EUIPO, probably due to the specificity of its operating sector, the legislator's choice has been to remove the power of substitution to the Boards: the SRB Appeal Panel and the ERA Board of Appeal, established (together with the respective Agencies) in 2014 and 2016, as well as the Boards of EASA and ACER, whose founding Regulations were revised in 2018 and 2019, don't have this power. Currently, only the BoA of EUIPO, CPVO, and ECHA retain the power of substitution. See respectively Art. 71 of Regulation (EU) n. 2017/1001; Art. 72 of Regulation (EC) n. 2100/94 and Art. 93(3) of Regulation (EC) n. 1907/2006.

[12] See fn 10 above. On the connection between the loss of the power of substitution and the setback of the principle of functional continuity, see J. ALBERTI, *The Position of Boards of Appeal: Between Functional Continuity and Independence*, in M. CHAMON, A. VOLPATO, M. ELIANTONIO (eds.), *Boards of Appeal of EU Agencies. Towards Judicialization of Administrative Review?*, Oxford, 2022, pp. 248-253; J. ALBERTI, *Le 'attrici non protagoniste' delle riforme dello Statuto: le commissioni di ricorso delle agenzie dell'Unione europea*, *cit*. Even if there is not a full consistency between these two elements in jurisprudence, it should be noted that the judgments cited in this paper regarding the principle of functional continuity in relation to EASA and ACER, although rendered after the amendment of their founding Regulations (which deprived them of the power of substitution), refer to previous situations, at the time when the first version of the Regulations was in effect.

[13] In this regard, see L. BOLZONELLO, *Independent Administrative Review Within the Structure of Remedies under the Treaties: The Case of the Board of Appeal of the European Chemicals*

possibility that the establishing acts of EU bodies may lay down specific *conditions* and *arrangements* concerning the actions brought against them, and the need to appeal to the Boards to get access to the General Court could apply to this scenario (in this sense, the BoAs would not constitute judicial bodies but rather an administrative 'filter' for the judicial body).

Apart from these textual considerations, an analysis of the structural-organizational profiles of these entities also suggests that the Boards are administrative bodies. The legal literature has often highlighted that the members of these Boards do not always come from legal backgrounds, and that there are issues which undermine the essential requirement of independence necessary for a body to be categorized as a 'tribunal'. While there seem to be no doubts about the *functional independence* of the BoAs, the Procedural Regulations of which include satisfactory rules on incompatibility, abstention, and recusal[14], some questions arise regarding their *organic independence*, namely independence from potential outside interventions and pressure[15]. In particular, after the 'first' appointment procedure, generally carried out by the Management Board (based on a list prepared by the Commission), the procedure for renewing appointments is problematic. Renewal – which for EUIPO, CPVO, and ACER has no time limits – is determined by the Agency following a positive evaluation of the member's performance by the Management Board. This arrangement inevitably exposes the members of the BoAs to constant influence from the Agency, since they must gain and maintain its favor to have their appointments renewed. Likewise, when it comes to removal, the independence of the members of the appeal boards is not fully guaranteed: only EUIPO and CPVO have a mechanism for the removal

Agency, in *European Public Law*, p. 570 e 571.

[14] All the founding Regulations of the Boards provide, although in different terms, extensive guarantees regarding (*i*) an absolute incompatibility of the members with the exercise of other functions within the Agency and (*ii*) a relative incompatibility, concerning the individual procedure, in the event of a conflict of interest. These incompatibilities correspond to the classic duty of abstention of the Board members and the right of the parties involved to recuse him. In this regard, see (EUIPO) Art. 166(9) and Art. 169 of Regulation (EU) n. 2017/1001; (CPVO) Art. 47(4) and Art. 48 of Regulation (EC) n. 2100/94; (EASA) Art. 106(4) and Art. 107 of Regulation (EU) n. 2018/1139; (ECHA) Art. 90(3, 5) and 6 of Regulation (EC) n. 1907/2006; (ACER) Art. 26(2) and Art. 27 of Regulation (EU) n. 2019/942; (ESAs) Art. 59 of the respective Founding Regulations of the ESAs; (SRB) Art. 85 of Regulation (EU) n. 806/2014; and (ERA) Art. 56(2, 3) and Art. 57 of Regulation (EU) n. 2016/796 .

[15] See J. ALBERTI, *Le 'attrici non protagoniste' delle riforme dello Statuto: le commissioni di ricorso delle agenzie dell'Unione europea*, *cit.*, p. 150 ff.; G. GRECO, *Le commissioni di ricorso nel sistema di giustizia dell'Unione europea*, Milano, 2020, p. 71 ff.; C. TOVO, *Le agenzie decentrate dell'Unione europea*, Napoli, 2016, p. 258 ff.; and J. ALBERTI, *Le agenzie dell'Unione europea*, Milano, 2018, p. 232 ff.

of members that involves the Court of Justice as a guarantee[16]. In other cases, removal is carried out by the Commission, except for ACER, where the decision is left directly to the Management Board[17].

The direct application of Article 41 of the Charter of Fundamental Rights of the European Union (Charter) to the BoAs follows from their qualification as essentially administrative entities. This conclusion is evident in the jurisprudence of the General Court (and of the Court of Justice), which has repeatedly requested the application of this provision by the Boards. In particular, the principle of sound administration under Article 41 of the Charter obliges the BoAs to provide reasons for their decisions[18] and abide by the duty of diligence (according to which they are required to accurately and impartially examine all relevant facts and legal elements of the case submitted to them)[19] as well as the duty to ensure the right of the parties involved to be heard[20]. Some of the Boards own decisions have embraced this stance, affirming the need to ensure, within their proceedings, the standards of sound administration codified in the Charter[21].

As briefly outlined here, the tendency to recognize the BoAs administrative review bodies, with reference to Article 41 of the Charter, stems (almost) exclusively from a *static analysis* of them. Apart from the functions and powers attributed to these Boards (i.e., the degree of control they exert, which could indicate a more distinctly administrative rather than judicial character)[22], the elements that make them administrative are

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[16] For EUIPO, see Art. 166(7) of Regulation (EU) n. 2017/1001; for CPVO, see Art. 47(5) of Regulation (EC) n. 2100/94.

[17] See Art. 26(2) of Regulation (EU) n. 2019/942, which states that "during their term of office, members of the BoA may be relieved of their duties only for serious reasons and if the administrative board so decides, following the opinion of the regulators' committee".

[18] See General Court, November 30th 2022, case T-611/21, *ADS L. Kowalik, B. Wlodarczyk* v *EUIPO*, ECLI:EU:T:2022:739, para 20 ff.

[19] See General Court, February 5th 2019, case T-177/16, *Mema* v *CPVO*, ECLI:EU:T:2019:57, para 38; General Court, November 30th 2017, case T-140/15, *Aurora* v *CPVO*, ECLI:EU:T:2017:830, para 74; General Court, March 25th 2015, case T-378/13, *Apple and Pear Australia* v *EUIPO*, ECLI:EU:T:2015:186, para 44.

[20] See General Court, June 29th 2017, case T-63/16, *E-Control* v *ACER*, ECLI:EU:T:2017:456, para 62.

[21] See decision of ACER Board of Appeal of 9 December 2022 in case A-003-2022, *Uniper Global Commodities SE* v *ACER*. In particular, at para, 33, it is stated: "the Board of Appeal must exercise its duties and prerogatives in a manner that ensures respect for the principle of procedural economy, that is, the need to conclude proceedings swiftly to create legal certainty while guaranteeing the effective protection of the rights of the parties and compliance with the panoply of the right to good administration".

[22] The issue regarding the intensity of the review operated by the BoA has been for a long time a subject of legal literature and jurisprudence. This is primarily due to the lack

essentially related to their formal position within the treaties and their structural and organizational profiles.

Putting such considerations aside for a moment, this paper will investigate these entities from a *dynamic perspective*, focusing on the proceedings that take place before them. The goal is to analyze the procedural guarantees offered by the Boards to understand whether, in their conduct, they limit themselves to applying the standards of sound administration or rather, due to the legal context in which they are placed, they provide the parties with broader guarantees, namely those codified by Article 47 of the Charter regarding the right to an effective remedy and to a fair trial. In other words, the objective is to understand whether the right to a *fair administrative procedure* has become, in the practice of the Boards, a true right to a *fair trial*.

2. Boards of Appeal and Article 47 of the Charter in 'jurisprudence'

Starting with an examination of the decisions rendered by these bodies in reference to Article 47 of the Charter, my research initially sought to provide a preliminary view of the procedural guarantees provided by the BoAs[23]. In other words, taking for granted the application of Article 41 of the Charter, it seeks to verify whether, over time, the Boards have been oriented (even exceptionally or sporadically) toward guaranteeing the standards of a fair trial within their proceedings. Subsequently, the research was expanded to include the jurisprudence of the General Court and Court of Justice, which are competent to rule on the decisions of the BoAs, and, therefore, also have the task of monitoring the fairness of the proceedings held before them, if necessary, requesting that they apply Article 47 of the Charter.

Between January 1st 2018, and March 1st 2023, the BoAs ruled on Article 47 of the Charter thirteen times. Only three of these, however, explicitly refer to the application of the provision within their proceedings, while the other ten concern the actions of the Agency to which they

of indications within the founding Regulations. Specifically, the problem concerns the possibility that the Boards, alongside a legitimacy review (similar to the one carried out by the General Court under Article 263 TFEU), also perform a substantive review related to the technical assessments (technically complex) made by the Agency. Furthermore, it questions whether this substantive review can broadly translate into a complete re-examination of the contested decision or if it should instead adhere to the reasons and elements presented in the appeal proceeding. In this regard see G. GRECO, *Le commissioni di ricorso nel sistema di giustizia dell'Unione europea*, *cit.*, p. 358 ff.

[23] The research was conducted using the new *Common Database of EU Agencies' Boards of Appeal*, available online at https://boa.europeanlitigation.eu. This database collects decisions rendered by the BoAs from January 1st 2018.

belong. In particular, these latter rulings deal essentially with the issues of the obligation to state reasons and of accessing documents[24], both indirectly related to Article 47 of the Charter, as they are prodromal to the possibility of initiating an effective appeal against a given ruling before the competent judge.

Moving on to the rulings that are most relevant here, it must first be noted that, in none of the three cases, did the ESAs Joint Board of Appeal or the SRB Appeal Panel (authors of the decisions) express the view that, as administrative bodies, they were unable to examine the grounds of appeal related to their potential violation of Article 47 of the Charter. Two of the three decisions concluded, however, that there was no violation of the provision in question, both arguing that the whole system of judicial remedies available to the party (both at the national and EU levels) should ensure compliance with Article 47 of the Charter, rather than merely the individual appeal before the Board. The first decision – *Decision by the ESAs Joint Board of Appeal of 19 July 2023, in case BoA-D-2023-02* - ruled on the inadmissibility of the appeal against a EIOPA report due to the non-binding nature of the act. Therefore, the issue of access to justice is of primary importance with regard to Article 47 of the Charter, particularly with reference to challengeable acts. It would not be violated in the present case because, despite the fact that the report in question does not constitute a challengeable act, it could still be the subject of indirect review by an EU court. Indeed it is well known that parties have the option to challenge national measures implementing this report before domestic courts, which can then turn to the Court of Justice to request clarification on the validity of the underlying act (and thus of the contested report) in accordance with *FBF* case law[25]. According to the ESAs Joint Board of Appeal, "it must be noted […] that the whole system of remedies contributes to ensuring the protection of rights in the EU legal framework

[24] Decisions that concern the relationship between the obligation to provide reasoning by the Agency and Article 47 of the Charter include: decision of SRB Appeal Panel of 14 April 2023 in case 1/2022, *BNP Paribas S.A.*, *BNP Paribas Personal Finance and BGL BNP Paribas* v *SRB* and decision of ACER Board of Appeal of 7 February 2020 in case A-006-2019, *Operator Gazociągów Przesyłowych GAZ-SYSTEM S.A. (GSA)* v *ACER*. On the other hand, decisions addressing the theme of access to documents were all rendered by SRB Appeal Panel and are, in chronological order from most to least recent: decision of 8 March 2023 in case 5/2022; three decisions of 19 June 2019, respectively in cases 18/2018, 19/2018, and 21/2018; and, finally, three decisions of 19 June 2018, respectively in cases 51/2017, joined cases 44/2017 and 7/2018, and joined cases 50/2017 and 1/2018.

[25] See case Court of Justice, July 15th 2021, case C-911/19, *FBF*, ECLI:EU:C:2021:294, in which the Court admitted its review, in a preliminary ruling, on the EBA orientations, i.e., on acts not endowed with binding force (soft law).

so that the inadmissibility of an appeal before the Board of Appeal does not, as such, deprive the applicants of other legal remedies"[26].

The second decision – *Decision by the ESAs Joint Board of Appeal of 8 June 2023, in case BoA-D-2023-01* - concerns the bankruptcy of a Romanian insurance company, which coincided with the simultaneous withdrawal of its license. The decision focuses on the request to suspend an EIOPA report on the 'health' of the Romanian institution, which presented a negative portrait of the entity that would have influenced the final decision of the competent National Authority to declare its bankruptcy. Regardless of the merits of the case, it should be noted that, despite the applicant representing interim measures as "an important guarantee of the right to effective judicial protection as enshrined in Article 47 of the Charter of Fundamental Rights"[27], the request for suspension was denied by the Board of Appeal. This was partly because the Board did not find the prerequisites of necessity and urgency, and it did not believe that the absence of such a measure would amount to a violation of Article 47 of the Charter. As in the first decision, the Board considered the whole system of remedies offered to the requesting party, observing that the national court, before which the appeal against the decision of the Romanian supervisory authority is pending, could suspend the national measures of implementation of the report (and, simultaneously, turn to the Court of Justice through a preliminary ruling on validity), thus ensuring respect for the right to an effective remedy and an impartial tribunal[28].

Conversely, the third decision accepted arguments regarding the violation of Article 47 of the Charter, made this time by the SRB Appeal Panel (decision of the SRB Appeal Panel of 29 June 2022, in case 1/2022). The dispute concerned an appeal by a banking group of the decision on the determination of the MREL (Minimum Requirement for own funds and Eligible Liabilities)[29] made by SRB (the competent resolution authority) in its regard, in the year 2021. One of the main issues in the case is the admissibility of this appeal: without delving into technicalities, it

[26] Decision of ESAs Joint Board of Appeal of 19 July 2023 in case BoA-D-2023-02, *Euroins Insurance Group AD* v *EIOPA*, para 72.

[27] Decision of ESAs Joint Board of Appeal of 8 June 2023 in case BoA-D-2023-01, *Euroins Insurance Group AD* v *EIOPA*, para 26.

[28] *Ivi* para 26 ff.

[29] By MREL, we mean the minimum requirement for own funds and eligible liabilities for a credit institution. This indicator was introduced by Article 45 of Directive 2014/59/EU, establishing a framework for the recovery and resolution of credit institutions and investment firms (the so-called Bank Recovery and Resolution Directive, hence the acronym 'BRRD'), with the aim of ensuring that credit institutions structure their liabilities in a way that increases their loss-absorbing capacity and does not compromise the effectiveness of the bail-in tool.

suffices to know that the MREL is determined on an annual basis. As one might imagine, during the pendency of the appeal proceeding (which did not end in 2021), the contested decision was replaced by a new determination in 2022. This circumstance, according to the resisting Agency, "rendered the appeal moot"[30]. The Appeal Panel, accepting the defense arguments of the appellant, based on the need to comply with Article 47 of the Charter, ruled on the admissibility of the appeal, since, in its opinion, the occurrence of a new decision "is not a factor that renders the existing appeal moot but rather a new factor allowing the appellant to continue its appeal and to adapt its claims and pleas in law in the existing proceedings to also challenge, in the same proceedings, the new decision"[31]. It should be noted that the Board reached this conclusion with the specific intention of ensuring access to justice concerning decisions on the MREL: in fact, if an appeal like the one in question were considered inadmissible, the cyclical nature of the determination of this indicator, combined with the generally long timeframe of justice ("justice cannot be rendered instantly"[32]), would *de facto* make any useful scrutiny of such decisions impossible. In conclusion, in this case, while the Appeal Panel explicitly stated the administrative nature of its intervention (a clarification not present in the first two decisions analyzed), it also asserted the need for the administrative remedy to be *effective* to ensure the rule of law[33]. In a sense, the decision suggests that, since the step before the Board of Appeal represents a 'filter' for access to more properly judicial protection[34], Article

[30] Decision of SRB Appeal Panel of 29 June 2022 in case 1/2022, para 137.

[31] *Ivi* para 142.

[32] *Ivi* para 144.

[33] The relevant point of the decision is reported in the note (i.e. para 144): "finally, the Appeal Panel considers that, given the fact stated above that the MREL determination is cyclical in nature, if the original appeal were considered moot in a situation as the one of the present appeal, the yearly (or less than yearly, as in the current case) reconsideration of MREL determinations may de facto prevent their legal review, because, as noted, justice cannot be rendered instantly, neither by the Appeal Panel, nor, subsequently, by European Courts. If several years may pass until the matter is settled with a judgment with the effects of *res judicata* the initial appeal would have been rendered moot several times over. *This would run counter to the necessary coherence and the effect utile of a system of judicial protection provided for by EU law and would contrast with Article 47 of the Charter of Fundamental Rights of the European Union*, which constitutes a reaffirmation of the principle of effective judicial protection and requires, in its first paragraph, that any person whose rights and freedoms guaranteed by EU law are violated should have the right to an effective remedy before a court in compliance with the conditions laid down in that article. The very existence of effective judicial review (in this case, *preceded by effective administrative review by the Appeal Panel*) designed to ensure compliance with provisions of EU law is of the essence of the rule of law (emphasis added)".

[34] The appeal before the Boards is generally a preliminary condition for the admissibility of the appeal before the GC. However, not all SRB decisions need to be

47 of the Charter cannot be fully guaranteed before the EU judge if it is not similarly guaranteed before the Board of Appeal.

Continuing the inquiry with an analysis of the jurisprudence of the General Court and the Court of Justice reveals that the latter, addressing the matter essentially with reference to the EUIPO Board of Appeal, seems to consistently affirm the non-applicability of Article 47 of the Charter to the Boards, due to their nature as administrative entities[35]. It bears noting that EUIPO Board of Appeal has a special set of rules compared to the other Boards, as described below, so the issue remains somewhat open. Regarding this set of decisions, it should only be noted that, while the General Court has generally been clear in stating the non-applicability of Article 47 of the Charter to the Board in question, the Court of Justice has adopted a more 'measured' approach, confirming the principles expressed at first instance but without the same degree of explicitness.

The only case in which the General Court seems to have ruled in favor of the applicability of Article 47 of the Charter to the Boards is the judgment of 20 September 2019, *Germany* v *ECHA*. For our purposes, this case dealt with the longstanding issue of the degree of control operable by the Boards of Appeal over the Agency's decisions. The General Court, in affirming the competence of the ECHA Board of Appeal to examine the grounds offered to demonstrate the existence of substantial errors affecting the Agency's decision (thus rejecting the appellant's arguments attempting to exclude a review on the merits by the Board in technically complex assessments), argued that a different conclusion "would not (have) be(en) capable of ensuring an effective remedy for the purposes of Article 47(1) of the Charter of Fundamental Rights of the European Union"[36]. Scholars have questioned the value of this statement, and it

previously contested before this Appeal Panel, as described in Article 85(3) of Regulation (EU) n. 806/2014.

[35] See, for example, General Court, April 20th 2005, case T-273/02, *Krüger* v *OHIM*, ECLI:EU:T:2005:134, para 62, where the GC "has precluded the possibility of relying on a right to a fair 'hearing' before the Board of Appeal of OHIM, since proceedings before the Boards of Appeal are administrative and not judicial in nature". See also General Court, May 3rd 2018, case T-463/17, *Raise Conseil* v *EUIPO*, ECLI:EU:T:2018:249, para 22; General Court, February 16th 2017, joined cases T-828/14 and T-829/14, *Antrax It.* v *EUIPO*, ECLI:EU:T:2017:87, para 38; General Court, December 12th 2002, case T-63/01, *Procter & Gamble* v *OHIM*, ECLI:EU:T:2002:317, para 22 and 23; and, regarding ECHA, General Court, May 11th 2017, case T-115/15, *Deza* v *ECHA*, ECLI:EU:T:2017:329, para 213. On this point, in legal literature, see in particular G. GRECO, *EUIPO Board of Appeal in the Light of the Principle of Fair Trial*, in *European Public Law*, 2022, p. 19 ff.

[36] General Court, September 20th 2019, case T-755/17, *Germany* v *ECHA*, ECLI:EU:T:2019, para 57.

bears noting that it remains a *unicum* in EU jurisprudence. Therefore, far from drawing conclusions beyond its natural scope, it seems to have settled on the principle of the effectiveness of the judicial system as a whole. In other words, the General Court reference to Article 47 of the Charter likely pertains not to the specific dispute before the Board of Appeal but to the entire system of protection, which, in any case, (according to the opinion of the General Court) cannot guarantee the principles of a fair trial if the Boards do not operate a penetrating control of the Agency's conduct at the outset, [37].

3. Boards of Appeal and Article 47 of the Charter in light of the procedural guarantees provided in the litigation before them. In particular, the right to a fair trial

Having analyzed the relevant jurisprudence on the BoAs and Article 47 of the Charter, this paper shall conclude by delving into the procedural guarantees provided by these bodies. Given the non-applicability of the norm in question to the Boards, generally speaking, due to the impossibility (or inability?) to classify them as 'judicial bodies' (as we saw, with few exceptions, in the previous section), we shall now investigate, beyond the reference to the Charter's provisions, the relationship between the BoAs and, specifically, the right to a fair trial. Breaking down the right under Article 47 of the Charter, it essentially entails the *right to effective judicial protection*, meaning the right to an effective remedy before a judge (the *right of access to a tribunal*) and the *right to a fair trial*. While analyzing the former meaning would involve a fundamental contradiction, given that the BoAs are not, by structure and powers[38], qualified as 'tribunals' (at least according to the majority of scholarship and case law), the latter meaning may be assessed with reference to the Boards. The ultimate goal of the analysis, as stated in the introduction, is to understand, from a dynamic and procedural perspective, what standards of protection are guaranteed by the BoAs and whether these standards can essentially overlap with those required by Article 47 of the Charter. This is particularly important due to the mechanism introduced in Article 58a of the Statute of the Court of Justice, which provides a filter for appeals against decisions of the

[37] See D. RITLENG, *Boards of Appeal and Article 47 of the Charter: Uneasy Bedfellows?*, in M. CHAMON, A. VOLPATO, M. ELIANTONIO (eds.), *Boards of Appeal of EU Agencies. Towards Judicialization of Administrative Review?*, *cit.*, p. 307; also J. ALBERTI, *Le 'attrici non protagoniste' delle riforme dello Statuto: le commissioni di ricorso delle agenzie dell'Unione europea*, *cit.*, p. 155-156.

[38] This refers to the theme of the intensity of control exercised by the Boards on the decisions of the Agency.

General Court related to cases previously dealt with by the BoAs[39]. This system, making the intervention of the Court of Justice merely optional (limited to cases raising "an issue that is significant with respect to the unity, consistency or development of Union law"[40]) seems to rest on the assumption that the BoAs play a role comparable to that of a court of first instance, such that the provision for two additional degrees of judgment after their decisions would be unnecessary (and economically burdensome). However, in the author's opinion, the protection guaranteed to individuals could be considered partially satisfactory only if the litigation before the Boards were to tend, at least partially, to adhere to the principles of a fair trial under Article 47 of the Charter, rather than to those of a fair procedure codified in Article 41 of the Charter[41].

The right to a fair trial, according to the jurisprudence of the European Court of Human Rights, recalled by the Court of Justice itself[42], encompasses various guarantees, including, for our purposes, the right of defense (primarily the adversarial principle), the principle of equality of arms, and the right to a reasonable duration of the proceedings. These rights will be analyzed below in relation to litigation before the BoAs.

1) Right of defense: the adversarial principle

The adversarial principle, founding rule of the dialectic of the trial, implies the right of a party to respond to the accusations made against it. It means, as recalled by jurisprudence, "that the parties have a right to a process of inspecting and commenting on the evidence and observations submitted to the court"[43]. It follows from this principle that courts must

[39] On the functioning of the filtering mechanism, see L. DE LUCIA, *L'evoluzione della tutela dei diritti nei confronti delle agenzie europee. A proposito della recente modifica dello Statuto della Corte di giustizia dell'Unione europea*, in *Riv. ita. dir. pubb. com.*, 2019, p. 335 ff. Note that the filter, which originally involved only the appeals decisions from the BoAs of EUIPO, CPVO, ECHA, and EASA, has now been extended, in a generalized manner, to all existing Boards, as well as progressively to those of any new institution.

[40] Article 58a(3) Statute of the Court of Justice.

[41] Further considerations on the need to apply Article 47 of the Charter following the introduction of the filtering mechanism referred to in Article 58a of the Statute have been set out in the Conclusions of AG Bobek of 28 November 2019, case C-702/18 P, *Primart* v *EUIPO*, ECLI:EU:C:2019:1032, paras 70-72.

[42] See, *inter alia*, Court of Justice, June 26th 2007, case C-305/05, *Ordre des barreaux francophones et germanophone et al.*, ECLI:EU:C:2006:788, paras 29-31. On the right to a fair trial, as codified in the Charter, see also D. DOMENICUCCI, F. FILPO, *La tutela giurisdizionale effettiva nel diritto dell'Unione europea*, in (eds.) R. MASTROIANNI, O. POLLICINO, S. ALLEGREZZA, F. PAPPALARDO, O. RAZZOLINI, *Carta dei diritti fondamentali dell'Unione europea*, Milano, 2014, p. 873 ff.

[43] Court of Justice, February 14th 2008, case C-450/06, *Varec*, ECLI:EU:C:2008:91,

base their decisions exclusively on circumstances and documents of which both parties have knowledge and on which they have been able to express their views[44].

In this regard, the Procedural Regulations of the BoAs all follow a markedly dialectical logic, often emphasizing the need to ensure the adversarial principle is preserved in specific procedural passages (such as the joinder of proceedings[45], the suspension of proceedings[46], or the provision of precautionary measures[47]). Moreover, the jurisprudence of the General Court has repeatedly highlighted the adversarial nature of the proceedings before the Boards[48], going so far as to relate the right of defense, guaranteed before these bodies, to the right to a fair trial[49]. To understand whether the adversarial principle applied by the BoAs corresponds to what is required by Article 47 of the Charter, or if it is limited to the right to be heard under Article 41 of the Charter (which seems to admit more exceptions due to the favorable nature of the measure, the existence of public interests and the absence of discretion for the administration), the wording contained in Article 94(1) and Article 75, respectively, of the Founding Regulations of EUIPO and CPVO is of particular relevance. These provisions state, in the same terms[50], that

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para 47.

[44] See, *inter alia*, Court of Justice, June 4th 2016, case C-300/11, *ZZ*, ECLI:EU:C:2013:363, para 56.

[45] See in this regard, for example, (EASA) Article 28 of the Practice Directions to parties to appeal proceedings before the Board of Appeal, 7 December 2020, WI.IMS.00122.-001.

[46] See in this regard, for example, (EUIPO) Article 44(7) of the decision of the Presidium of the Appeal Boards 2020-1, of February 27, 2020, concerning the Procedural Regulation; (EASA) Article 30 of the Procedural Regulation of the Appeal Board, *cit.*; (ECHA) Article 25(1) of Commission Regulation (EC) n. 771/2008 of 1 August 2008 laying down the rules of organisation and procedure of the Board of Appeal of the European Chemicals Agency, in *OJ* L 206, 02.09.2008, p. 5 ff.

[47] See, for example, (ACER) Article 27(4) of the Rules of Procedure; (ERA) Article 17(1) of Commission Implementing Regulation (EU) 2018/867 of 13 June 2018 laying down the Rules of Procedure of the Board(s) of Appeal of the European Union Agency for Railways, in *OJ* L 149, 14.06.2018, p. 3 ff.

[48] See General Court, November 18th 2020, case T-735/18, *Aquind* v *ACER*, ECLI:EU:T:2020:542, para 77; as well as case General Court, September 20th 2019, T-125/17, *BASF Grenzach* v *ECHA*, ECLI:EU:T:2019:638, para 61.

[49] See General Court, September 18th 2012, joined cases T-133/08, T-134/08, T-177/08, and T-242/09, *Schräder* v *CPVO*, ECLI:EU:T:2012:430, para 180.

[50] The provisions in question generally refer to the Agency decisions. The application of these provisions to the BoA is, however, explicitly stated, regarding EUIPO, in Article 48 of Commission Delegated Regulation (EU) n. 2018/625 of 5 March 2018 supplementing Regulation (EU) n. 2017/1001 of the European Parliament and of the Council on the European Union trade mark, and repealing Delegated Regulation (EU) 2017/1430, in *OJ* L 104, 24.04.2018, p. 1 ff.; with reference to CPVO,

decisions adopted by the Boards "shall be based only on reasons or evidence on which the parties concerned have had an opportunity to present their comments", codifying one of the cornerstones of EU jurisprudence on the right to a fair trial. It is noteworthy that this indication overlaps with the one found in the Rules of Procedure of the General Court, where Article 64 states that the General Court "shall take into consideration only those procedural documents and items which have been made available to the representatives of the parties and on which they have been given an opportunity of expressing their views". In conclusion, as I am not the first to observe[51], this overlap between the sets of rules strongly suggests that the adversarial principle before the BoA must be interpreted in light of its stronger and more protective meaning, namely the one of Article 47 of the Charter.

2) Principle of equality of arms

According to the principle of equality of arms, as EU case law has held, each party involved in a dispute "must be afforded a reasonable opportunity to present his case, including his evidence, under condition that do not place him at a substantial disadvantage vis-à-vis his opponent"[52].

In this regard, the rules of litigation before the BoAs appear to guarantee a generally equal level of participation by both parties of the administrative procedure culminating in the adoption of the contested decision by the Agency. And while it is impossible to deny the problems posed by the Boards in terms of organic independence, remains nonetheless true that the Regulation safeguarding their functional independence (see above § 1), seems adequate, at least from a strictly procedural point of view, to put them in a neutral position with respect to the parties to the litigation.

The most critical issues arise from proceedings before the EUIPO Board of Appeal, which are exceptional in that they do not involve the

instead, in Article 51 of Commission Regulation (EC) n. 874/2009 of 17 September 2009 establishing implementing rules for the application of Council Regulation (EC) n. 2100/94 as regards proceedings before the Community Plant Variety Office (recast), in *OJ* L 251, 24.9.2009, p. 3 ff. Both rules state, in the same terms, that "unless otherwise provided in this title, the provisions relating to proceedings before the instance of the Office which adopted the decision subject to appeal shall be applicable to appeal proceedings mutatis mutandis".

[51] See G. GRECO, *Le commissioni di ricorso nel sistema di giustizia dell'Unione europea*, *cit.*, p. 307.

[52] Court of Justice, November 6th 2012, Case C-199/11, *Otis et al.*, ECLI:EU:C:2012:684, para 71.

participation of the Agency[53], unlike those before other Boards[54]. Without dwelling on the reasons for this, it is undeniable that the exclusion significantly limits the Agency's right to equality of arms in defending a contested act. At the same time, it eliminates the neutrality of the Board, which ends up merging with and absorbing the Agency. All of this has direct consequences on the trials before the General Court: since it is not party to the proceedings before the Board, the Agency does not have the opportunity to challenge the Board's decisions in front of the General Court, and is able, at most and if necessary, to participate as a defendant in the appeal proceedings. This last consideration can be extended to all the BoAs, since, even in the other cases, where the Agency participates in the proceeding before the BoAs, the Agency cannot appeal the Boards' decisions.

3) Principle of reasonable duration of the proceedings

Turning last to the principle of reasonable duration of the proceedings, it bears noting that it exists, in its sense of "reasonable duration of the procedure", even in the administrative context. Article 41(1) of the Charter establishes the right of every person to have their affairs handled, not only impartially and fairly, but also within a reasonable time by the institutions and bodies of the Union. Therefore, whether the need for the BoAs to respect this principle is attributed to Article 47 of the Charter or, to Article 41 of the Charter, as the Genera Court has[55],

[53] This circumstance is evident from the entire context of the procedure before the EUIPO Board of Appeal. From the reading of Regulation (EU) n. 2017/1001, and the procedural Regulation of the Board of Appeal (decision of the Presidium of the Boards of Appeal, 2020-1), it emerges, in fact, that there are two procedures that can be brought before the latter. The first is an *inter partes* appeals procedure, that is an appeal against a decision made within an administrative procedure in which there were more than one party (generally concerning issues related to the forfeiture or invalidity of the trademark or, instead, opposition); the second is an *ex parte* procedure, in which "the party which has lodged the appeal is the sole party to the procedure" (Article 69 of Regulation (EU) n. 2017/1001), it is an appeal against an Agency's decision rendered without the participation of any other party except the one who initiated the procedure. It follows that *inter partes* proceedings before the Board are limited to those where another private party is present: the Agency is never part of the appeal proceedings. This conclusion has also been confirmed in jurisprudence, since the General Court has expressly stated that EUIPO "is not a party to proceedings before its Boards of Appeal" (see General Court, December 12th 2002, case T-110/01, *Vedial* v *OHMI*, ECLI:EU:T:2002:318, para 17).

[54] It is no coincidence, indeed, that, as mentioned above, the EU courts have repeatedly expressed the non-applicability of Article 47 of the Charter precisely with reference to the EUIPO Board of Appeal, which, however, as can be seen, has a peculiar discipline compared to the others.

[55] See General Court, July 13th 2015, case T-242/02, *Sunrider* v *OHMI*,

does not seem to affect the substance of the right granted to the parties involved. Certainly, considering the proceedings before the BoAs as administrative has led to the provision, where present, of very tight deadlines for their conclusion (generally ranging from thirty to ninety days from the filing of the appeal). This circumstance, as scholars have pointed out[56], does not seem entirely appropriate to the kind of review actually carried out by these bodies, which involves substantially judicial activities often related to very complex legal and technical issues, and would require 'reasonable' development times, more along the lines of those that apply to the General Court and the Court of Justice.

4. Conclusion

At the end of this analysis, one cannot but observe that the relationship between BoAs and Article 47 of the Charter is still, at this stage, rather weak. Based on their classification as administrative bodies, the General Court and the Court of Justice generally appear to insist on requiring the Boards to apply just the standards outlined in Article 41 of the Charter. Likewise, the Boards themselves, within the scope of their activities, do not seem particularly inclined to position themselves as 'judicial bodies', refraining from invoking, on their own initiative, the safeguards codified in Article 47 of the Charter. An exception potentially comes from the ESAs Joint Board of Appeal, which in its decision of 28 December 2020, *Scope Ratings* v *ESMA*[57], has placed itself *not in functional continuity* with the Agency. If, in fact, the non-applicability of Article 47 of the Charter comes from the functional continuity of the Board with respect to the Agency, as seen with reference to EUIPO Board of Appeal, then the application of Article 47 of the Charter by the ESAs Joint Board of Appeal could be inferred from the statement contained in *Scope Ratings* v *ESMA*. However, even substantively, compliance with the right to a fair trial still remains unclear, both in terms of the right to adversarial proceedings (notably, the formulation in the Founding Regulations of EUIPO and CPVO has not been echoed by other Agencies) and in terms of equality of arms. A common denominator in cases where Article 47 of the Charter has been invoked is the observation that the whole judicial system must ensure compliance with this provision. This argument is

ECLI:EU:T:2005:284, paras 51-55.

[56] See L. DE LUCIA, *L'evoluzione della tutela dei diritti nei confronti delle agenzie europee. A proposito della recente modifica dello Statuto della Corte di giustizia dell'Unione europea*, *cit.*, pp. 349-350.

[57] Decision of ESAs Joint Board of Appeal of 28 December 2020 in case BoA-2020-D-03, *Scope Ratings* v *ESMA*, BoA-2020-D-03, para 141.

employed by the ESA's Joint Board of Appeal (in the first two cases analyzed) to reject the grounds of appeal based on Article 47 of the Charter, thus concluding that it should not fall only to the individual action before the Board to ensure strict application of the provision in question, but rather to the system as a whole. Conversely, this same argument is used, in the opposite sense, by the SRB Appeal Panel, as well as by the GC in *Germany* v *ECHA*. There, in order to accommodate the arguments of the parties alleging that their rights had been violated under Article 47 of the Charter (thus implying that the system could not be in compliance with the aforementioned provision without the contribution of the BoA). Although the heterogeneity of the various approaches is evident, these different conclusions may derive from the details of the individual cases.

In conclusion, two types of considerations arise from the above analysis. First, the assertion that entities not subject to Article 47 of the Charter nonetheless contribute to overall compliance with it is somewhat jarring. Second, this paradox is exacerbated by the fact that, as these entities are administrative in nature (according to the case law), the EU judicial system can be held to comply with Article 47 of the Charter thanks in part to the contribution of remedies that are administrative in nature, not judicial. Here it bears noting that there is a distinction between the system of protection of the individual against the actions of the Union in a broad sense, including political and administrative remedies (which, as such, is not subject to compliance with the guarantees of Article 47 of the Charter)[58], and the specifically judicial protection system that revolves around the role of courts and is subject to the principle of a fair trial.

As mentioned above (see § 3), the landscape is further complicated by the provision of the filtering mechanism under Article 58 *a* of the Statute, which seems to implicitly, but fully, incorporate the BoA into the framework of EU judicial protection. This factor should be accompanied, however, by a recognition of the need for them to take on the responsibility of respecting the guarantees of Article 47 of the Charter. In this regard, the addition of the epithet 'independent' within Article 58a of the Statute, with reference to the BoA, cannot go unnoticed. This adjective, in effect, seems to give the BoA a sort of *license of independence*, which would bring them closer to the *status* of 'tribunals' and, consequently, require them to comply with Article 47 of the Charter. Indeed, according to the EU system of sources, Article 58a of the Statute,

[58] This refers to the right of petition (see Article 227 TFEU), the possibility of turning to the European Ombudsman in cases of maladministration (see Article 228 TFEU), and also, for example, with reference to the actions of the Agencies, the possibility of filing an 'appeal' before the Commission to challenge its legitimacy (a typical administrative remedy).

a primary law, appears already to point toward the need for the BoA to apply the procedural guarantees of Article 47 of the Charter. This suggests that the institutive and Procedural Regulations of the BoAs should be amended, at least in theory, to conform to the required standards of independence, or risk illegitimacy.

INTERIM PROTECTION BEFORE THE BOARDS OF APPEAL

La tutela cautelare dinanzi alle commissioni di ricorso delle Agenzie dell'Unione europea

La protection provisoire devant les chambres de recours des Agences de l'Union européenne

MASSIMO FRANCESCO ORZAN*

TABLE OF CONTENTS: 1. Introduction. – 2. Interim protection before the CJEU. – 3. Interim protection before BoA. – 3.1. Where lodging an appeal has suspensory effect (EUIPO and ECHA). – 3.2. Where BoAs have the power to suspend the contested act (ACER, ERA, ESA and SRB). – 3.3. Where another body of the Agency has the power to suspend the contested act. – 3.3.1. The Agency's Executive Director (EASA). – 3.3.2. The Office (CPVO). – 4. Interim protection before BoA that mirror the CJEU: Commonalities and Differences. – 5. Concluding Remarks.

1. Introduction

This article focuses on interim protection before Boards of Appeal (BoA) of EU Agencies. In the light of the ongoing debate among scholars on the nature, role and function of BoA in the EU legal order and, in particular, the possibility of considering BoA as the expression of a process of decentralisation of the EU judicature[1], the analysis of this protection is to be conducted using the interim relief granted by the Court of Justice of the European Union (CJEU) as a basis of comparison.

Thus, after briefly reviewing the main features of interim protection before the Court of Justice (ECJ) and the General Court (GC), firstly, it is appropriate to give a general overview of interim relief before each Board

* Legal Secretary, General Court of the European Union.

[1] J. ALBERTI, *The Position of Boards of Appeal: Between Functional Continuity and Independence*, in M. CHAMON, A. VOLPATO, M. ELIANTONIO (eds.), *Boards of Appeal of EU Agencies: Towards Judicialization of Administrative Review*, Oxford, 2022, p. 245.

of Appeal to understand the level of harmonisation between them. In that regard, when an appeal is lodged before a Board of Appeal, three main categories of interim protection may be distinguished: where lodging an appeal has suspensory effect; where BoA have the power to suspend the contested act; where another body of the Agency has the power to suspend the contested act. Secondly, in the light of this general overview, it is useful to examine interim relief before BoA that have the power to suspend the contested act, which mirror the protection granted by the CJEU. The aim of this analysis is to put into perspective commonalities and differences, on one side, among BoA and, on the other side, between BoA and the CJUE in provisional protection. A short conclusion follows a summation of the outcome of the analysis.

2. Interim protection before the CJEU

In the proceedings before the Court of Justice and the General Court, the need to ensure interim relief originates from the fact that the EU legal order is based on the principle of the presumption of legality of acts which is a principle of Administrative Law common to the majority of its Member States. According to this principle, the lodging of an application before a judge does not suspend the effects of the challenged act. Thus, interim relief makes it possible to avoid the parties' positions being irreparably damaged pending the main proceedings.

The possibility of seeking interim relief has its basis in Articles 278, 279 and 299 TFEU and Article 39 of the Statute[2]. Those provisions

[2] On interim measures before the CJEU see A. TIZZANO, *I provvedimenti urgenti nel processo comunitario*, in *I processi speciali. Studi offerti a V. Andrioli dai suoi allievi*, Napoli, 1979, pp. 362–395; E. SHARPSTON, *Interim and Substantive Relief in Claims under Community Law*, London, 1993; J. L. CRUZ VILAÇA, *La procédure en référé comme instrument de protection juridictionnelle des particuliers en droit Communautaire*, in *Scritti in onore di Giuseppe Federico Mancini II*, Milano, 1998, pp. 257–307; C. MORVIDUCCI, *Le misure cautelari nel processo comunitario*, Padova, 2004; B. VESTERDORF, *De l'interprétation par le juge communautaire des référés*, in G. C. RODRIGUES IGLESIAS (ed.), *Problèmes d'interprétation. Mélanges à la mémoire de Constantinos N. Kakouris*, Bruxelles, 2004, pp. 431-469; F. CASTILLO DE LA TORRE, *Interim Measures in Community Courts: Recent Trends*, in *Common Market Law Review*, 2007, pp. 237-353; M. JAEGER, *Le référé devant le président du Tribunal de l'Union européenne depuis septembre 2007*, in *Journal de droit européen*, 2010, pp. 197-213; M. CONDINANZI, *La protezione giurisdizionale cautelare avanti al Giudice dell'Unione europea: l'efficacia e l'equilibrio*, in *Liber Amicorum Antonio Tizzano*, Torino, 2018, pp. 190-209; C. IANNONE, *Artt. 278 e 279 TFEU*, in A. TIZZANO (ed.), *Trattati dell'Unione europea*, Milano, 2014, pp. 2187-2203; K. LENAERTS, M. RADLEY, *Recent Case-Law of the European Court of Justice*, in *Interim Measures Cases. European Law Reporter*, 2016, pp. 2-20; M. JAEGER, *Il giudice della procedura cautelare dinanzi alla Corte di giustizia dell'Unione europea. Qualche considerazione sull'evoluzione delle sue competenze*, in *Liber Amicorum Antonio Tizzano*, Torino, 2018, pp. 437-447; P. IANNUCCELLI,

establish the general framework for interim relief, which is fleshed out in more detail in the RoP (Rules of Procedure) of the ECJ and GC. Article 278 TFEU ensures the suspension of the contested act, which is a typical protection. Article 279 TFEU ensures an atypical protection, since it recognises the CJEU's jurisdiction to prescribe any necessary interim measures.

Article 39 of the Statute offers some details on interim relief. It clarifies that: firstly, in principle, a single judge hears an application for interim measures, namely the President or, subject to the conditions laid down in the ECJ's RoP, the Vice-President[3]; secondly, the proceedings for interim measures are summary; thirdly, the ruling of the judge hearing an application for interim measures is provisional and cannot prejudice the decision in the main proceedings.

The RoP of the two jurisdictions develop this general framework. Chapter 10, Articles 160-165 of the ECJ's RoP and Chapter 16, section 2, Articles 156-161 of the GC's RoP deal with suspension of operation or enforcement and other interim measures. Even if there is some difference in the formulation of these provisions, they are identical in substance. The first parts of both RoP concern the application for suspension or other interim measures according to Articles 278 and 279 TFEU and indicate the formalities that must be respected, the procedure, the nature of the decision issued by the judge hearing an application for interim measures and the relevance of changes in circumstances and the conditions for a new application.

Concerning the proceedings for interim measures, from a formal point of view, the application for interim measures must be lodged with a separate act. This means that the application may be lodged at the same time as or after the lodging of the main claim, but not before, on pain of inadmissibility of the application. The application must be 'self-sufficient', i.e. it must contain all the necessary elements for the judge hearing an application to assess whether the conditions for granting the requested interim measures are satisfied, without it being necessary to refer to the

Interim Judicial Protection Against Publication of Confidential Information in Commission Antitrust Decisions, in *World Competition Law and Economics Review*, 2018, pp. 43-65; M. F. ORZAN, *Articolo 39 St. Artt. 160–164 RP CG and 156–160 RP Trib.*, in C. AMALFITANO, M. CONDINANZI, P. IANNUCCELLI (eds.), *Le regole del processo dinanzi al giudice dell'Unione europea*, Napoli, 2018, pp. 189-195, pp. 816-843 and pp. 1315-1317; F. PICOD, *Référé devant la Cour de justice de l'Union européenne*, in *JCL Europe*, pp. 1-28; E. BARBIER DE LA SERRE, C. LAVIN, *Le droit du référé européen depuis 2007: entre prudence et coups d'audace*, in *Cahiers de droit européen*, 2019, pp. 613-679; M. F. ORZAN, *La tutela cautelare nei ricorsi diretti dinanzi alla Corte di giustizia dell'Unione europea*, Bari, 2023.

[3] Decision of the Court of Justice of 23 October 2012 concerning the judicial functions of the Vice-President of the Court GU, in *OJ* L 300, 30.10.2012, p. 47.

main action[4]. From this requirement, it follows that the summary procedure, although instrumental to the main application, is, in some respects, autonomous.

The filing of an application for interim relief opens the written phase of this procedure. In this regard, there are important distinctions to be drawn with the ordinary procedure. Firstly, while, in the ordinary procedure, the RoP of the two jurisdictions fix the time limit for lodging the defence, in the interim measures proceedings, they leave the judge hearing the application free to fix the time limit for lodging the defendant's observations. Secondly, in the written phase of the procedure, there is no joinder or rejoinder[5].

The oral phase of interim relief proceedings is different from that of an ordinary procedure. First of all, from a terminological point of view, it would be more correct to qualify it as an audition rather than a hearing. Secondly, while in the ordinary procedure, when parties ask to be heard stating the reasons for the request, in most cases the CJEU guarantees the hearing, in the interim relief proceedings this is not always true. Indeed, the case-law has made it clear that, in the absence of precise rules governing the oral proceedings in the context of this procedure, the judge hearing an application for interim measures has a wide discretion in deciding whether or not to hear the parties before issuing the order[6].

The granting of interim relief is subject to the demonstration of the existence of urgency (*periculum in mora*) and of the *prima facie* validity of the factual and legal arguments that justify the acceptance of the application (*fumus boni iuris*). Moreover, other than those two conditions, provided for in the RoP of the two jurisdictions, case-law has added another requirement, namely the balance of interests. Hence, once the first two conditions are satisfied, the judge hearing an application for interim measures must compare the damage alleged by the applicant with that which could be suffered by the defendant (or by a third party) should the

[4] General Court, March 4th 2020, case T-658/19 R, *Vizzone v Commission*, ECLI:EU:T:2020:86, para 8.

[5] Court of Justice, July 19th 2012, case C-110/12 P(R), *Akhras* v *Council*, ECLI:EU:C:2012:507, para 59 which held that "in relation to an application for interim measures, it is for the [Judge hearing the application for interim measures] to assess the need to hold a hearing and to hear the parties' oral submissions" and "in that regard [he or she] must enjoy a broad discretion". Nevertheless, in the case-law, the judge hearing the application for interim measures may allow the applicant to take a position on the observations lodged by the defendant, in particular when his or her decision is based on those observations.

[6] *Ivi* para 57.

interim relief be granted. This requirement may now also be considered as a condition[7].

As regards the conditions individually considered, and starting with urgency, the burden of proof regarding the risk of serious and irreparable damage lies with the applicant, who cannot rely on hypothetical facts, i.e. those linked to future and uncertain events, but has to rely on proven facts, or at least facts whose occurrence is sufficiently probable[8]. Moreover, it is the applicant's duty to submit the documents necessary to enable the judge hearing an application for interim measures to have a true and comprehensive picture of that applicant's financial situation, on pain of the inadmissibility of the application[9], and these documents must be drawn up by an independent expert[10]. Finally, an application must be considered inadmissible if the applicant has already suffered the damage. Indeed, in such a case, there is no longer any urgency due to the materialisation of the harm[11].

Three aspects of the urgency must be taken into account: the characteristics of the damage, its seriousness and its irreparability. Damage must be personal and it is necessary that there be a causal link between the alleged damage and the contested act[12]; the seriousness of the damage

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[7] See K. LENAERTS, M. RADLEY, *Recent Case-law of the European Court of Justice in Interim Measures Cases*, in *European Law Reporter,* 2016, pp. 2-20; V. TERRIEN, *Interim Measures*, in V. LUSZCZ (ed.), *European Court Procedure. A Practical Guide*, Oxford, 2020, p. 585; M. F. ORZAN, *La tutela cautelare nei ricorsi diretti dinanzi alla Corte di giustizia dell'Unione europea*, Bari, 2023, p. 184. See also Opinion of Advocate General Tanchev, April 11th 2019, case C-619/18 R, *Commission* v *Poland (Independence of the Supreme Court)*, ECLI:EU:C:2019:325, para 29.

[8] General Court, March 5th 2002, case T-241/00 R, *Le Canne* v *Commission*, ECLI:EU:T:2002:57, para 37.

[9] General Court, January 26th 2017, case T-474/15 R, *GGP Italy* v *Commission*, ECLI:EU:T:2017:36, para 27; General Court, December 12th 2014, case T- 532/14 R, *Alsharghawi* v *Council*, ECLI:EU:T:2014:1104, para 22; General Court, November 26th 2015, case T-461/13 R, *Spain* v *Commission*, ECLI:EU:T:2015:891, para 35 and General Court, December 4th 2012, case T-370/10 R, *Rubinetterie Teorema* v *Commission*, ECLI:EU:T:2012:641, paras 43-44.

[10] General Court, March 5th 2002, case T-241/00 R, *Le Canne* v *Commission*, *cit.*, para 35; General Court, January 13th 2014, case T-134/12 R, *Investigación y Desarrollo en Soluciones y Servicios EN* v *Commission*, ECLI:EU:T:2014:31, para 16 and General Court, May 11th 2017, case T-115/15 R, *Deza* v *ECHA*, ECLI:EU:T:2017:329, para 44.

[11] General Court, April 10th 2018, case T-274/15 R, *Alcogroup and Alcoldis* v *Commission*, ECLI:EU:T:2018:179, para 16; General Court, July 20th 2016, case T-483/13 R, *Oikonomopoulos* v *Commission*, ECLI:EU:T:2016:421, para 19 and General Court, July 9th 2009, case T-246/08 R, *Melli Bank* v *Council*, ECLI:EU:T:2009:266, para 53.

[12] Court of Justice, December 14th 2001, case C-404/01 P(R), *Commission* v *Euroalliages and Others*, ECLI:EU:C:2001:710, paras 61-62.

must be established following a comparative approach[13]; a pecuniary damage is never irreparable[14], but the case-law has established three exceptions: a threat to the applicant's viability[15], an irremediable loss of market shares[16] and impossibility of quantifying the damage[17].

As regards *fumus boni iuris*, it is interesting to note that there has been an evolution of its degree of probability. At the beginning, the judge of provisional measures considered that *fumus boni iuris* was satisfied if the application in the main action was well-founded[18]. Then, the judge of provisional measures considered that this condition was satisfied if the application in the main action was not, at first sight, entirely unfounded[19]. Finally, in the recent case-law, the judge of provisional measures considered that *fumus boni iuris* is satisfied where one of the pleas relied on reveals the existence of difficult legal issues the solution to which is not immediately obvious and therefore calls for a detailed examination that cannot be carried out by the court hearing the application for interim relief but must be the subject of the main proceedings, or where the discussion of issues by the parties reveals that there is a major legal disagreement whose resolution is not immediately obvious[20].

With regard to the balance of interests, the interests in obtaining interim measures must outweigh those opposing their adoption. In practical terms, that means examining whether or not the interest of the party seeking interim measures in obtaining suspension of the operation of the contested act outweighs the interest in its immediate implementation. In that examination, it must be determined whether the possible annulment of that act by the judgment on the substance would make it possible to reverse the situation that would have been brought about by its immediate implementation and, conversely, whether suspension of its operation would be such as to impede the objectives

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[13] General Court, February 9th 2022, case T-740/18 R, *Taminco* v *Commission*, ECLI:EU:T:2022:61, para 40.

[14] Court of Justice, November 28th 2013, case C-390/13 P(R), *EMA* v *InterMune UK and Others*, ECLI:EU:C:2013:795, para 48.

[15] General Court, September 19th 2019, case T-476/17 R, *Arysta LifeScience Netherlands* v *Commission*, ECLI:EU:T:2019:618, para 32.

[16] *Ivi* para 54.

[17] Court of Justice, November 28th 2013, case C-390/13 P(R), *EMA* v *InterMune UK and Others*, *cit.*, paras 49-51.

[18] Court of Justice, July 15th 1960, Joint cases 43/59, 45/59 e 48/59 R, *Von Lachmüller and Others* v *Commission*, ECLI:EU:C:1960:15, para 492.

[19] General Court, March 10th 2005, case T-184/01 R, *IMS Health* v *Commission*, ECLI:EU:T:2005:95, paras 56-75.

[20] Court of Justice, July 11th 2019, case C-619/18 R, *Commission* v *Poland (Independence of the Supreme Court)*, ECLI:EU:C:2019:615, para 30.

pursued by the contested act in the event of the main action being dismissed[21].

As regards the procedural relationship between urgency, *fumus boni iuris* and balance of interests, first of all, it must be highlighted that, in the absence of a provision of EU law requiring the judge hearing an application for interim measures to have a predetermined scheme of analysis in assessing the existence of the conditions that must be satisfied for granting the requested interim measures, he is free to decide how and in what order to analyse them[22]. Thus, because of their cumulative nature, having found that one of the conditions is not met, the judge hearing an application for interim measures can dismiss the application without ruling on the others[23].

Finally, it should be noted that, in interim measures proceedings, the judge has the power to adopt *inaudita altera parte* orders. Indeed, in a situation where, following the lodging of an application, the judge considers that the arguments put forward by the applicant do not appear *prima facie* unfounded and it cannot be ruled out that they satisfy the condition of urgency, he may adopt an order immediately without the other party having submitted its own observations. This type of order is adopted when the judge hearing an application for interim measures considers that there is a risk that the serious and irreparable damage linked to the condition of urgency is going to occur within a very short time following the lodging of the application for interim relief. In that case, according to settled case-law, the purpose of proceedings for interim relief is not to ensure reparation for damage already suffered[24]. Thus, the adoption of this type of order allows the judge to avoid the application for interim measures becoming manifestly devoid of purpose because of the occurrence of the damage.

3. Interim protection before BoAs

Some authors have pointed out that, even if there are several commonalities and reciprocal influences among BoA, each Board nevertheless maintains certain specificities because of the specific nature

[21] Court of Justice, March 1st 2017, case C-512/16 P(R), *EMA* v *MSD Animal Health Innovation and Intervert International*, ECLI:EU:C:2017:149, para 127.

[22] Court of Justice, December 17th 1998, case C-363/98 P(R), *Emesa Sugar* v *Council*, ECLI:EU:C:1998:628, para 50.

[23] Court of Justice, July 16th 2020, case C-378/16 P-R, *Inclusion Alliance for Europe* v *Commission*, ECLI:EU:C:2020:575, para 16.

[24] General Court, March 14th 2014, case T-292/11 R, *Cemex and Others* v *Commission*, ECLI:EU:T:2014:125, para 42.

of EU Agencies[25]. This assessment may also be applied to interim relief before BoA.

Indeed, when an appeal is lodged before a Board of Appeal, three main categories of interim protection may be distinguished:

3.1 where lodging an appeal has suspensory effect (EUIPO and ECHA);

3.2 where BoA have the power to suspend the contested act (ACER, ERA, ESA and SRB);

3.3 where another body of the Agency has the power to suspend the contested act:

a. the Agency's Executive Director (EASA);

b. the Office (CPVO).

3.1 Where lodging an appeal has suspensory effect

The interim protection granted by the EUIPO and ECHA Regulations belongs to this first category. Indeed, according to Article 66 of the EUIPO Regulation[26] and Article 91(2), of the REACH Regulation[27], an appeal "shall have suspensive effect". This means that those BoA[28] do not have a role in the establishment of the provisional protection, because the legal consequence of lodging the appeal is the suspension of the contested act. In that regard, it must be pointed out that this represents a definite retreat from the principle of presumption of legality of acts that,

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[25] M. CHAMON. A. VOLPATO, M. ELIANTONIO, *Conclusion,* in M. CHAMON. A. VOLPATO, M. ELIANTONIO (eds.), *Boards of Appeal of EU Agencies*, Oxford, 2022, p. 322; M. CHAMON, *Les chambres de recours des agences décentralisées de l'Union européenne et la C.J.U.E.*, in *Journal de droit européen*, 2023, pp.434-443.

[26] Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark, in *OJ* L 154, 16.6.2017, p. 1-99.

[27] Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC, in *OJ* L 396, 30.12.2006, p. 1-849.

[28] On EUIPO BoA, see D. HANF, *The Trailblazers: The Boards of Appeal of EUIPO and CPVO*, in M. CHAMON. A. VOLPATO, M. ELIANTONIO (eds.), *cit.*, p. 59 and G. GRECO, *EUIPO Boards of Appeal in the Light of the Principle of Fair Tria*l, in *European Pubic Law*, 2022, pp. 19-34. On ECHA BoA see M. KRAJEWSKI, *Relative Authority of Judicial and Extra-Judicial Review: EU Courts, Boards of Appeal, Ombudsman*, Oxford, 2022, pp. 103-138; A. VOLPATO, E. MULLIER, *The Board of Appeal of the European Chemicals Agency at a Crossroads*, in M. CHAMON. A. VOLPATO, M. ELIANTONIO (eds.), *cit.*, p. 84.

as has been indicated above, is the principle on which the ECJ and the GC base their reasoning regarding applications for interim measures.

Concerning the EUIPO Regulation, this automatic suspension may be justified, on one side, because of the well-known principle of functional continuity that characterises the relationship between BoA and the Office. BoA may exercise any power which lies within the competences of the Office, including the power to substitute the challenged decisions and, thus, a principle of administrative efficiency explains the suspension of the contested act. On the other side, the suspension is necessary to avoid the Office having to take any steps that cannot easily be reversed[29]. Concerning REACH Regulation, if the principle of functional continuity could be applied when that Regulation entered into force, after the *BASF* judgment[30], its application seems more complicated. In that judgment, indeed, the GC stated that this principle cannot be applied to the ECHA BoA[31]. Nevertheless, other reasons may justify the effects of the contested act being suspended if an appeal is lodged before the ECHA BoA. In that regard, it must be recalled that Article 25 of the ECHA Regulation establishes the principle that "[i]n order to avoid animal testing, testing on vertebrate animals for the purposes of this Regulation shall be undertaken only as a last resort". As a consequence, given that the ECHA can adopt decisions that require registrants to conduct animal testing, the rationale for this automatic suspension could be that it pre-empts a situation in which registrants start to conduct animal testing on the basis of a contested decision that the ECHA BoA could set aside.

Moreover, it must be highlighted that Article 71 of the EUIPO Regulation establishes that the decision rendered by the BoA "shall take

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[29] See EUIPO Guidelines, 2024, available at https://guidelines.euipo.europa.eu.

[30] General Court, September 9th 2019, case T-125/17, *BASF* v *ECHA*, ECLI:EU:T:2019:638, para 124. For a comment see M. CHAMON, A. VOLPATO, *Sketching Out the Role and Function of the ECHA Board of Appeal: Germany v ECHA and BASF v ECHA*, in *European Law Review*, 2020, pp. 840-856.

[31] See General Court, September 9th 2019, case T-125/17, *BASF* v *ECHA*, *cit.*, in which, at paras 80 and 95, the GC stated that "contrary to what is provided in relation to the boards of appeal of other Agencies, such as the Board of Appeal of the EUIPO, the rules applicable to the Board of Appeal of the ECHA do not contain any provisions providing that the provisions relating to procedures before the unit which adopted the decision subject to appeal apply mutatis mutandis to appeal proceedings" and, thus, "the nature and scope of the examination carried out by the boards of appeal of EUIPO are highly dependent on the legislative and regulatory context in which it takes place, which is very different from that of the Board of Appeal of the ECHA". Some authors consider that, because of this judgment, the relationship between the ECHA and its Boards of Appeal is one of 'functional discontinuity'. See L. DI LUCIA, *The Boards of Appeal as Hybrid Adjudicators: On Some Shortcomings of Article 58a of the Statute of the Court of Justice of the European Union*, in M. CHAMON. A. VOLPATO, M. ELIANTONIO (eds.), *cit.*, p. 182.

effect only as from the date of expiry of the period [of two months from the date of the notification of that decision] or if an action has been brought before the GC within that period, as from the date of dismissal of such action of any appeal filed with the ECJ against the decision of the GC". This implies that the effect of the contested act is suspended from the date on which the appeal is lodged before the BoA until the dismissal of the appeal rendered by the ECJ[32]. By contrast, REACH Regulation does not contain such a provision and, indeed, an action lodged before the GC against a decision rendered by the BoA does not suspend its effects. As a consequence, the applicant must lodge an application for interim protection[33]. This difference between the two Regulations is not obvious, but it might be explained by taking into account their object and aims. In EUIPO Regulation, where a case is brought before the GC and the ECJ, the same reasons indicated above – that is, concerning the aim of avoiding the taking of any steps that cannot easily be reversed – justify the suspension of the contested act until a final decision is taken by the two jurisdictions[34]. Conversely, as indicated above, REACH Regulation takes into consideration animal welfare, but the two main objectives of that Regulation are the protection of public health and the environment. Thus, even if the suspension of the contested decision of the Agency before the ECHA BoA may be justified to avoid animal testing based on an act that could be set aside by the Board, legislators have decided that this suspension cannot be extended to proceedings before the CJEU. The retreat from the principle of presumption of legality of acts applies only in proceedings before BoA, whereas before the CJEU, considerations of public health and the environment outweigh animal welfare considerations and thus justify the applicant pressing ahead with animal testing[35].

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[32] General Court, May 12th 2009, case T-410/07 R, *Jurado Hermanos* v *UAMI*, ECLI:EU:T:2009:153, para 30.

[33] General Court, November 11th 2023, case T-655/20 R, *Symrise* v *ECHA*, ECLI:EU:T:2023:736.

[34] See EUIPO Guidelines, 2024, available at https://guidelines.euipo.europa.eu.

[35] On that point, it is worth recalling that in the President of the GC, on April 30th 2020, case T-868/19 R, *Nouryon Industrial Chemicals and Others* v *Commission*, ECLI:EU:T:2020:171, para 25, stated that "[a]lthough the applicants in the present case refer to a large number of animals which have to be sacrificed on account of the tests concerned, they do not claim, apart from the risk of actions being initiated against themselves in the event that the contested decision is annulled, any direct damage, such as non-material or financial damage, which the carrying out of those animal tests would entail for the applicants. Consequently, while their argument that the implementation of the contested decision would harm animal welfare does indeed have an ethical dimension, it cannot establish the urgency of the suspension sought for the applicant".

3.2 Where BoA have the power to suspend the contested act

The interim protection granted by ACER and ERA BoA[36], ESA BoA and SBR Appeal Panel[37] belongs to this second category. Before those BoA, the lodging of an appeal against a decision adopted by one of those Agencies does not have suspensory effect and their establishing Regulations confer on BoA the power to suspend the effects of the contested decision.

The four Regulations establishing those Agencies contain the same provision: an appeal does not have suspensory effect; however, if BoA consider that circumstances so require, they may suspend the application of the contested decision[38]. By contrast, the wording of the Rules of Procedure of those BoA are different.

Article 27 of the Rules of Organisation and Procedure of the ACER BoA states that: i) upon application of a party to the proceedings or of its own motion, the Board of Appeal may suspend the application of the contested decision; ii) the application to suspend the application of the contested decision shall be admissible only if the applicant has challenged that decision in an action before the Board and if the application was

[36] On the ACER and ERA BoA, see C. TOVO, *The Boards of Appeal of Networked Services Agencies: Specialized Arbitrators of Transnational Regulatory Conflicts?*, in M. CHAMON. A. VOLPATO, M. ELIANTONIO (eds.), *cit.*, p. 34.

[37] On the ESA BoA and SRB Appeal Panel, see M. LAMANDINI, D. RAMOS MUÑOS, *Law and Practice of Financial Appeal Bodies (ESAs Board of Appeal, SRB Appeal Panel): A View from the Inside*, in *Common Market Law Review*, 2022, pp. 119-160; M. CHAMON, D. FROMAGE, *Between Added Value and Untapped Potential: The Boards of Appeal in the Field of EU Financial Regulation,* in M. CHAMON. A. VOLPATO, M. ELIANTONIO (eds.), *cit.*, p. 8; M. LAMANDINI, D. RAMOS MUÑOS, *Some Reflections on the Standard of Review in the Experience of the ESAs Joint Board of Appeal and of the SRB Appeal Panel*, in *European Company and Financial Law Review*, 2022, pp. 950-970; M. CONDINANZI, *The 'Judicial' Control of Discretionary Measures in Banking and Financial Fields: the Role of EU Courts (and Boards of Appeal)*, in *European Compani and Financial Law Review,* 2022, pp. 978-991.

[38] See article 28 of Regulation (EU) 2019/942 of the European Parliament and of the Council of 5 June 2019 establishing a European Union Agency for the Cooperation of Energy Regulators (recast), in *OJ* L 158, 14.6.2019, p. 22-53; article 58(2), of Regulation (EU) 2016/796 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Railways and repealing Regulation (EC) No 881/2004, in *OJ* L138, 26.5.2016, p. 1-45; article 60(3) of the 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, in *OJ* L 331, 15.12.2010, p. 84–119 and article 85(6) of the 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, in *OJ* L 225, 30.7.2014, p. 1-90.

submitted together with that action[39]; the application shall state the circumstances giving rise to urgency and the pleas of fact and law establishing a *prima facie* case for the suspension applied for as well as the fact that the applicant's interest in the imposition of interim measures outweighs other interests at stake in the proceedings; iii) the application shall be served on the opposite party, and the chairperson shall prescribe a short time limit within which that party may submit written observations; iv) the decision on the application shall take the form of a reasoned order not subject to appeal which shall be served on the parties forthwith[40].

Article 17 of the ERA BoA Rules of Procedure establishes that: i) BoA may grant a suspension of the contested decision where appellants have demonstrated that there is urgent need to grant a suspension for the preservation of their rights and interests due to a risk of serious and irreparable damage to those rights and interests; ii) the chairperson may invite the opposing party to submit written observations on the request[41].

Article 10 of the Rules of Procedure of the ESA BoA[42] and SRB Appeal Panel[43] states that: i) the procedures set out in these Rules (including those set out below as to directions and pre-hearing conference) apply as the chair shall deem appropriate to the determination of any question regarding the suspension of a decision by the Board; ii) in exceptional circumstances, the BoA or the Appeal Panel may also suspend the application of the contested decision for a period sufficient to permit full discussion of the suspension; iii) the decision determining any question as to suspension shall be given in writing and the two BoA may amend their decisions to suspend or not suspend at any time on the application of any of the parties.

The comparison of those provisions shows the lack of uniform regulation of interim protection proceedings before BoA. Article 27 of ACER BoA's RoP refers, in essence, to the ECJ's and the GC's RoP; Articles 10 of the ESA BoA's and SRB Appeal Panel's RoP refers to

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[39] It is worth noting that the obligation to lodge the application for interim protection together with the appeal may be justified by the four-month timeframe in which the ACER Board of Appeal must handle the appeal. See para 4.

[40] See www.acer.europa.eu/sites/default/files/documents/en/The_agency/Organisation/Board_of_Appeal/BoA_Public_Docs/ACER_BoA_Rules_of_Procedure_2023.pdf.

[41] Commission implementing Regulation (EU) 2018/867 of 13 June 2018 laying down the Rules of Procedure of the Board(s) of Appeal of the European Union Agency for Railways, in *OJ* L 149, 14.6.2018, pp. 3-15.

[42] See www.eba.europa.eu/sites/default/files/document_library/854319/BoA%20Rules%20of%20Procedure%202020%20(final).pdf.

[43] See www.srb.europa.eu/system/files/media/document/2020_appeal_panel_rop_en_1.pdf.

Article 278 TFEU; Article 17 of the ERA BoA's RoP refers only to the condition of the urgency.

Nevertheless, Article 27 of the ACER BoA's RoP and Article 10 of the ESA BoA's and SRB Appeal Panel's RoP are still of interest. On the one hand, Article 27 of the ACER BoA's RoP deals in great detail with the condition for granting interim relief and with the procedural features of the proceedings. On the other hand, Article 10 of the ESA BoA's and SRB Appeal Panel's RoP appears to refer to the notions of "summary procedure", *inaudita altera parte* orders and changes in the circumstances and the conditions for a new application for interim protection.

3.3 Where another body of the Agency has the power to suspend the contested act

The interim protection granted by the EASA and CPVO Regulations, in which the effect of lodging the appeal against the contested act is not decided by the BoA but by another body of the Agency, belongs to the third category. Because of certain differences between those two Regulations, it is preferable to examine the EASA Regulation first, and the CPVO Regulation afterwards.

a. EASA Regulation

Article 108(2) of the EASA Regulation[44] and Article 15(2) of the Rules of Procedure[45] provide that "an appeal shall not have suspensory effect", but they specify that "where the Executive Director considers that circumstances so permit, he or she may suspend the application of the decision appealed against". This provision must be understood in the context of the "interlocutory revision", provided for in Article 108 of the EASA Regulation. According to this Article, before examining the appeal, Board of Appeal gives the Agency the opportunity to review its decisions. If the Executive Director considers the appeal to be well founded, he or she shall rectify the decision within two months of being notified by the BoA; otherwise, if the decision is not rectified, the Agency shall then

[44] Regulation (EU) 2018/1139 of the European Parliament and of the Council of 4 July 2018 on common rules in the field of civil aviation and establishing a European Union Aviation Safety Agency, and amending Regulations (EC) No 2111/2005, (EC) No 1008/2008, (EU) No 996/2010, (EU) No 376/2014 and Directives 2014/30/EU and 2014/53/EU of the European Parliament and of the Council, and repealing Regulations (EC) No 552/2004 and (EC) No 216/2008 of the European Parliament and of the Council and Council Regulation (EEC) No 3922/91, in *OJ* L 212, 22.8.2018, pp. 1-122.

[45] See www.easa.europa.eu/sites/default/files/dfu/WI.IMS_.00122_-_Rules_of_Procedure_Dec_2020_website.pdf.

decide whether or not to suspend the application of the decision pursuant to Article 108(2). In that regard, it must be pointed out that there are several decisions adopted by the EASA BoA in which, in the part concerning the procedure, it is indicated whether or not the contested decision was suspended by the Executive Director, but no basis for the decision is given[46].

b. CPVO Regulation

Article 67 of CPVO Regulation distinguishes two different categories of appeals: i) appeals against decisions taken pursuant to Articles 20, 21, 59, 61, 62, 63 and 66, as well as on decisions relating to fees pursuant to Article 83, to costs pursuant to Article 85, to the entering or deletion of information in the register pursuant to Article 87 and to the public inspection pursuant to article 88; ii) appeals against decisions relating to compulsory licenses, taken pursuant to Articles 29 and 100(2), unless a direct appeal before the GC is lodged pursuant to Article 74[47].

Article 67(2), first sentence, states that the lodging of an appeal in the first category has suspensory effect. However, Article 67(2), second sentence, clarifies that, if it considers that circumstances so require, the Office may order that the contested decision not be suspended. Thus, interim protection relating to this first category of contested acts appears to be a little peculiar because, in principle, the typical interim protection involves the suspension of the contested act and not its non-suspension.

In that regard, an example can be useful to understand the rationale for this wording. In the *Regents of the University of California v CPVO* case, the applicant filed an application for a Common Plant Variety Right (CPVR) for the clementine variety 'Tang Gold'[48]. Even if the Office granted the CPVR, the applicant lodged an appeal against a part of the decision granting the right concerning the official description of the variety and pleaded that the effect of granting the CPVR to the variety

[46] In most cases, the Executive Director decided not to suspend the contested decisions. See, for instance, decision of EASA Board of Appeal of 17 December 2012 in case AP/01/2012, *Heli-Flight* v *EASA*, para 10. For an example in which the Executive Director suspended the contested decision, see decision of EASA Board of Appeal of 19 April 2018 in case AP/10/2017, *Reiner Stemme Utility Air-systems GmbH* v *EASA*, para 10.

[47] Council Regulation (EC) No 15/2008 of 20 December 2007 amending Regulation (EC) No 2100/94 as regards the entitlement to file an application for a Community plant variety right, in *OJ* L 8 of 11.01.2008, p. 2.

[48] For a summary of the case, see Community Plant Variety Office, *CPVO case-law 2015-2020 – Summaries of decisions and judgments of the Board of Appeal, the General Court and the Court of Justice of the European Union*, Vol. II, Publications Office, 2020, available at https://data.europa.eu/doi/10.2803/875178.

'Tang Gold' should not be suspended as an effect of the appeal in the manner provided for in Article 67(2), first sentence, of the CPVO Regulation.

As in the EASA Regulation, Article 70 of the CPVO Regulation provides for an interlocutory procedure which allows the Office to rectify the contested decision or to decide, if circumstances so require, not to suspend its effects. At the end of this interlocutory procedure, the Office decided not to rectify the contested decision and to continue the suspension of its effect. In the proceedings before the BoA, the applicant also contested the legality of the decision of the Office regarding the non-suspensory effect of an appeal, but the Board considered that this category of CPVO decision is not subject to appeal[49].

The second category of appeals which concerns decisions relating to compulsory licenses does not have suspensory effect, but to date, the Office has not taken this kind of decision.

4. Interim protection before BoAs that mirror the CJEU: Commonalities and Differences

In this part of the presentation, it is useful to compare the interim protection before the second category of BoA which has been analysed in the previous paragraph – that is, the ACER and ERA BoA, the ESA BoA and SRB Appeal Panel – with the one granted by the CJEU. This comparison is made from a procedural and substantive point of view.

From a procedural point of view, firstly, before the CJEU, the judge hearing the application for interim relief is, in principle, a single judge, i.e. the president before the GC, the vice-president before the ECJ, even if the latter can decide to refer the case to a chamber. By contrast, before BoA is the Board itself, not the reporting member and not the chairperson (president).

Secondly, BoA have the power to suspend the contested act but not the power to adopt any other measures.

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[49] On that point, Martin Ekvad, the former president of CPVO BoA highlighted that, on the one hand, "[g]uidance, as to what kind of circumstances should be taken into account when considering not suspending the decision, may be found by analogy in the case-law of the CJEU regarding the taking of interim measures". On the other hand, he stressed that "the right of the Office to take decisions on suspensory effect is questionable", because "[u]nder such circumstances, the Office has already made its final decision and has had the opportunity to correct its decision in the interlocutory stage pursuant to article 70 of the Basic Regulation". As a consequence, he suggested that "[a] preferred alternative would be for the Board of Appeal to take such a decision". See M. EKVAD, *The Functioning of the Community Plant Variety Office Board of Appeal*, in C. GEIGER, C. A. NARD, X. SEUBA (eds.), *Intellectual Property and the Judiciary*, Cheltenham, 2018, p. 6.

Thirdly, before the GC and the ECJ, the judge hearing the application for interim relief must swiftly adopt his decision but there is no time limit for doing so. BoA do not have a time limit for adopting interim measures either, but they do have a time limit for adopting the decision in the main application: 3 months for the ESA BoA; 1 month for the SRB Appeal Panel; 4 months for the ACER BoA and 3 months for the ERA BoA. Thus, on the one hand, the importance of interim protection in such an expedited procedure must be relativised and, on the other hand, the existence of such a short time limit seems to be an expression of a principle of administrative efficiency rather than one of sound administration of justice.

Fourthly, in principle, before the CJEU, the issue of the admissibility of the main application should not be examined in proceedings relating to an application for interim measures[50]. Nevertheless, even if the issue is examined and the judge hearing the application for interim protection finds that the main application is not admissible, he can dismiss the application for interim relief, but it is the chamber to which the main application is assigned that has jurisdiction to give final judgment on this issue[51]. By contrast, the ESA BoA "considere[d] that to grant a suspension it must consider at the same time if the appeal is admissible", and since the appeal was not admissible, "[i]n those circumstances, the question of a suspension [did] not arise"[52]. Thus, it seems that for reasons related to the principle of 'procedural economy', in the light of the short time limit for adopting the final decision, when an issue of admissibility arises and is well founded, this Board of Appeal, at least, refrains from considering the application for interim relief.

Fifthly, the orders adopted by the judge hearing the application for interim measures before the GC can be challenged before the vice-president of the ECJ according to Article 57, second paragraph of the Statute[53], whereas, the current state of the legal framework does not seem

[50] Order of the President of the Court, November 3rd 1980, case 186/80 R, *Benoît Suss v Commission of the European Communities*, ECLI:EU:C:1980:258, para 14.

[51] For instance, the president of the General Court dismissed an application for interim measures, considering the main application inadmissible (Order of the President of the General Court, August 29th 2013, case T-5/13 R, *Iran Liquefied Natural Gas Co.* v *Council*, ECLI:EU:T:2013:395) but the GC did consider the main application admissible (General Court, September 18th 2015, case T-5/13, *Iran Liquefied Natural Gas Co.* v *Council*, ECLI:EU:T:2015:644).

[52] Decision of ESAs Joint Board of Appeal of 13 September 2019 in case D-2019-05, *Creditreform Rating AG* v *EBA*, available on the *Common Database of EU Agencies' Boards of Appeal*, paras 54 and 71.

[53] See C. NAÔME, *Art. 57 Statuto*, in C. AMALFITANO, M. CONDINANZI, P. IANNUCCELLI, *Le regole del processo dinanzi al giudice dell'Unione europea*, Napoli, 2017, p.

to provide for those remedies against decisions on the application for interim relief adopted by those BoA – neither before them nor the GC. Even if this situation is not satisfactory for the unsuccessful party of the interim relief proceedings, several elements do not allow a different conclusion.

First of all, Article 27 of the Rules of Organisation and Procedure of the ACER BoA expressly excludes that orders may be challenged, and a systematic interpretation, on one side, of the ESAs and SRB Regulations and, on the other side, of the ERA Regulation and ERA RoP, leads to the conclusion that the decisions which can be challenged before the CJUE are only the decisions adopted by those BoA in the main appeal[54]. Indeed, there is not a provision that explicitly recognises remedies against decisions rendered by those BoA in interim proceedings, whereas the jurisdiction of the vice-president against orders adopted by the judge hearing the application for interim measures before the GC is based on the Statute. Secondly, even if, from a theoretical point of view, the circumstance that BoA of those four Agencies have a short timeframe to adopt their decisions cannot be considered to exclude interim protection, from a substantive point of view, as indicated above, this enables relativisation of the concrete effects of interim protection before them.

From a substantive point of view, it is useful to compare the BoA approach with the approach of the judge hearing the application for interim measures before the CJEU. In that respect, the ESA BoA has rendered some very interesting interim decisions, in the *Skandinaviska Ensklida Banken AB* v *ESMA*, *Euroins Insurance Group AD v EIOPA* and *Dubai Commodities Clearing Corporation* v *ESMA* cases[55].

In *Skandinaviska Ensklida Banken*, in which the ESA BoA was asked for the first time to suspend a contested decision, the BoA noted that: i) Article 60(3) of the ESMA, which states that the BoA can suspend the decision if it "considers that circumstances so require", does not set out

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[54] See Articles 60(7) and 61(1) of Regulation (EU) No 1095/2010, *cit.*; Article 85(7) and 86(1) of Regulation (EU) No 806/2014, *cit.* and Article 63 of ERA Regulation (EU) 2016/796, *cit.*

[55] The ERA BoA and SRB Appeal Panel still have not adopted interim measures. The ACER BoA adopted some 'reasoned orders' on application for interim protection, but those orders are not available and there is only a written record in the final decisions. See, for instance, decision of ACER Board of Appeal of 6 August 2019 in case A-004-2019, *HEA and FGSZ* v *ACER*, available on the *Common Database of EU Agencies' Boards of Appeal*, para 13 which held that "[o]n 3 July 2019, the Board of Appeal dismissed the requests for the suspension of the application of the Contested Decision both in the cases A-004-2019 and A-005-2019, in the form of a reasoned order, in compliance with article 26 of the Rules of Procedures".

legal criteria; ii) BoA is not a court, but an integral part of ESMA; iii) on the one hand, all the circumstances of a case must be taken into account in deciding whether to suspend the application of a contested decision under Article 60(3) of the ESMA Regulation and, on the other, the decisive factor should be the weighing of interests; iv) even if irreparable damage to the applicant would clearly be important in that regard if demonstrated, the correct interpretation of Article 60(3) of the ESMA Regulation in context is not restricted to these considerations, and the public interest is likely to be an important consideration in deciding the outcome. In this case, the ESA BoA rejected the application for interim protection[56].

In the *Euroins Insurance Group AD* case, the BoA stated that "[a]ccording to the case law, interim measures may be granted if it is established that they are justified, *prima facie*, in fact and in law, and that they are urgent in so far as they are necessary in order to avoid serious and irreparable harm. Those conditions are cumulative, and consequently an application for interim measures must be dismissed if any one of them is not satisfied. An application for interim measures must also, when necessary, involve a weighing of the competing interests"[57]. In this case, ESA BoA decided that the condition relating to urgency was not satisfied and dismissed the application without examining the other conditions.

Finally, in the *Dubai Commodities Clearing Corporation* case, in which the contested decision was suspended, the ESA BoA made some general remarks on interim relief proceedings and clarified the nature of its competences.

Concerning the general remarks on interim relief proceedings, firstly, the ESA BoA noted that "pursuant to Article 60(3) of the ESMA Regulation, reflected in Article 10(1) of the Rules of Procedure, the Board of Appeal may suspend the application of the Contested Decision 'if it considers that circumstances so require'" and "[t]hat wording reflects Article 278 TFEU", adding that "a decision on a suspension request should follow the case law of the Court of Justice and the General Court on similar requests". Secondly, the BoA recalled the principle of presumption of legality of acts. Thirdly, the BoA recalled that interim measures may be granted if it is established that they are justified, *prima facie*, in fact and in law, i.e., that there is a *fumus boni iuris*, that they are urgent in so far as they are necessary in order to avoid serious and irreparable harm and if the balancing of interests is in favour of the

[56] Available on the *Common Database of EU Agencies' Boards of Appeal*, paras 86, 92 and 96.

[57] Available on the *Common Database of EU Agencies' Boards of Appeal*, para 29.

applicant[58]. On the basis of those considerations, the BoA made its assessment of urgency, *fumus boni iuris* and balance of interests and concluded that all the conditions for the suspension of the contested decision were satisfied.

Concerning the nature of its competences, the ESA BoA recognised that, by contrast with the position of the ECJ and the GC, which are specifically empowered by virtue of Article 279 TFEU to prescribe any necessary interim measures, it has only been granted the power to suspend the application of the contested act, mirroring Article 278 TFEU but not Article 279 TFEU[59].

Those decisions rendered by the ESA BoA are quite interesting. It is true that, in those decisions, the ESA BoA refers to its previous decisions to affirm the consistency of its reasoning, but it seems clear that between the *Skandinaviska Ensklida Banken* case – in which its position was that the conditions provided for the suspension of a contested act before the ECJ and the GC could not be decisive for the adoption of a similar decision in the light of Article 60(3) of the ESMA Regulation – and the *Dubai Commodities Clearing Corporation* case – in which it affirmed that "a decision on a suspension request should follow the case law of the [ECJ] and the [GC] on similar requests" – there has been an evolution in the ESA BoA's approach concerning the perception of its role in the EU legal order.

It is permissible to consider that, to some extent, this evolution may have been inspired by the *BASF* and *Aquind* case-law[60]. Those judgments established that complex technical, scientific and economic assessments made by BoA are subject to limited review by the GC, whereas BoA have full control of the decisions rendered by EU Agencies. In essence, this case-law shows that BoA have a supporting role in enhancing the effective judicial protection of the applicants, because their stricter review of the decisions adopted by EU Agencies lightens the nature of the review made by the EU judicature. Thus, even if BoA keep on being hybrid bodies[61], the recognition of their role in helping the CJEU with reviewing may be

[58] Available on the *Common Database of EU Agencies' Boards of Appeal*, paras 28-30.

[59] *Ivi* para 63.

[60] General Court, November 18th 2020, case T-735/18, *Aquind* v *ACER*, ECLI:EU:T:2020:542. For a comment on that judgment, see V. CHARIKLEIA, *Chambres de recours des agences de l'Union européenne: quelle intensité de contrôle?*, in *Revue de l'Union européenne*, 2021, pp. 81-87.

[61] On the hybrid nature of BoA, see S. OOSTERHUIS, R. WIDDERSHOVEN, *Rethinking the Position of the Boards of Appeal from a Comparative Perspective*, in M. CHAMON, A. VOLPATO, M. ELIANTONIO (eds.), *cit.*, pp. 196-199; J. ALBERTI, *The Position of Boards of Appeal,* M. CHAMON, A. VOLPATO, M. ELIANTONIO (eds.), *cit.*, pp. 250-252.

considered a 'booster' of perceptions of them as judicial bodies or, at least, as acting as judicial bodies[62].

5. Concluding Remarks

The above examination, on the one hand, confirms the lack of harmonisation concerning the interim protection before BoA and, on the other, shows the existence of several differences and some commonalities between the provisional protection granted by the CJEU and BoA that mirror the Rules of Procedure and case-law of Luxembourgish Courts.

The lack of harmonisation among BoA on interim protection is a matter of fact. The question is whether a harmonised approach is really necessary. The differences among the mechanisms established before BoA appear justified by the nature and objectives of EU Agencies. Thus, 'one size fits all' cannot be considered the right answer[63] because it would imply a total rethinking of the Regulations establishing EU Agencies – which at present is not under consideration. Moreover, if a harmonised approach were to be decided upon, several questions would arise. Of all the models of interim protection that have been examined above, which one should be applied? The automatic suspension provided for by the ECHA and EUIPO Regulations or the suspension decided by BoA as established in the ACER, ERA, ESMA and SRB Regulations? From this point of view, statistical data has to be taken into account. There are BoA that handle thousands of appeals per year – for instance, the EUIPO BoA – while other BoA do not have as many appeals to handle. This aspect must be considered because choosing the model where lodging an appeal has no suspensory effect could have a very significant impact on the workload of the EUIPO BoA. By contrast, perhaps choosing the model where lodging an appeal has suspensory effect could constitute an acceptable retreat from the principle of the presumption of legality of EU acts? Lastly, the rationale for automatic suspension in the context of the EUIPO and ECHA Regulations is understandable, but would it work for the other BoA?

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[62] On that point, see M. LAMANDINI, D. RAMOS MUÑOS, *Law and Practice of Financial Appeal Bodies (ESAs' Board of Appeal, SRB Appeal Panel): A view from the inside*, in *Common Market Law Review,* 2020, p. 120. The authors consider that "(some) appeal bodies offer sufficient safeguards to justify the exclusion of an ultimate judicial review by the highest court, i.e. to justify their being treated as courts, or quasi-courts, of first instance".

[63] J. ALBERTI, *The Threshold Guardians. The future of EU Agencies' Boards of Appeal in light of the recent reforms of CJEU Statute*, in *Review of European Administrative Law*, 2023, pp. 36-86.

Concerning the comparison between interim protection before some BoA and the one granted by the CJEU, it is true that, firstly, the ACER, ERA, ESA BoA and the SRB Appeal Panel RoP mirror the GC's and ECJ's RoP with differing degrees of exactness. Secondly, the ESA BoA based its reasoning, in particular in the *Dubai Commodities Clearing Corporation* case, on CJEU case-law. However, those elements, which may give rise to reflection on a number of points and contribute to the ongoing debate on the nature of BoA, are not enough to consider that interim protection before those BoA is an expression of a completed process of decentralisation of the EU judicature.

In conclusion, as indicated in the introduction, the aim of this contribution was to understand in which way the analysis of interim protection before BoA could be useful to address in the general discussion on the possibility of considering BoA as the expression of a process of decentralisation of the EU judicature. This analysis seems to confirm that, even if in some Agencies there is a trend to the judicialisation of interim protection, which is, however, at an embryonic stage, this trend cannot be extended to all EU Agencies. In that regard, it must be recalled that interim protection has an ancillary nature with respect to the main proceedings. Thus, the evolution of this protection in the future will largely depend on the outcome of the institutional discussions on BoA. If the judicial nature of BoA should become prevalent, interim protection should follow the same path. On the contrary, if the process of decentralisation of EU judicature should take place only partially, as the present legal framework guarantees, a certain flexibility should keep being recognised in BoA in which an administrative nature prevails over the judicial one[64].

[64] On the possible evolution of BoA, see J. ALBERTI, *The Threshold Guardians*, *cit.*, pp. 81-93. The author highlights that scholars agree on the need to 'untap' the potential of BoA and, after having indicated two possible evolutions – a conservative one, in which BoA keep on being administrative bodies, and a progressive one, in which BoA could become specialised administrative courts – he proposes a 'functionalist approach'. Even if this approach postulates, in the long-term, the judicialization of BoA, it has, in comparison to the other two, the advantage of recognising that judicialization cannot be imposed, because "[BoA] are currently quite different one from the other, in terms of powers, functions and workload" and, thus, "their evolution should take place progressively, amending their founding Regulations […] tailoring any amendment to the needs of each sector". This allows us to imagine a scenario in which it would be possible to have certain BoA in which the judicial model is dominant, and others in which the administrative one remains prevalent. In other words, in the same system, BoA with different structures and functions could coexist.

MORE THAN THE EU COURTS, LESS THAN THE AGENCIES: INTENSIFYING THE BOARDS OF APPEALS' STANDARD OF REVIEW AFTER THE *AQUIND*-JUDGMENT

Più di un giudice, meno di un'agenzia: lo standard of review *operato dalle commissioni di ricorso e il suo rafforzamento dopo la sentenza* Aquind

Plus qu'un juge, moins qu'une agence : intensifier le niveau de contrôle des chambres de recours après l'arrêt Aquind

SOFIE OOSTERHUIS*

TABLE OF CONTENTS: 1. Introduction. - 2. Life before *Aquind*. - 2.1 Limited review: 'manifest errors of assessment'. - 2.2 Intensification of the review. - 2.3 From full reviews to limited review. - 2.4 Observations. - 3. Intensifying the standard of review: the EU Courts' take on the BoAs. - 3.1 ECHA: 'vitiated in error'. - 3.2 ACER: full review? - 3.2.1 Context - 3.2.2 Composition and powers. - 3.2.3 New standard. - 3.3 Implications. - 4. The post-*Aquind* era. - 4.1 ECHA. - 4.2 ACER. - 4.3 SRB Appeal Panel. - 4.4 Observations. - 5. Conclusion.

1. Introduction

The EU administration has specialized over the last couple of decades by the introduction of EU Agencies in specific policy fields. They enable the EU to have more scientific expertise within their policy making. Moreover, some of these Agencies have individual decision-making powers, empowering them to take high impact decisions within contentious fields[1]. As prescribed by the non-delegation doctrine, judicial

* PhD Candidate in European Administrative Law at the Utrecht University.

[1] Currently, 10 out of the 38 Agencies have a BoA with a mandatory preliminary nature which amounts to 8 BoAs in total. These are: the European Union Intellectual Property Office (EUIPO), the Community Plant Variety Office (CPVO), the European Railway Agency (ERA), the European Chemicals Agency (ECHA), the European Agency for the Cooperation of Energy Regulators (ACER), the three European Supervisory

review over these decisions is vital to the legitimacy of Agencies[2]. Besides judicial control, Boards of Appeal have been set up as an internal mechanism of control. They are part of the organizational structure of their respective Agencies but operate independently in their review. They offer a first level of protection for individuals affected by the contested decisions.

The added value of this appeal proceeding offered by the BoAs has been questioned in literature[3]. Aside from functioning as a filter mechanism, ensuring that not all cases proceed to the EU Courts, the expectation is that the BoAs can offer a more substantial level of review than the EU Courts can do. These BoAs are not only composed of legal experts but also of technical experts, potentially allowing them to conduct a review on the technical considerations of the contested decisions[4]. Standard of review refers to the degree to which the content of the contested decisions can be reviewed. In particular it indicates the extent to which the BoAs are able and required to conduct a more intensive review of the appreciation of complex technical and economic facts in the light of the relevant legal framework. Because of the institutional balance within the EU, the EU Courts apply a limited standard of review in this regard. This means that they can only address questions of legality regarding the content of the contested decision, leaving a margin of appreciation to the Agencies. Thereto the EU Courts only check whether the contested decision does not exceed the bounds of powers that have been conferred upon the Agencies, and whether it is vitiated by manifest errors of assessment[5]. As the Agencies take decisions in technical fields,

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Authorities (ESAs) – which are the European Banking Authority, the European Securities and Markets Authority, and the European Insurance and Occupational Pensions Authority – the Single Resolution Board (SRB), and the European Aviation Safety Agency (EASA).

[2] M. CHAMON, *EU Agencies: Does the Meroni Doctrine Make Sense*, in *Maastricht Journal of European and Comparative Law*, 2010, pp. 281, 283; M SIMONCINI, *EU Agencies in the Internal Market: A Constitutional Challenge for EU Law*, in M. BELOV (ed.) *Global constitutionalism and its challenges to Westphalian constitutional law*, 2018, p. 164.

[3] See for example the various contributions in M. CHAMON, A. VOLPATO, M. ELIANTONIO (eds.) *Boards of Appeal of EU Agencies: Towards Judicialization of Administrative Review?*, Oxford, 2022.

[4] S. OOSTERHUIS, *The rise of complex decision-making in the European Union: boards of appeal as a mechanism to mitigate challenges of scientific uncertainty*, in *Review of European Administrative* Law, 2023, p. 113.

[5] Court of Justice, September 2nd 2021, case C-579/19, *The Queen, on the application of: Association of Independent Meat Suppliers and Cleveland Meat Company Ltd* v *Food Standards Agency*, ECLI:EU:C:2021:665, paras 88-93. See, amongst others, Court of Justice, February 15th 2005, case C-12/03 P, *Commission* v *Tetra Laval*, ECLI:EU:C:2005:87, para 39; General Court, March 7th 2013, case T-96/10, *Rütgers Germany et al* v *ECHA*,

this might mean that the contested decisions circumvent a substantial review[6]. This is where the BoAs could play a vital role.

In 2023, the Court of Justice has given an important judgment answering this question in the *Aquind* case, confirming the findings of the General Court from 2020[7]. Both EU Courts took the view that BoAs cannot merely conduct a limited review but, instead, must intensify their review. The technical expertise within these BoAs would allow for such intensification. At the same time, however, it also appears that the EU Courts acknowledge that these BoAs cannot be expected to repeat the initial decision-making process. A middle ground must be struck between these two approaches.

This paper aims to place the *Aquind*-judgment in context, in order to examine the normative question what this middle ground could entail. This will be done by exploring what questions have led up to this specific case, analyse what the EU Courts have stated in their rulings, and evaluate how the BoAs have implemented these findings thus far in their own decisions. This will be done via an analysis of BoA decisions. The Common Database of EU Agencies' Boards of Appeal, as implemented by the Jean Monnet Module on EU Specialized Judicial Protection, has been used to find relevant BoA decisions in which the intensity of review is explicitly discussed. Furthermore, it is important to note that the BoAs of the two intellectual property Agencies, EUIPO and CPVO, are not included in the paper because the *Aquind*-judgment seems less important for them. As has been acknowledged by the EU Courts in earlier case law, the nature of their decisions is fundamentally different from that of the decisions of the other Agencies[8]. After all, deciding about the content and scope of property rights has been a classic task of (civil) courts for ages, making and maintaining the current unlimited *de novo* assessment of the

ECLI:EU:T:2013:109, paras 99-100; Court of Justice, July 15th 2021, case C-911/19, *Fédération bancaire française (FBF)* v *Autorité de contrôle prudentiel et de résolution (ACPR)*, ECLI:EU:C:2021:599, paras 75-79, 83-84, 122-123, 125-129; M. GARGANTINI, M. SCHOLTEN, *The past is the past. The future is all that's worth discussing* (Lord Baelish, The Game of Thrones). Some reflections on the non-delegation doctrine and its impact on the ESAs powers after the CJEU decision on the FBF case, EU Law Enforcement Blog 30 September 2021 <https://eulawenforcement.com/?p=8077>.

[6] S. OOSTERHUIS, *The rise of complex decision-making in the European Union: boards of appeal as a mechanism to mitigate challenges of scientific uncertainty, cit.*, pp. 113, 114.

[7] General Court, November 18th 2020, case T-735/18, *Aquind Ltd* v *ACER*, ECLI:EU:T:2020:542; Court of Justice, March 3rd 2023, case C-46/21 P, *ACER* v *Aquind*, ECLI:EU:C:2023:182.

[8] General Court, September 20th 2019, case T-125/17, *BASF Grenzach GmbH* v *ECHA*, ECLI:EU:T:2019:638, paras 91-103; General Court, November 18th 2020, case T-735/18 *Aquind Ltd* v *ACER*, *cit.*, para 80; Opinion of AG Sánchez-Bordona, September 15th 2022, case C-46/21 P, *ACER* v *Aquind*, ECLI:EU:C:2022:695, para 64.

decisions of the intellectual property Agencies by their BoAs rather uncontroversial – or, as discussed elsewhere in this Volume, quite controversial, yet only with regard the composition and the resources currently granted to BoAs[9].

This paper first delves into the life before the *Aquind*-judgment by looking in the decision-making practice of these BoAs prior to this case (section 2). Then this paper turns to the *Aquind*-judgment and analyse in detail what the EU Courts have found specifically on the standard of review (section 3). Subsequently, the post-*Aquind* era is explored by evaluating how the BoAs have implemented this new standard thus far and how the EU Courts have reflected on the new standard (section 4). This paper concludes by observing the shift in the intensity of review conducted by the BoAs (section 5).

2. Life before *Aquind*

Before delving into the specificities and the implications of the *Aquind* judgment, the life before this groundbreaking case will be explored. As already stated in the introduction and further analysed in section 3, the EU Courts found that intensification of the standard of review mainly lies in the technical expertise of the BoAs. One of the main characteristics that is shared among all the BoAs is that they are composed of both legal and technical experts. Their underlying regulatory framework prescribes the specific technical knowledge required to be able to be appointed as a BoA member. Some have more extensive rules than others, but the main gist is that these technical members must have an educational background and/or relevant (work) experience in the field of their respective Agency. While the actual division between legal and technical members also differs per BoA, there is always at least one member that has technical knowledge. This section explores how the BoAs have (or rather, have not) used their expertise in their decision-making practice prior to the *Aquind* judgment[10].

[9] See, in this *Volume*, M. NAVIN-JONES, *Ramifications Of The Aquind Judgements For 'Non Permanent' Boards Of Appeal*, p. 197. As for the impact of *Aquind* on EUIPO BoAs, see in this *Volume*, G. HUMPHREYS, *Standard Of Review And The Right To An Effective Judicial Protection: A Reflection From The Euipo's Perspective*, p. 185.

[10] Decisions of the ERA BoA are not included because in the two decisions it took thus far the intensity of review was not under discussion as they only regarded legal interpretations.

2.1 Limited review: 'manifest errors of assessment'

Another characteristic that all the BoAs have in common, is that the intensity of review is not defined in their underlying regulatory frameworks. It has, therefore, been left to the BoAs themselves to define their relationship vis-à-vis the Agency and vis-à-vis the EU Courts in deciding on their intensity of review. As a result, the majority of the BoAs adopted a limited approach in reviewing the contested decisions. Lamandini and Ramos Muñoz argue that due to the lack of judicial guidance, the 'appeal bodies will likely limit themselves to a more detailed and granular fact analysis, but will balk at the prospect of explicitly claiming an approach to review that is different than that of the EU Courts, and will mostly mirror their stance on that of EU Courts[11]. The BoAs of EASA and ACER have explicitly referred to case law by the EU Courts to justify a limited review in their appeal procedures.

In *Heli-Flight*, the EASA BoA explicitly confined itself to a limited review[12]. Subsequently, the EASA BoA observed that these decisions on civil aviation safety matters contain complex technical assessments. By referring to case law of the CJEU, the EASA BoA constrained itself to solely reviewing manifest errors[13]. In addition, the EASA BoA stated that the provision on the issuance of an approval of flight conditions is 'broadly drafted', which, thus, also grants discretion to EASA in taking the contested decision[14]. This deferential review can further be derived from how the EASA BoA assessed the normative regimes on helicopters, on which it states that "[if] the Agency seeks to ensure a higher safety standard than the one applicable elsewhere or hitherto, the Appellant has not referred to a norm that impedes that Agency from doing so"[15]. This shows that in the eyes of the EASA BoA, the Agency entertained discretion in deciding the safety standard within civil aviation.

The same approach was taken by the ACER BoA. By also referring to the same case law of the EU Courts, the ACER BoA argued that it is limited to reviewing whether ACER made a manifest error of assessment,

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[11] M. LAMANDINI, D. RAMOS MUÑOZ, *Law and Practice of Financial Appeal Bodies (ESAs Board of Appeal, SRB Appeal Panel): A View from the Inside*, in *Common Market Law Review*, 2020, pp. 119, 154.

[12] Decision of EASA BoA of 17 December 2012 in case AP/01/2012, *Heli-Flight GmbH & Co. KG* v *EASA*, para 63.

[13] *Ibidem*. See also M. SIMONCINI, M. VERISSIMO, *The EASA Board of Appeal in Search of Identity: An Effective Filter between Administration and Courts?*, in M. CHAMON, A. VOLPATO, M. ELIANTONIO (eds.), *cit*, p. 107.

[14] Decision of EASA BoA of 17 December 2012 in case AP/01/2012, *Heli-Flight GmbH & Co. KG* v *EASA*, para 63.

[15] *Ivi* para 74.

thereby leaving a considerable margin of appreciation for ACER since "complex assessment [leaves] discretionary power to the Agency"[16]. As a result, the ACER BoA did not 'carry out its own complete assessment' or repeat ACER's analysis[17]. The main rationale behind this, according to the ACER BoA, was that the appeal procedure is created for 'reasons of procedural economy', due to which they have a limited timeframe to decide on the contested decision[18]. After the 2019 reform of the ACER Regulation[19], the ACER BoA held on to this approach, while no longer referring to the case law of the EU Courts but relying on its established decision-making practice. The ACER BoA argued that the underlying Regulation establishes the BoA as an independent administrative body within ACER and that because of the "quasi-judicial characteristics of the appeal procedure, the limitation of its decision-making powers, the procedural economy and the principle of effectiveness [...], the BoA cannot and should not attempt to exercise the same level of analysis as has been carried out by the Agency before"[20].

A limited review can also be found in the decision-making practice of the BoAs of the financial Agencies. In its earlier decisions, the ESAs JBoA has stated that they cannot perform a *de novo* assessment but that they can only review the legality of the contested decisions[21]. However, this still left open the question what exactly is the standard of review that the ESAs JBoA should adopt. In later decisions, the JBoA stated that there is a high

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[16] Decision of ACER BoA of 17 May 2012 in case A-001-2017, *Energy Control Austria et al.* v *ACER,* para 108; decision of ACER BoA of 17 October 2018 in case A-001-2018, *Aquind Limited* v *ACER,* paras 47 and 52; decision of ACER BoA of 14 February 2019 in case A-002-2018, *PRISMA European Capacity Platform GmbH* v *ACER,* para 63; decision of ACER BoA of 11 July 2019 in case A-001-2019, *Amprion GmbH & Transnet BW GmbH* v *ACER,* para 76.

[17] Decision of ACER BoA of 17 October 2018 in case A-001-2018, *cit.*, para 52; decision of ACER BoA of 14 February 2019 in case A-002-2018, *cit.*, para 63; decision of ACER BoA of 11 July 2019 in case A-001-2019, *cit.,* para 76; decision of ACER BoA of 6 August 2019 in case A-004-2019, *Hungarian Energy and Public Utility Regulatory Authority et al.* v *ACER,* para 255; decision of ACER BoA of 7 February 2020 in case A-006-2019, *GAZ-SYSTEM S.A.* v *ACER,* para 51.

[18] Decision of ACER BoA of 17 October 2018 in case A-001-2018, *cit.*, para 43; decision of ACER BoA of 14 February 2019 in case A-002-2018, *cit.*, para 63; decision of ACER BoA of 11 July 2019 in case A-001-2019, *cit.*, para 76; decision of ACER BoA of 7 February 2020 in case A-006-2019*, cit.*, para 52.

[19] Regulation (EU) n. 2019/942 of the European Parliament and of the Council of 5 June 2019 establishing a European Union Agency for the Cooperation of Energy Regulators (Recast), in *OJ* L 158, 14.06.2019, p. 22 ff.

[20] Decision of ACER BoA of 7 February 2020 in case A-006-2019, *cit.*, para 52.

[21] M. CHAMON, D. FROMAGE, *Between Added Value and Untapped Potential: The Boards of Appeal in the Field of EU Financial Regulation*, in M. CHAMON, A. VOLPATO, M. ELIANTONIO (eds.), *cit.*, p. 24.

threshold for the appeal to be declared founded and that it's not its function to decide policy[22]. Only in *Scope Rating* v *ESMA* did the ESAs JBoA give some insight into their standard of review. The contested decision was a fine imposed by ESMA on Scope Rating for failing to systematically apply its credit-rating methodology. Scope Rating argued that it had objective reasons to deviate from this methodology[23]. In this case, the ESAs JBoA distinguished between the interpretation of the underlying legal provisions and the application of the facts in the light of these provisions. The former (interpretation of the legal provision) was seen as a purely legal question, not leaving any discretion to ESMA[24]. As regards the latter (application of the facts), however, the ESAs JBoA afforded ESMA a margin of discretion. This margin seems to apply not only to the appreciation of complex and technical facts, but the appreciation of facts in general[25].

The SRB Appeal Panel, initially, also left the question of its standard of review wide open. Several authors argued that, therefore, the standard of review is a standard of legality[26]. Herinckx observed in this regard that the Appeal Panel cannot second guess the contested decision, and that the pleas brought forward were comparable to that at the CJEU[27]. At the same time he acknowledged that the AP does not have to exercise the same restraint as the CJEU because it is also composed of technical experts. This expertise allows the AP to dig deeper into the complex economic assessments[28]. Therefore, the AP can be expected to investigate more thoroughly whether the SRB was erroneous[29].

Interestingly, while all these appeal bodies took a quite deferential approach initially when reviewing the contested decisions, we can also observe an intensification in the decision-making practice in some of these.

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[22] M. CHAMON, *De Gemeenschappelijke Bezwaarcommissie van de Europese Toezichthoudende Autoriteiten*, Tijdschrift voor Europees en economisch recht 171, 2020, pp. 178-179.

[23] Decision of ESAs JBoA of 28 December 2020 in case D-2020-03, *Scope Ratings GmbH* v *ESMA*.

[24] M. CHAMON, D. FROMAGE, *Between Added Value and Untapped Potential: The Boards of Appeal in the Field of EU Financial Regulation*, in M. CHAMON, A. VOLPATO, M. ELIANTONIO (eds.), *cit.,* pp. 27-28.

[25] *Ibidem*.

[26] M. LAMANDINI, D. RAMOS MUÑOZ, *cit.*, pp. 119, 149.

[27] Y. HERINCKX, *Judicial Protection in the Single Resolution Mechanism*, in R. HOUBEN, W. VANDENBRUWAENE, *The Single Resolution Mechanism,* 2017, pp. 94-95.

[28] *Ivi* p. 97.

[29] *Ivi* p. 98.

2.2 Intensification of the review

Even before the EU Courts discussed the BoA's intensity of review in their case law, some of the BoAs already appeared to have intensified their review. In anticipation of the *Aquind*-judgment (further discussed in section 3), the ACER BoA already appeared to be willing to conduct a more intense review. Authors have argued that this more intensive approach seems to be grounded in the principle of proportionality in particular, leading to a detailed reasoning on the technical and economic elements underlying the Agency's governance choices[30]. A similar approach could be found in the EASA BoA and the SRB Appeal Panel.

In two of its decisions, the EASA BoA appears to have intensified its review by employing the principle of proportionality in its review while this principle was not explicitly raised by the appellant. In *Issoire Aviation*, the EASA BoA considered that the Agency "has acted in accordance with the principle of proportionality" as under these circumstances the Agency still took a "decision less onerous to the Applicant"[31]. Thus, as the EASA BoA noted, the Agency had not only "acted within the limits of the applicable provisions, but within those limits it has also sought to take full consideration of the interests of the Appellant"[32]. The *Aviones Piezas y Accesorios* decision concerned the partial suspension of privileges of Design Organizations Approval (DOA) due to non-compliance with the approval requirements for a DOA[33]. The Appellant did not agree with the contested decision as it reclassified their DOA to a lower level than its initial level[34]. In this respect, the EASA BoA considered that, based on the underlying file, "the contested decision was proportionate as it only led to a partial suspension and not to a revocation of the DOA, and that the Appellant had various opportunities to be heard before the contested decision was adopted"[35].

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[30] C. TOVO, *The Boards of Appeal of Networked Services Agencies: Specialized Arbitrators of Transnational Regulatory Conflicts?*, in M. CHAMON, A. VOLPATO, M. ELIANTONIO (eds.), *cit.*, p. 53; M. KRAJEWSKI, *Judicial and Extra-Judicial Review: The Quest of Epistemic Certainty*, in M. CHAMON, A. VOLPATO, M. ELIANTONIO (eds.), *cit.,* p. 296; J. Y. OLLIER, A. PIEBALGS, *The appeal procedure in the application of the EU Energy Law – experience from ACER's Board of Appeal 2016-2021*, RSC PP 2023/06, pp. 26-27.

[31] Decision of EASA BoA of 21 November 2014 in case AP/06/2013, *Issoire Aviation* v *EASA,* paras 45-46.

[32] *Ivi* para 46.

[33] Decision of EASA BoA of 19 December 2022 in case AP/17/2022, *Aviones Piezas y Accesorios (APA) S.L.* v *EASA*.

[34] *Ivi* para 40.

[35] *Ivi* para 74.

Lamandini and Ramos Muñoz argued that while the SRB Appeal Panel did have a similar approach as the EU Courts in the law of finance, that their level of scrutiny is more intense than the traditional manifest error limitation[36]. They observed that in the *Banco Popular Español* decision, the Appeal Panel left a margin of appreciation to the SRB since the applicable framework expressly uses words as "may" in relation to the powers that the SRB can exercise. This use of words implies that the SRB has to make a choice, a discretion which is confined to manifest errors of assessment[37]. Nonetheless, Lamandini and Ramos Muñoz argued that this still: "[…] implies a close scrutiny of all errors of facts and of law, extended to the verification not only that the evidence relied on by the Agency is factually accurate, reliable and consistent, but also whether if constitutes all the relevant information which must be taken into account in order to asses a complex situation and whether that information is capable of supporting the conclusions drawn from it"[38].

Therefore, while discretion may be granted by the legal framework to the SRB, this "does not go unchecked and is weighted against principles like proportionality, reasonableness and equal treatment"[39]. The SRB Appeal Panel also referred to settled case law by the EU Courts in *Technische Universität München* in this respect[40]. *Technische Universität München*, which has been further elaborated in *Tetra Laval*, introduced the process-oriented review[41]. The process-oriented review focuses on the quality of fact-finding activities of the institution and whether it has adequately stated reasons for its decisions[42]. This review employs principles of good administration such as the duty of care, the duty to state comprehensive reasons, the duty to impartial and objective investigation of facts, and the principle of proportionality[43]. This has arguably intensified the review conducted by the EU Courts as well as it goes beyond just merely checking for manifest errors of assessment.

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[36] M. LAMANDINI, D, RAMOS MUÑOZ, *cit.*, pp. 950, 962.

[37] *Ivi* pp. 950, 959.

[38] *Ibidem*.

[39] *Ivi* pp. 950, 960.

[40] Decision of SRB AP of 27 January 2022 in case 2/2021.

[41] E. VOS, *The European Court of Justice in the face of scientific uncertainty and complexity*, in M. DAWSON, B. DE WITTE, E. MUIR (eds.), *Judicial Activism at the European Court of Justice*, pp. 151-152; Court of Justice, November 21st 1991, case C-269/90, *Technische Universität München* v *Hauptzollamt München-Mitte,* ECLI:EU:C:1991:438; European Court of Justice, February 15th 2005, case C-12/03 P, *Tetra Laval,* ECLI:EU:C:2005:87.

[42] R. J. G. M. WIDDERSHOVEN, *The European Court of Justice and the Standard of Judicial Review*, in J. DE POORTER, E. HIRSCH BALLING, S. LAVRIJSSEN (eds.), *Judicial Review of Administrative Discretion in the Administrative State,* Springer, 2019, p. 55.

[43] M. KRAJEWSKI*, Judicial and Extra-Judicial Review: The Quest of Epistemic Certainty*, in M. CHAMON, A. VOLPATO, M. ELIANTONIO (eds.), *cit.*, p. 278.

2.3 From full review to limited review

The ECHA BoA is the only appeal body that initially conducted a full review but has experienced a recourse to a, seemingly, more limited review. The REACH Regulation confers broad powers onto the ECHA BoA by stating that they can exercise the same powers as the Agency[44]. For the ECHA BoA this provision was, besides its mixed legal and technical qualified composition, reason to employ explicitly a more intense review than the EU Courts[45].

In earlier decisions, the ECHA BoA found that it "can carry out a new, full examination as to the merits of the appeal, in terms of both law and fact"[46]. It concluded that it may consider "all circumstances and facts applicable during the administrative procedure that led to the adoption of the contested decision", and was "not limited to the arguments of facts and law raised by the parties"[47].This implied not only that the ECHA BoA considered itself to not be bound by the grounds brought forward by the party but also that not only legal grounds could be brought forward but also technical grounds. Essentially, in these cases, the ECHA BoA stated that it could fully re-consider or conduct a *de novo* review of the entire dispute, meaning that it could act like ECHA would itself[48].

In more recent decisions, the ECHA BoA seems to have limited its review and refrained itself from conducting a *de novo* review[49]. The ECHA BoA still finds that because it consists of both legally and technically qualified members and has the same powers as ECHA, it should be able

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[44] Art. 93(3) Regulation (EC) n. 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), in *OJ* L 396, 20.12.2006, p. 1 ff.

[45] A. VOLPATO, E. MULLIER, *The Board of Appeal of the European Chemicals Agency at a Crossroads*, in M. CHAMON, A. VOLPATO, M. ELIANTONIO (eds.), *cit.*, p. 93.

[46] E. MULLIER, R. CANO, *The ECHA Board of Appeal and the Court of Justice: Comparing and Contrasting Chemicals Litigation*, in *International Chemical Regulatory and Law Review*, 2018, p 110; decision of ECHA BoA of the 10 October 2011 in case A-001-2010, *N.V. Elektriciteits – Produktiemaatschappij Zuid-Nederland EPZ* v *ECHA*, para 36; decision of ECHA BoA of 10 October 2013 in case A-004-2012, *Lanxess Deutschland GmbH* v *ECHA*; ECHA BoA, decision of ECHA BoA 23 September 2015 in case A-005-2014, *Akzo Nobel Industrial Chemicals and Others* v *ECHA*.

[47] Decision of ECHA BoA of the 10 October 2011 in case A-001-2010, *cit.*, para 37.

[48] M. NAVIN-JONES, *A Legal Review of EU Boards of Appeal in Particular the European Chemicals Agency Board of Appeal*, in *European Public Law*, 2015, pp. 143, 153; G. LIGUGNANA, *Dispute Resolution in European Agencies: the ECHA Board of Appeal*, in A. CASSATELLA, G. LIGUGNANA, B. MARCHETTI, *Administrative remedies in the European Union: The emergence of a quasi-judicial administration*, Torino, 2017, p. 93.

[49] A. VOLPATO, E. MULLIER, *The Board of Appeal of the European Chemicals Agency at a Crossroads*, in M. CHAMON, A. VOLPATO, M. ELIANTONIO (eds.), *cit.*, p. 96.

to conduct technical assessment that is not limited to 'manifest' errors of assessment[50]. In these decisions, the ECHA BoA has also taken account of economic, technical and scientific considerations as well as legal considerations[51]. In *CINIC Chemical Europe Sárl* and *Altair Chimica SpA and Others*, the ECHA BoA, for the first time, acknowledged that ECHA "has a wide margin of discretion" but at the same time also observed that this does not "prevent the Board of Appeal from examining whether the Agency […] took into consideration all the relevant factors and circumstances of the situation the act was intended to regulate"[52].

Interestingly, the intensity of review took a turn in the *Dow* decision. The ECHA BoA found that ECHA "must be recognized as enjoying broad discretion"[53], and continued that its role was limited to solely reviewing whether ECHA "misused its margin of discretion", referring to case law of the EU Courts endorsing this view[54]. This approach was also followed in other decisions by the ECHA BoA, seemingly showing a shift in the BoAs understanding of its role in reviewing the contested decisions. Krajewski observes that this is not solely a limited review as it appears that the ECHA BoA used a process-oriented review. He argues that the ECHA BoA only employs such process-oriented review in so-called "hard cases"[55]. Moreover, the ECHA BoA is more deferential in its assessment in cases of uncertainty due to the lack of well-established and commonly agreed upon scientific methodologies by checking whether the appellant's arguments have been appropriately considered and addressed by the Agency in the initial decision-making process[56]. In the other cases, Krajewski notes, the ECHA BoA does still appear to review the assessments more thorough than the EU Courts by delving into the design of scientific tests or methodological issues of available chemical studies[57].

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[50] E. MULLIER, R. CANO, *cit.*, pp. 105, 110; decision of ECHA BoA of 29 April 2013 in case A-005-2011, *Honeywell Belgium N.V.* v *ECHA*, par 117; decision of ECHA BoA of 23 September 2015 in case A-005-2014, *cit.*, para 54; G. LIGUGNANA, *cit.*, p. 93.

[51] E. MULLIER, R. CANO, *cit.*, pp. 105, 110.

[52] G. LIGUGNANA, *cit.*, p. 94; decision of ECHA BoA of 10 June 2015 in case A-001-2014*, CINIC Chemical Europe Sárl* v *ECHA*, para 74.

[53] Decision of ECHA BoA of 26 April 2012 in case A-001-2012, *Dow Benelux B.V.* v *ECHA,* para 109.

[54] *Ivi* para 110.

[55] M. KRAJEWSKI, *Judicial and Extra-Judicial Review: The Quest of Epistemic Certainty*, in M. CHAMON, A. VOLPATO, M. ELIANTONIO (eds.), *cit.*, p. 290.

[56] *Ivi* p. 292.

[57] *Ivi* p. 291.

2.4 Observations

These diverging approaches show that guidance by the EU Courts was necessary. While these appeal bodies do acknowledge to some extent that they have expertise and thus perhaps could do more than the EU Courts; they, at the same time, appear to be unsure of their exact role in the system of remedies against the contested decisions. The next section discusses the three landmark cases of the EU Courts in which they have tried to clarify this role.

3. Intensifying the standard of review: the EU Courts' take on the BoAs

As the intensity of review is not explicitly mentioned in the underlying regulatory framework, the BoAs are left guessing on what the correct approach should be. As previously analysed, the BoAs appear, in general, to rather conduct a limited review in line with deferential standard of review employed by the EU Courts. In recent case law, the EU Courts have attempted to clarify the relationship between the BoAs and their respective Agencies as well as with the EU Courts and concluded that the BoAs should intensify their standard of review.

This section explores the judgments of the EU Courts in three landmark cases: *BASF* v *ECHA*, *Germany* v *ECHA* and *Aquind* v *ACER*. While other legal issues have been raised in these judgments, this section only focuses on the findings relating to the BoAs' intensity of review.

3.1 ECHA: 'vitiated in error'

The General Court has discussed the ECHA BoA's intensity of review in two landmark cases: *BASF* v *ECHA* and *Germany* v *ECHA*[58]. Both these cases pertain the evaluation of substances in which ECHA asked the applicants for additional information, that these applicants have appealed before the ECHA BoA. In these cases, the two appellants argued opposing views on the intensity of review. BASF argued that the ECHA BoA should conduct a de novo assessment, thus including a technical review, while Germany argued that the review by the ECHA BoA should

[58] General Court, September 20th 2019, case T-125/17, *BASF Grenzach GmbH* v *ECHA*, *cit.*; General Court, September 20th 2019, case T-755/17, *Federal Republic of Germany* v *ECHA,* ECLI:EU:T:2019:647; see for a full analysis of these two judgments the case note: M. CHAMON, A. VOLPATO, *Sketching Out the Role and Function of the ECHA Board of Appeal: Germany v ECHA and BASF v ECHA*, in *European Law Review*, 2002, p. 840.

only be limited to procedural aspects. The General Court found a middle ground between these two opposing views.

The General Court predominantly focused on the composition of the ECHA BoA. Since the ECHA BoA does not only consist of legal experts but also of technical qualified members, the ECHA BoA "has the necessary expertise at its disposal in order to itself carry out assessments of scientific evidence" and, thus, can conduct "a balanced assessment of both legal and technical aspects"[59].Due to the combined composition, the review of the ECHA BoA "is not limited to verifying the existence of manifest errors"[60]. The ECHA BoA should, instead, rely on the legal and scientific competences of the member to examine whether the arguments brought forward of the appellant demonstrates that the considerations of the ECHA decisions are vitiated in error[61]. This leads to a more intense review than is carried out by the EU Courts because of its assessment of highly complex scientific and technical facts[62]. Nonetheless, the General Court also notes that it is not desirable for the ECHA BoA to "systematically conduct itself a new review of the assessment of scientific and technical facts" as this would not sufficiently consider the objectives of the decision-making procedure in which the Member States play a significant role[63].

Following Article 93(3) of the underlying Regulation 1907/2006 (REACH), mentioned above, the ECHA BoA can exercise the same powers as ECHA itself, and is therefore allowed to substitute the ECHA decisions annulled[64]. The General Court, however, finds that a more intense review cannot be derived from this provision, because it 'governs solely the [BoA]'s powers after having held that an action before it' is well

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[59] General Court, September 20th 2019, case T-125/17, *BASF Grenzach GmbH* v *ECHA*, *cit.*, para 88-89; General Court, September 20th 2019, case T-755/17 *Federal Republic of Germany* v *ECHA, cit.*, para 51.

[60] General Court, September 20th 2019, case T-125/17 *BASF Grenzach GmbH* v *ECHA*, *cit.*, para 89; General Court, September 20th 2019, case T-755/17 *Federal Republic of Germany* v *ECHA, cit.*, para 52.

[61] *Ibidem*.

[62] General Court, September 20th 2019, case T-755/17 *Federal Republic of Germany* v *ECHA*, *cit.*, para 53.

[63] General Court, September 20th 2019, case T-125/17 *BASF Grenzach GmbH* v *ECHA*, *cit.*, paras 116 and 129.

[64] Article 93(3) Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC, in *OJ* L 369, 30.12.2006, p. 1 ff.

founded. By contrast, "it does not govern the review carried out by that [BoA] in relation to the merits of an action before it"[65]. So, according to the General Court the more intense review by the ECHA BoA is not related to the BoA's power of substitution.

3.2 ACER: full review?

In 2023, the Court of Justice, for the first time, commented on the BoAs' intensity of review in the *Aquind* case[66]. In this case, *Aquind* submitted a request for an exemption under Regulation (EC) n. 714/2009, on conditions for access to the network for cross-border exchanges in electricity, for a proposed electricity interconnector between the electricity transmission systems in the United Kingdom and France. As the national regulatory authorities in France and the UK could not reach an agreement, this request was forwarded to ACER which refused the exemption. *Aquind*, subsequently, filed an appeal with ACER's BoA. The ACER BoA took its appeal decision in 2018, in which it stated that they are solely limited to checking whether ACER made a manifest error of assessment, given the margin of discretion that should be left to ACER in deciding on complex economic and technical issues. Hereby, the ACER BoA equated its intensity of review to that of the EU judicature in such cases. *Aquind* disagreed with this approach and argued that such a limited review would be contrary to the organizational provisions on the ACER BoA in Regulation (EC) n. 713/2009, and thus filed an appeal at the General Court which has subsequently been appealed by ACER at the Court of Justice on which Advocate General Campos Sánchez-Bordona provided his Opinion[67].

The main question in this case is whether the ACER BoA was correct in equating its review of complex technical and economic assessments to the limited judicial review carried out by the EU judicature. The short answer is no. The General Court, AG Campos Sánchez-Bordona, and the Court of Justice all agreed that more should be expected in terms of the BoA's intensity of review.

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[65] General Court, September 20th 2019, case T-125/17 *BASF Grenzach GmbH* v *ECHA*, *cit.*, para 66.

[66] Court of Justice, March 3rd 2023, case C-46/21 P, *ACER* v *Aquind*, *cit.*

[67] S. OOSTERHUIS, *The CJEU Judgment in C-46/21 P, Aquind v ACER: Boards of Appeal as expert mechanisms of conflict resolution to conduct a 'full review' of contested decisions*, in *EU Law Enforcement*, 31 July 2023.

3.2.1 Context

Before delving into the specificities of the ACER BoA, the EU Courts and the AG also make some interesting observations about the context within the ACER BoA operates. They observe that the ACER BoA fits with the general tendency of the EU legislature to provide for a mechanism to appeal contested decisions an appellate body within the EU Agencies that "have been given significant decision-making powers over complex technical or scientific matters"[68].These BoAs are seen as appropriate means of rights protection, and it appears as if the General Court sees them as a compensation for the limited review exercised by the EU Courts on these complex technical or scientific matters[69]. AG Campos Sánchez-Bordona also adds that there would be 'little sense' in having them if they would not be able to assess the technical and economic aspects of the contested decision. The AG finds that the BoAs cannot be comparable to the EU Courts, otherwise their establishment would be "redundant"[70].

Also looking into the context of the ACER BoA, the General Court also observes that the appellants must exhaust the BoA procedure and are "barred from challenging the decision of the Agency before the EU judicature"[71]. According to the General Court, which has also been confirmed by the Court of Justice, this "supports the finding that the Board of Appeal cannot carry out a limited review of the decision" as that would otherwise lead to a limited review by the General Court over a limited review which "fails to offer the guarantees of effective judicial protection"[72].

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[68] General Court, November 18th 2020, case T-735/18, *Aquind Ltd* v *ACER,* cit., para 51; Opinion of AG Sánchez-Bordona, September 15th 2022, case C-46/21 P, *ACER* v *Aquind, cit.*, para 44; Court of Justice, March 9th 2023, case C-46/2 P, *ACER* v *Aquind*, *cit.*, para 56.

[69] General Court, November 18th 2020, case T-735/18 *Aquind Ltd* v *ACER*, *cit.*, para 51; Court of Justice, March 9th 2023, case C-46/21 P *ACER* v *Aquind*, *cit.*; Opinion of AG Sánchez-Bordona, September 15th 2022, case C-46/21 P, *ACER* v *Aquind, cit.*, para 44; Court of Justice, March 9th 2023, case C-46/2 P, *ACER* v *Aquind*, *cit.*, para 56.

[70] Opinion of AG Sánchez-Bordona, September 15th 2022, case C-46/21 P, *ACER* v *Aquind, cit.*, para 44; Court of Justice, March 9th 2023, case C-46/2 P *ACER* v *Aquind*, *cit.*, para 56.

[71] General Court, November 18th 2020, case T-735/18 *Aquind Ltd* v *ACER*, *cit.*, paras 57-58.

[72] General Court, November 18th 2020, case T-735/18 *Aquind Ltd* v *ACER*, *cit.*, paras 57-58; Court of Justice, March 9th 2023, case C-46/2 P, *ACER* v *Aquind*, *cit.*, paras 66-67.

3.2.2 Composition and powers

When zooming into the ACER BoA specifically, the EU Courts and the AG seem to predominantly focus on its composition. The ACER BoA, just like the other BoAs, is composed of both legal and technical experts. As a result, the General Court finds that the "EU legislature thus intended to provide the Board of Appeal of ACER with the necessary expertise to allow itself to carry out assessments of complex technical and economic facts relating to energy"[73].The AG and the Court of Justice seem to take this even a step further by implying that the ACER BoA could carry out a full review by stating that the composition meets the requirements necessary to conduct a full review of decisions adopted by ACER' and that "they have or should have the technical knowledge necessary to conduct a detailed examination of appeals"[74]. Therefore, the Court of Justice concludes, the BoA is not created in order "to confine itself to a limited review of complex technical and economic assessments"[75]. Moreover, the EU Courts observe that infringement of EU law or raising pleas of law is not a prerequisite of filing an appeal at the ACER BoA[76].

The General Court also discusses the powers that have been attributed onto the ACER BoA by the 2009 ACER Regulation, by observing that broad powers were conferred upon the ACER BoA. The General Court found that the ACER BoA had a power of discretion as they could exercise the same power available to ACER itself, leaving however in the middle whether this would actually affect the ACER BoA's intensity of review[77]. The AG also observes this attribution of power. Since the 2019 reform of the ACER Regulation, the ACER BoA does not have the same powers anymore but that it can only confirm or remit the contested decision. To that extent, the AG notes that the reform only further proves that the ACER BoA should intensify its review. As the

[73] General Court, November 18th 2020, case T-735/18 *Aquind Ltd* v *ACER*, *cit.*, para 53.

[74] Opinion of AG Sánchez-Bordona, September 15th 2022, case C-46/21 P, *ACER* v *Aquind, cit.*, para 52; Court of Justice, March 9th 2023, case C-46/2 P *ACER* v *Aquind*, *cit.*, paras 62-64.

[75] Court of Justice, March 9th 2023, case C-46/2 P *ACER* v *Aquind*, *cit.*, para 65.

[76] General Court, November 18th 2020, case T-735/18 *Aquind Ltd* v *ACER*, *cit.*, para 51; Opinion of AG Sánchez-Bordona, September 15th 2022, case C-46/21 P, *ACER* v *Aquind, cit.*, para 44; Court of Justice, March 9th 2023, case C-46/2 P *ACER* v *Aquind*, *cit.*, para 56.

[77] General Court, November 18th 2020, case T-735/18 *Aquind Ltd* v *ACER*, *cit.*, para 56; Court of Justice, March 9th 2023, case C-46/2 P *ACER* v *Aquind*, *cit.*, paras 60-61.

reform has strengthened the BoA's human resources as well, the AG finds that this puts the BoA "in an ideal position to undertake a full review of the decisions adopted by the Agency"[78]. ACER's argument that the initial time limit of two months, which has now been extended to four months, shows that the legislature intended to limit the review undertaken by the BoA is not enough according to the AG. It is precisely the technical knowledge and expertise, again focusing on the composition of the ACER BoA, that makes it easier for the BoA to understand the issue quickly and adjudicate promptly[79]. Interestingly, the attributed powers and reform of the ACER Regulation is not discussed by the Court of Justice.

3.2.3 New standard

Another important aspect that was raised during this case was the comparability to the ACER BoA to the ECHA BoA, and whether the earlier held new standard set out by the General Court would be applicable in *Aquind* as well. The EU Courts and the AG found that the ACER BoA is very comparable to the ECHA BoA, especially in terms of their composition and nature of the procedure, and concluded that it would be "contrary to the very nature of appellate bodies within Agencies for those bodies to conduct [a] limited review"[80]. The General Court, therefore, held, in line with its earlier case law, that: "the review carried out by the Board of Appeal of ACER of complex technical and economic assessments […] must not be confined to a limited review of manifest errors of assessment. On the contrary, relying on the scientific expertise of its members, that board must examine whether the arguments put forward by the appellant are capable of demonstrating that the considerations on which that decision of ACER is based are vitiated by error"[81].

As previously stated, the AG and Court of Justice seem to imply a further intensification by expecting a full review of complex technical, scientific, and economic assessments of the contested decision. While the AG states that the ACER BoA is confined to grounds brought forward by the appellant to demonstrate that the contested decision "is vitiated by

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[79] Opinion of AG Sánchez-Bordona, September 15th 2022, case C-46/21 P, *ACER* v *Aquind, cit.*, para 64.

[80] General Court, November 18th 2020, case T-735/18 *Aquind Ltd* v *ACER*, *cit.*, para 61; Opinion of AG Sánchez-Bordona, September 15th 2022, case C-46/21 P, *ACER* v *Aquind, cit.*, para 77.

[81] General Court, November 18th 2020, case T-735/18 *Aquind Ltd* v *ACER*, *cit.*, para 69.

errors", he also seems to suggest that the ACER BoA should "carry out a full and unlimited review of decisions"[82]. The Court of Justice has dropped the 'unlimited' part and finds that the ACER BoA meets the requirements to conduct a full review of the contested decision[83]. It is unclear from the opinion and the judgment, however, to what extent this is different than the earlier conclusion of the General Court. As the same wording is not used by the AG and the Court of Justice in relation to the intensity of review, it does seem to imply that this is a different standard. Nonetheless, the examination of appeals is not unlimited as the scope of review is limited to the grounds brought forward by the appellant due to the adversarial nature of the appeal procedure. Therefore, the ACER BoA is not expected to conduct a *de novo* assessment[84].

3.3 Implications

While the next section further explores what the exact implications of these cases are on the practice of the BoAs, there are also some broader implications of these cases. The AG and the Court of Justice in *Aquind* make some general observations about the BoA mechanism. Besides stating that the ACER BoA is very comparable to the ECHA BoA and placing the ACER BoA within the wider context of the creation of BoAs, they also observe that all the BoAs share common features. They are described as "administrative revision bodies" that "have a certain independence, perform quasi-judicial functions through adversarial procedures" and are composed of both legal and technical experts. Moreover, they are seen as "a quick, accessible, specialized and inexpensive mechanism" for rights protection[85]. This might mean that the *Aquind* judgment not only affects the future intensity of review of the

[82] Opinion of AG Sánchez-Bordona, September 15th 2022, case C-46/21 P, *ACER* v *Aquind, cit.*, para 64 and para 52.

[83] Court of Justice, March 9th 2023, case C-46/2 P *ACER* v *Aquind*, *cit.*, para 63. The reason for the Court of Justice to drop the 'unlimited' part might be that the standard of 'unlimited jurisdiction' is in Article 261 TFEU related to the judicial assessment of *penalties*. Under the standard the court is empowered to substitute its own appraisal for the Commission's and, consequently, to cancel, reduce or increase the fine or penalty payment imposed (cf. Court of Justice, December 8th 2011, case C-389/10 P, *KME* v *Commission*, ECLI:EU:C:2011:816, para 130). This standard is perhaps too far-reaching to be applied by the BoA's outside the area of penalties as well.

[84] General Court, November 18th 2020, case T-735/18 *Aquind Ltd* v *ACER*, *cit.*, paras 75-80; Opinion of AG Sánchez-Bordona, September 15th 2022, case C-46/21 P, *ACER* v *Aquind, cit.*, para 64.

[85] Opinion of AG Sánchez-Bordona, September 15th 2022, case C-46/21 P, *ACER* v *Aquind, cit.*, para 41; Court of Justice, March 9th 2023, case C-46/2 P *ACER* v *Aquind*, *cit.*, para 59.

ACER BoA, but that this new standard might be applicable across all the BoAs[86].

Another question that has usually been raised within the context of the *Aquind* judgment is the recent shift in powers of the ACER BoA since the 2019 reform. As previously stated, the ACER BoA was able to exercise the same powers as ACER itself up to that point, meaning that it could substitute the contested decision with its own. Since the reform, the ACER BoA can only confirm the contested decision or remit it to the Agency. In the two ECHA cases, the General Court found that a broad scope of powers does not affect the intensity of review. This issue has been left undiscussed by the Court of Justice in the *Aquind* case. Therefore, it is seems likely that this shift of powers does not affect the *Aquind* message that the ACER BoA should apply a full review of decisions contested in future as well, a vision which is shared by General Court in recent case law, discussed below[87].

4. The post-*Aquind* era

These landmark cases provide the much-needed guidance to the BoAs on the extent to which they need to review the contested decisions. As expected, the ACER and ECHA BoAs have adjusted their decision-making practice accordingly. Moreover, the SRB Appeal Panel also made some remarks on these cases in relation to its own standard of review.

4.1 ECHA

The ECHA BoA has dealt with multiple cases in which they have been confronted with explicitly discussing their intensity of review. In line with the two General Court judgments, the ECHA BoA has stated that their aim is to examine "whether the evidence submitted by the Appellant is capable of demonstrating that the decision is vitiated by error"[88]. In that respect, the ECHA BoA should rely on the legal and scientific

[86] With an exception of the BoAs of the two intellectual property Agencies, EUIPO and CPVO, which will probably continue their unlimited *de novo* assessment. See already section 1 of the paper.

[87] General Court, September 6th 2023, case T-212/20, *Operator Gazociągów Przesylonych Gaz-System S.A.* v *ACER*, *cit.*, para 36.

[88] Decision of ECHA BoA of 21 February 2021 in joined cases A-016-2019 to A-029-2019, *Lubrizol France SAS a.o.* v *ECHA,* para 103; decision of ECHA BoA of 10 May 2022 in case A-002-2021, *LANXESS Deutschland GmbH* v *ECHA,* para 54; decision of ECHA BoA of 23 August 2022 in case A-004-2021, *Clanese Production Germany GmbH & Co. KG* v *ECHA,* para 36.

competences of its members[89]. The burden of proof is on the appellants to provide sufficient evidence that ECHA made an assessment in error, which the ECHA BoA examines "whether the Agency has examined carefully and impartially all the relevant facts of the individual case, and whether those facts support the conclusions that the Agency drew from them"[90]. The General Court, in *Polynt SpA* v *ECHA*, was again posed the question whether the ECHA BoA carried out its review with the required intensity following the new case law[91]. The General Court repeated that regarding the scientific assessments of ECHA, its BoA "is not limited to verifying the existence of manifest errors" but that, instead, "must examine whether the arguments put forward by the applicant are capable of demonstrating that the considerations on which that decision of ECHA is based are vitiated by error"[92]. In this decision, the General Court found that the ECHA BoA did not make a manifest error of assessment since it explicitly referred to assessing errors of assessment, and moreover also conducted a detailed scientific assessment[93]. The General Court, thus, found that the new decision-making practice of the ECHA BoA fits with the new standard.

4.2 ACER

Since the *Aquind*-judgment, the ACER BoA has reiterated the aim of its BoA procedure: to protect "the rights of the parties in cases brought against decisions involving significant decision-making powers over complex scientific or technical matters"[94]. In two decisions from 2022, which predates the 2023 judgment of the Court of Justice, the ACER BoA repeated the new standard as introduced by the General Court. In the *BnetzA* decision and *PSE* decision, the ACER BoA held, by referring to

[89] Decision of ECHA BoA of 10 May 2022 in case A-002-2021, *cit.*, para 54.

[90] Decision of ECHA BoA of 12 January 2021 in case A-007-2019, *Chermours Netherlands B.V.* v *ECHA,* para 40; decision of ECHA BoA of 9 February 2021 in case A-015-2019, *Polynt S.p.A.* v *ECHA,* para 36; decision of ECHA BoA of 22 March 2022 in case A-003-2020, *Campine nv* v *ECHA,* para 111; decision of ECHA BoA of 22 March 2022 in case A-004-2020, *Tribotecc GmbH* v *ECHA*, para 111; also comparable decision of ECHA BoA of 10 May 2022 in case A-002-2021, *cit.*, para 55 in which the ECHA BoA states that "it is necessary to examine whether the Agency took into account all the relevant facts of the individual case".

[91] General Court, July 28th 2023, case T-207/21, *Polynt SpA* v *ECHA*, ECLI:EU:T:2023:361.

[92] *Ivi* para 83.

[93] *Ivi* paras 84-96.

[94] Decision of ACER BoA of 9 December 2022 in case A-002-2022, *RWE Supply & Trading GmbH* v *ACER*, para 31; decision of ACER BoA of 9 December 2022 in case A-003-2022, *Uniper Global Commodities SE* v *ACER*, para 31.

Aquind, that the appellant must demonstrate that the contested decision is vitiated by an error[95].

Moreover, the General Court even held, before the 2023 *Aquind*-judgment about an ACER BoA decision dating from 2020, that the "ACER BoA in practice carried out a review which went beyond a mere limited review, so that, de facto, it complied with its obligations as regards the intensity review it was required to carry out"[96]. Thereby, thus, already observing the shift in intensity of review by the ACER BoA in anticipation of the *Aquind*-judgment.

Even more recently, the General Court was yet again asked whether the review carried out by the ACER BoA was consistent with the new standard. In this case, the General Court made an interesting observation regarding the 2019 reform of the ACER Regulation. The General Court found that in respect of the ACER BoA's powers to alter the contested decision, that there is nothing to suggest "that the EU legislature intended to alter the scope or intensity of the review of legality carried out by that board" nor that "review was necessarily limited, as regards assessments of a technical or complex nature in ACER's decisions, to a review of a manifest error of assessment"[97]. Therefore, the General Court found that in this particular case the ACER BoA decision had to be annulled because it merely carried out "a limited review of the technical or complex assessments", thereby misinterpreting their legislative provisions in the ACER Regulation[98].

4.3 SRB Appeal Panel

In that light, the comments by the SRB Appeal Panel on the applicability of *Aquind* to their own decision-making practice is highly interesting. In one decision dating from 2023, the Appeal Panel held that the SRB makes choices of technical nature for which a "margin of technical discretion needs to be respected unless there is a manifest error of assessment"[99]. In line with its earlier decision-making practice, mentioned above in section 2.2, it does, however, refer to the process-

[95] Decision of ACER BoA of 29 April 2022 in case A-013-2021, *BNetzA* v *ACER*, para 117; decision of ACER BoA of 28 May 2021 in case A-001-2022, *PSE* v *ACER*, para 62.

[96] General Court, February 15th 2023, case T-606/20, *APG* v *ACER*, ECLI:EU:T:2023:64, para 204; General Court, February 15th 2023, case T-607/20, *APG* v *ACER*, ECLI:EU:T:2023:65, para 204.

[97] General Court, September 6th 2023, case T-212/20, *Operator Gazociągów Przesyłowych Gaz-System S.A.* v *ACER*, *cit.*, para 36.

[98] *Ivi* paras 38-44.

[99] Decision of SRB Appeal Panel of 13 February 2023 in case 3/2022, para 60.

oriented review that must be conducted considering this assessment[100]. The SRB Appeal Panel also explicitly reflects on the effects of the *Aquind*-judgment in this respect, and states that it is not persuaded by the new standard of review. The SRB Appeal Panel finds that the important difference between the ECHA and ACER BoA's and itself are the powers that have been attributed to the former BoA's, meaning that they were able to exercise the same powers as the Agencies, while the SRB Appeal Panel can only confirm or remit. Therefore, the SRB Appeal Panel finds that "[s]uch difference seems to be associated with the institutional design of these entities, and, as such, it warns against a too linear inference by analogy from the case-law in *BASF* and *Aquind*"[101]. The SRB Appeal Panel, thus, explicitly differentiates itself from the new standard of review and holds on to its earlier process-oriented decision-making practice.

4.4 Observations

It is clear from the recent decision-making practice from the ECHA and ACER BoA and the following cases by the General Court, that these BoAs must conduct a more intense review of the scientific and technical considerations of the contested decisions under appeal. For the ECHA BoA it has been confirmed by the General Court that their new decision-making practice fits this new approach; for the ACER BoA some steps towards this new standard has been made. Only the SRB Appeal Panel has explicitly referenced to the *Aquind*-judgment in relation to their own standard of review. Its reason for not adopting the new standard, which is based on the powers attributed to the other BoAs, appears to be flawed. As previously held by the General Court in *Germany* v *ECHA* and more recently *Gaz-System S.A.* v *ACER*[102], the fact that these BoAs exercise the same powers as the Agency, does not affect their intensity of review. In other words, it does not matter whether a BoA is, like its Agency, empowered to substitute the decision annulled or merely can confirm or remit the contested decision, they must conduct a more intense review of technical considerations. It, therefore, appears that the process-oriented review of manifest errors of assessment by the SRB Appeal Panel might not be sufficient.

[100] *Ivi* paras 61-69.

[101] *Ivi* para 77.

[102] General Court, September 6th 2023, case T-212/20, *Operator Gazociągów Przesyłowych Gaz-System S.A.* v *ACER*, *cit.*, para 36, discussed in section 4.2.

5. Conclusion

The EU Agencies' BoAs have received a lot of scholarly attention in the last decade and have been under scrutiny by the EU Courts at a regular base. The main mystery that has always, and perhaps still, surround(ed) these appeal bodies is their role vis-à-vis their respective Agency and vis-à-vis the EU Courts. In one aspect, the EU Courts have shed some light on their role in respect to the BoAs' intensity of review. This has started with the two landmark cases in regard to the ECHA BoA and has further plummeted since the groundbreaking *Aquind*-judgment by the Court of Justice. It is clear that, due to the combined composition of both legal and technical experts, more is expected from the BoAs. The *Aquind*-judgment even seems to hint towards a full review that should be conducted by the BoAs. Not only is this judgment groundbreaking in that respect, but it seems to have far-reaching consequences for the other BoAs as well. The Court of Justice, following the AG's opinion, has made comments about the BoA remedy in general. This may very well imply that this new standard is not only applicable to the ACER BoA but to all the other BoAs as well.

While these cases have cleared up that the BoAs cannot apply the same (low) level of intensity to their review as the EU Courts, but that more is expected, it still leaves some vital questions. Partly they are concerned with institutional issues, such as whether the current independence and the personal and financial resources of the different BoA's are sufficient to conduct the intensive review required within the time-limit prescribed, issues that are discussed in other contributions in this Volume[103]. In relation to the standard of review, the main question seems to be what the intensity should be when the BoAs have to deal with question of scientific uncertainty or issues of a political nature[104]. What would then be considered as sufficient? And, at the end who decides about what such uncertainty requires, the Agency or the BoA? Only time will tell.

[103] See for these issues, J ALBERTI, *The threshold Guardians. The future of EU Agencies' Boards of Appeal in light of the recent reforms of CJEU Statute (2023)*, in *Review of European Administrative Law*, p. 67.

[104] See for the discussion on scientific uncertainty: S OOSTERHUIS, *cit.*, 2023, p. 113.

FILTERING APPEALS OVER DECISIONS ORIGINALLY TAKEN BY THE BOARDS OF APPEAL: RATIONALE, IMPACT AND POTENTIAL EVOLUTION OF ARTICLE 58a OF THE CJEU STATUTE

Il 'filtro' delle impugnazioni in cause provenienti dalle commissioni di ricorso: ratio*, effetti e possibili evoluzioni dell'Articolo 58bis dello Statuto della CGUE*

Le 'filtrage' des pourvois dans les affaires concernant les chambres de recours : ratio legis*, effets et développements potentiels de l'Article 58bis du Statut de la CJUE*

RICCARDO TORRESAN*

TABLE OF CONTENTS: 1. Introduction. – 2. The legal issues arising from Article 58a's rationale, before and after the 2024 reform of the Statute. – 3. The functional structure of the filtering mechanism… – 4. …and the ECJ's case law applying it. – 5. A glance over the future: some potential further developments in an institutional perspective.

1. Introduction

An ever-growing workload, combined with a progressively higher need for effective judicial protection, is not new in the history of European integration. As a matter of fact, the origins of the General Court (once the Court of First Instance) can be traced exactly to the improvement of the EU judiciary, with the goal of making it better equipped to face that challenge[1]. The same can be said for many of the judicial reforms that were

* Interim Member of the Legal Service, Single Resolution Board. Views and opinions provided in this paper are only expressed on a personal capacity, and do not necessarily reflect, nor they bind in any way, the position of the Agency which the Author is affiliated to. Gratitude goes to Prof. Jacopo Alberti, as the coordinator to the Jean Monnet Module 'EU Specialized Judicial Protection' and the organiser of the closing conference thereof, for having hosted the speech which this manuscript is the further elaboration of.

[1] For references on the creation of the Court of First Instance and its development

set in place after the creation of the General Court, and notably in recent years: the (aborted) experiment of specialised courts[2], the progressively refined system of specialised chambers within the General Court[3] and,

into the current General Court, see T. KOOPMANS, *The Future of the Court of Justice of the European Communities*, in *Yearbook of European Law*, 1991, pp. 15-32; J. L. DA CRUZ VILAÇA, *The Court of First Instance of the European Communities: A Significant Step towards the Consolidation of the European Community as a Community Governed by the Rule of Law*, in *Yearbook of European Law*, 1991, pp.1-56; K. LENAERTS, *Some Reflections on the Separation of Powers in the European Community*, in *Common Market Law Review*, 1991, pp. 11-35; M. CONDINANZI, *Il Tribunale di primo grado e la giurisdizione comunitaria*, Milan, 1996, pp. 249-251; A. ARNULL, *Judicial Architecture or Judicial Folly? The Challenge Facing the European Union*, in *European Law Review*, 1999, pp. 516-524; C. TURNER, R. MUÑOZ, *Revising the Judicial Architecture of the European Union*, in *Yearbook of European Law*, 1999, pp. 1-93.

[2] M. BORRACCETTI, *Le camere giurisdizionali nel sistema giudiziario dell'Unione europea: il tribunale della funzione pubblica*, in E. CASADEI, G. COSTATO, L. SGARBANTI (eds.), *Il nuovo diritto agrario comunitario. Riforma della politica agricola comune, allargamento dell'Unione e Costituzione europea, diritto alimentare e vincoli internazionali*, Ferrara, 2005, pp. 475-491; A. B. CAPIK, *European Union Civil Service Tribunal: A Coherent Part of the Communities Courts System*, in *European Law Reporter*, 2005, pp. 107-109; R. SCHIANO, *Le 'camere giurisdizionali' presso la Corte di Lussemburgo: alcune riflessioni alla luce dell'istituzione del Tribunale della funzione pubblica*, in *Diritto dell'Unione europea*, 2005, pp. 719-738; H. CAMERON, *Establishment of the European Union Civil Service Tribunal*, in T*he Law and Practice of International Courts and Tribunals*, 2006, pp. 273-283; S. GERVASONI, *Le Tribunal de la fonction publique de l'Union européenne : deux ans après*, in *L'observateur de Bruxelles*, 2007, pp. 30-33; C. BERNARD-GLANZ, S. RODRIGUES, *Le Tribunal de la fonction publique de l'Union européenne : premier bilan*, in *L'actualité juridique fonctions publiques*, 2008, pp. 63-69; P. FUENTETAJA, A. JESÚS, *The European Union Civil Service Tribunal*, in A. DE WALSCHE, L. LEVI (eds.), *Mélanges en hommages à Georges Vandersanden : promenades au sein du droit européen*, Brussels, 2008, pp. 873-901; P. J. MAHONEY, *The European Union Civil Service Tribunal: A Specialised Tribunal or a Special Tribunal?*, in A. DE WALSCHE, L. LEVI (eds.), *cit.*, pp. 955-970; H. KRAEMER, *The European Union Civil Service Tribunal: A New Community Court Examined after Four Years of Operation*, in *Common Market Law Review*, 2009, pp. 1873-1913; C. BERNARD-GLANZ, *Plaider devant le TFP : quelques spécificité de la procédure*, in COURT OF JUSTICE OF THE EUROPEAN UNION (ed.), *Colloques à l'occasion du 5ème anniversaire du Tribunal de la fonction publique*, Luxembourg, 2010, pp. 7-29; S. SEYR, *La jurisprudence du TFP : questions de fond*, in COURT OF JUSTICE OF THE EUROPEAN UNION (ed.), *cit.*, pp. 65-74; W. HAKENBERG, *The European Union Civil Service Tribunal: A Three-Tier Structure*, in E. OLUFEMI (ed.), *The Development and Effectiveness of International Administrative Law*, London, 2012, pp. 251-263; G. VANDERSANDEN, *The Real Test: How to Contribute to a Better Justice. The Experience of the Civil Service Tribunal*, in M. BOBEK (ed.), *Selecting Europe's Judges*, Oxford, 2015, pp. 86-94; W. HAKENBERG, *The Civil Service Tribunal of the European Union: A Model to Follow as a Specialised Court?*, in E. GUINCHARD, M.-P. GRANGER (eds.), *The New EU Judiciary: An Analysis of Current Judicial Reforms*, Alphen aan den Rijn, 2017, pp. 161-177; G. GATTINARA, *Le TFP est mort! Vive le TFP?*, in C. AMALFITANO, M. CONDINANZI (eds.), *La Corte di giustizia dell'Unione europea oltre i trattati: la riforma organizzativa e processuale del triennio 2012-2015*, Milan, 2018, pp. 355-371.

[3] See notably on this matter U. ÖBERG, M. ALI, P. SABOURET, *On Specialisation of Chambers at the General Court*, in M. DERLÉN, J. LINDHOLM (eds.), *The Court of Justice of the European Union: Multidisciplinary Perspectives*, Oxford, 2018, pp. 211-224; M. F. ORZAN, *La*

most importantly herein, the development of a distinctive path of judicial review over EU Agencies' Boards of Appeal, a path which ultimately includes the 'filtering mechanism' regulated by Art. 58a of the CJEU Statute.

It is well known that Boards of Appeal originated as first-level scrutiny of the Agencies' administrative activity, to protect individuals and to better consider the potential impact on their rights and interests. While their legal nature may is still debated in legal scholarship[4], and while surely

specializzazione del Tribunale dell'Unione europea tra realtà e prospettive: ieri, oggi, domani (?), in C. AMALFITANO, M. CONDINANZI (eds.), *Il giudice dell'Unione europea alla ricerca di una assento efficiente e (in)stabile: dall'incremento della composizione alla modifica delle competenze*, Milan, 2022, pp. 89-116.

[4] Meaning that legal scholarship has expressed, over the years, a wide variety of nuanced positions trying to label Boards of Appeal as judicial bodies, administrative bodies or some kind of hybrid experiment. Although this is not the most suitable context to present a deeper analysis on this debate, see, for instance, the opinions put forward in M. HARRIS, *The Place of Formal and Informal Review*, in M. HARRIS, M. PARRINGTON (eds.), *Administrative Justice in the 21st Century*, Oxford, 1999, spec. pp. 42-54; L. DE LUCIA, *I ricorsi amministrativi nell'Unione europea dopo il Trattato di Lisbona*, in *Rivista trimestrale di diritto pubblico*, 2013, pp. 323-368; P. CHIRULLI, L. DE LUCIA, *Tutela dei diritti e specializzazione nel diritto amministrativo europeo. Le commissioni di ricorso delle agenzie europee*, in *Rivista italiana di diritto pubblico comunitario*, 2015, pp. 1305-1347; J. ALBERTI, *Le agenzie dell'Unione europea*, Milan, 2018, pp. 219-258; J. ALBERTI, *The Position of Boards of Appeal: Between Functional Continuity and Independence*, in M. CHAMON, A. VOLPATO, M. ELIANTONIO (eds.), *Boards of Appeal of EU Agencies. Towards Judicialization of Administrative Review?*, Oxford, 2022, pp. 245-272. Furthermore, it must be noted that these different visions are registered within legal scholarship only, as the CJEU's case law seems to be undoubtably solid in denying judicial nature to the Boards of Appeal. The institutional position of these bodies is usually addressed through the concept of 'functional continuity', which the General Court has firstly crafted in *Procter & Gamble* (General Court, December 12th 2002, case T-63/01, *Procter & Gamble* v *OHIM*, ECLI:EU:T:2002:317, para 21) and which allows to confer a particularly intense scrutiny upon Boards of Appeal but, at the same time, clearly precludes any comparison with a 'full' judge; see, among others, General Court, April 20th 2005, case T-273/02, *Krüger* v *OHIM – Calpis (CALPICO)*, ECLI:EU:T:2005:134, para 62; General Court, March 8th 2012, case T-298/10, *Arrieta D. Gross* v *OHIM - International Biocentric Foundation et al. (BIODANZA)*, ECLI:EU:T:2012:113, para 105; General Court, July 15th 2015, case T-398/13, *TVR Automotive* v *OHIM – TVR Italia (TVR ITALIA)*, ECLI:EU:T:2015:503, para 38; General Court, February 16th 2017, joint cases T-828/14 and T-829/14, *Antrax It* v *EUIPO – Vasco Group (Thermosiphons pour radiateurs)*, ECLI:EU:T:2017:87, para 38; General Court, February 21st 2018, case T-727/16, *Repower* v *EUIPO – repowermap.org (REPOWER)*, ECLI:EU:T:2018:88, para 86; General Court, May 17th 2018, case T-760/16, *Basil* v *EUIPO – Artex (Panier spéciaux pour cycles)*, ECLI:EU:T:2018:277, para 26. At most, EU judges have qualified these ones as *quasi-judicial bodies*, only recognising their ability to efficiently perform a scrutiny which shows, to a certain degree, some similarities with a proper judicial activity; on the notion of quasi-judicial bodies, see first General Court, September 18th 2012, joint cases T-133/08, T-134/08, T-177/08 and T-242/09, *Schräder* v *CPVO – Hansson (LEMON SYMPHONY)*, ECLI:EU:T:2012:430, para 137.

different from one to each other (notably regarding their powers, the type of scrutiny they perform, and the Rules of Procedure they apply), the contribution that these bodies offer to the administration's efficiency and the individuals' protection is almost universally recognised. Consequently, it is no wonder that the EU judiciary felt the need to better position itself regarding the Boards of Appeal, taking the opportunity to deal with the aforementioned issues (the workload growth and the effectiveness of judicial protection) by way of direct action. The envisioned solution, as far as direct actions are concerned, has been to equip the EU judicial system with a first-ever procedural mechanism, which enables the ECJ to 'filter' the appeal procedures it receives from the General Court, so long that it reviews a decision originally issued by a Board of Appeal[5]. This paper is intended to first assess the deficiencies arising from the interpretation of this mechanism's rationale, discussing how they affected the understanding and the evolution of the 'filter' within its first five years of life; second, the operational structure of the mechanism will be reviewed, combined with a deep analysis of the ECJ's case law so far; finally, this paper will explore some potential developments, arguing that the filtering mechanism might hold, in the near future, an relevant institutional positioning within the EU judicial system as a whole.

2. The legal issues arising from Article 58a's rationale, before and after the 2024 reform of the Statute

The mechanism now embodied in what currently is Art. 58a of the CJEU Statute has been introduced by virtue of Regulation 2019/629 within a broader scheme of reforms[6], and immediately linked to the

[5] The phrasing here is deliberately vague, as the inclusion of a Board of Appeal into the filtering mechanism's scope of application is, on the one hand, differentiated based on the time reference (either before or after May 1st 2019, the date of entry into force of the establishing Regulation) and, on the other hand, impacted by the latest reform of the Statute of the CJEU, which will be discussed in the following section of this manuscript.

[6] Specifically, the EU judiciary has been subject to a high-frequency reforms series in the last decade, none of which was operated by amendment of the Treaties. A first intervention was realised in 2012, with a combined 'restyling' of both the Statute and the ECJ's Rules of Procedure; see notably Regulation (EU, Euratom) 741/2012 of the European Parliament and of the Council of 11 August 2012 amending the Protocol on the Statute of the Court of Justice of the European Union and Annex I thereto, in *OJ* L 228, 23.08.2012, p. 1-3. Later on, a more structural reform has been launched in 2015, by kickstarting the General Court members' doubling process and redistributing some judicial competences between the two jurisdictions; see Regulation (EU, Euratom) 2015/2422 of the European Parliament and of the Council of 16 December 2015 amending Protocol No 3 on the Statute of the Court of Justice of the European Union, in *OJ* L 341, 24.12.2015, p. 14 ff. This same reform process has then been complemented

previously recalled rationales. Recitals 4 and 5 of that same Regulation state that "many appeals are brought in cases which have already been considered twice, initially by an independent Board of Appeal, then by the General Court, and […] many of those appeals are dismissed […] because they are patently unfounded or […] manifestly inadmissible". The Regulation goes on to conclude that a filtering mechanism on appeal procedures should have been introduced "[i]n order to enable the Court of Justice to concentrate on the cases that require its full attention", especially given "the constant increase in the number of cases brought before the Court [itself]". The legislator seems to have been clear in justifying the new procedural tool articulated in Art. 58a as a necessary measure for the judicial system to cope with its workload, notably by precluding 'superfluous' levels of judicial review in cases where this preclusion would not affect the effective protection of individuals' interests.

Now, it is well known that the filtering mechanism on appeal procedures is about to be deeply affected by the latest reform of the CJEU's Statute[7], especially for what concerns its scope of application. As much as this reform is clearly impacting the legal scenario taken into consideration herein, it still seems useful and appropriate to lead a reconstruction of the main legal issues which have characterised the mechanism's first outlook: on the one hand, although the reform's substantial content has now been greenlit by the EU legislator[8], the related legal act hasn't entered into force yet, so that the 2019 structure of the 'filter' is still the valid one as this manuscript is completed[9]; on the other hand, and most importantly, the evolution induced by the latest reform is only understandable if closely linked to this mechanism in its (soon outdated, but) current version. It is, therefore, the case to shed some light over some preliminary considerations which, albeit stemming out from

in 2019, with Regulation (EU, Euratom) 2019/629 of the European Parliament and of the Council of 17 April 2019 amending Protocol No 3 on the Statute of the Court of Justice of the European Union, in *OJ* L 111, 25.04.2019, p. 1 ff. which introduced the mechanism analysed in this manuscript.

[7] Request submitted by the Court of Justice pursuant to the second paragraph of Art. 281 of the Treaty on the Functioning of the European Union, with a view to amending Protocol No 3 on the Statute of the Court of Justice of the European Union, November 30th 2022.

[8] The Council and the European Parliament both officially greenlit the final text of the reform on March 19th 2024, as confirmed in press release n. 232/24 of the Council, Reform of the Statute of the Court of Justice adopted, issued on that same day.

[9] The draft of this contribution is finalised on March 31st 2024, a date which then serves as a time reference for the purposes of any case law, statistics and analysis produced in the present document.

the rationale the legislator provided back in 2019, are still (at least partially) relevant.

First, from the Court's perspective, it is immediately apparent that the 'mere' existence of Boards of Appeal has effects on its activity and its institutional role. The assessment of the Boards' nature as being either judicial or administrative, from this point of view, seems to be irrelevant: indeed, the Court considers that Boards of Appeal, whichever be their legal nature, do provide a first level of protection to individuals, sufficiently structured to justify the imposition of some limitations to the judicial scrutiny that the EU judges carry out – specifically, their existence limits, at least to some extent, the right to appeal the General Court's decisions. A partially separate question is then whether it is legally possible, in the light of the Treaties, to limit the right to appeal. It is to be remembered, in this respect, that none of the Treaties' provisions embodies or requires such thing as a 'right to appeal', meant either as a general principle of EU law or as an individual right to be granted. Art. 19 TEU[10] and Art. 47 CFREU[11] are actually crystal clear in recognising, with that twofold value, the principle of (and right to) effective judicial protection, but they never require the establishment of an appeal procedure within the judicial system in order to attain the necessary standard of effectiveness, leaving it to the legislator to take such a decision. As a matter of fact, the institution of the Court of First Instance (which in 1989 gave birth to the appeal procedure as a whole) should be regarded as a choice made by the EU legal order – arguably a wise one, but still a choice which was not imposed by the Treaties. All of this means, basically, that while Art. 256(1), second paragraph, TFEU currently acknowledges the possibility of appealing the General Court's decisions in front of the Court of Justice, this recognition doesn't imply that this very possibility can't be limited or conditioned – or even, if there ever will be a common political will to do so, excluded as a whole (although in this last case a revision of the Treaties would be inevitable).

[10] See notably A. ARNULL, *Article 19 TEU*, in H.-J. BLANKE, S. MANGIAMELI (eds.), *The Treaty on European Union (TEU) – A Commentary*, Heidelberg, 2013, pp. 759-783; G. TESAURO, *Commento all'Art. 19 TUE*, in A. TIZZANO (ed.), *Trattati dell'Unione europea*, Milan, 2014, pp. 195-215.

[11] See notably P. AALTO, H. C. H. HOFFMAN, L. HOLOPAINEN, E. PAUNIO, L. PECH, D. SAYERS, D. SHELTON, A. WARD, *Article 47 – Right to an Effective Remedy and to a Fair Trial*, in S. PEERS, T. HERVEY, J. KENNER, A. WARD (eds.), *The EU Charter of Fundamental Rights. A Commentary*, Oxford, 2014, pp. 1197-1276; M. CAIANIELLO, C. CONSOLO, D. DOMENICUCCI, F. FILPO, M. STELLA, *Commento all'Art. 47*, in R. MASTROIANNI, O. POLLICINO, S. ALLEGREZZA, F. PAPPALARDO, O. RAZZOLINI (eds.), *Carta dei diritti fondamentali dell'Unione europea*, Milan, 2017, pp. 862-912.

Second, in the immediate aftermath of Art. 58a's introduction into the system, some interpretative difficulties arose relating to the delimitation of this provision's scope of application. The latter had been structured through a peculiar time-based partition: concerning Boards of Appeal already existing *before* May 1st 2019 (the date of entry into force of Regulation 2019/629), the legislator's first choice had been to only include four (out of the existing eight) Boards of Appeal[12], explicitly qualifying those four as "independent" (as for the first paragraph of Art. 58a); on the other hand, *after* May 1st 2019, the filtering mechanism applies generally, to any "independent Board" which may be established from that date onwards (pursuant to the second paragraph of Art. 58a). Referring to both of these delimitations, Art. 58a has, indeed, sparked some criticism.

As for the delimitation *before* May 1st 2019, it is surely true, as already discussed herein, that Boards of Appeal show relevant differences among themselves, mainly relating to their powers over the Agencies' decisions they are supposed to review[13]. None of these differences, though, seems to be enough to justify the complete exclusion of some of these bodies (on a legal basis which, by the way, has never been specified), given that they all essentially enjoy the same institutional positioning and exert the same functions. Furthermore, the lack of an articulated legal reason behind this choice becomes all the more evident when observed through the lens of the CJEU's case law, which is quite consistent for a growing number of Boards of Appeal, regardless of whether they are covered, or not, by the scope of application of Art. 58a of the Statute. More precisely, this is

[12] Namely, the Boards currently operating within the European Union Intellectual Property Office (EUIPO), the Community Plant Variety Office (CPVO), the European Chemicals Agency (ECHA) and the European Union Aviation Safety Agency (EASA); the ones which have been cut out from the scope of application of the 'filter' are the Boards of the European Union Agency for the Cooperation of Energy Regulators (ACER), the European Union Agency for Railways (ERA), the Single Resolution Board (SRB) and the European Supervisory Authorities (ESAs). It is to be remembered, once again, that this 'selection' will soon be surpassed by the latest reform of the mechanism, the evolution induced by which will be discussed further on in this same section.

[13] For an overall review on the differences between Boards of Appeal in terms of powers, composition and functioning, see notably L. DE LUCIA, *I ricorsi amministrativi nell'Unione europea dopo il Trattato di Lisbona*, in *Rivista trimestrale di diritto pubblico*, 2013, pp. 323-368; P. CHIRULLI, L. DE LUCIA, *Tutela dei diritti e specializzazione nel diritto amministrativo europeo. Le commissioni di ricorso delle agenzie europee*, in *Rivista italiana di diritto pubblico comunitario*, 2015, pp. 1305-1347; C. TOVO, *Le agenzie decentrate dell'Unione europea*, Bologna, 2016, pp. 323-337; J. ALBERTI, *Le agenzie dell'Unione europea*, Milan, 2018, pp. 219-239; J. ALBERTI, *The Position of Boards of Appeal: Between Functional Continuity and Independence*, in M. CHAMON, A. VOLPATO, M. ELIANTONIO (eds.), *Boards of Appeal of EU Agencies. Towards Judicialization of Administrative Review?*, Oxford, 2022, pp. 245-272.

exemplified in the Court's approach in three leading cases, *Heli-Flight*[14], *BASF*[15] and *Aquind*[16], which relate respectively to the Boards of Appeal of EASA, ECHA and ACER. Notwithstanding the fact that the latter has not been covered, until the approval of the latest reform, by the application of the filtering mechanism – and transcending even some potentially relevant differences among the three of them[17] – the General Court and the Court of Justice (as the appeal judge) have agreed on conferring to all these bodies the same powers to perform an in-depth scrutiny of their Agency's decisions, searching for *any kind of error*, as opposed to General Court's review, which is then able to be restricted to the search for *manifest* errors[18]. Although the Court's case law in this subject is always based on the specific Board of Appeal which adopted the (contested) initial decision, this interpretation of the Boards' scrutiny seems to have some expansive potential. Indeed, it is already applied to bodies which are both included and not included in the scope of application of the filtering mechanism, which confirms the not-so-logical nature of the selection shown in the first version of Art. 58a of the Statute.

For what concerns the delimitation *after* May 1st 2019 (which, by the way, is being left untouched by the latest reform), some concerns arise over both how the 'filter' will be granted application and which bodies might be concerned by this provision. On the one side, some cumbersome scenarios take shape when investigating how, operationally speaking, a (potential) new Board of Appeal will be included in the filtering mechanism's scope of application. The phrasing of Art. 58a[19] seems to

[14] General Court, December 11th 2014, case T-102/13, *Heli-Flight* v *EASA*, ECLI:EU:T:2014:1064.

[15] General Court, September 20th 2019, case T-125/17, *BASF Grenzach* v *ECHA*, ECLI:EU:T:2019:638.

[16] General Court, November 18th 2020, case T-735/18, *Aquind* v *ACER*, ECLI:EU:T:2020:542; and as of an appeal, Court of Justice, March 9th 2023, case C-46/21 P, *ACER* v *Aquind*, ECLI:EU:C:2023:182.

[17] Just to name one (and probably the most evident) example, it is to be recalled that after the latest amendment of EASA's funding Regulation, the related Board of Appeal finds itself in a weaker position towards the Agency, notably for the fact that it is not clear anymore whether the board's decisions are legally binding to the Agency's decision-making bodies. For some Authors that expressed the same doubts, see M. SIMONCINI, M. VERISSIMO, *The EASA Board of Appeal in Search of Identity: An Effective Filter between Administration and Courts?*, in M. CHAMON, A. VOLPATO, M. ELIANTONIO (eds.), *cit.*, 2022, pp. 103-121.

[18] The General Court's reasoning in *Aquind* is particularly clear on this approach, when it states that "the Board of Appeal cannot carry out a limited review of the decision of the Agency", otherwise "the General Court would be carrying out a limited review of a decision which was itself the result of a limited review"; see the General Court's judgment in *Aquind*, para 58.

[19] Which settles for a quite straightforward (but also vague) formulation, stating that

suggest that, once a new board is set up, its inclusion should be completely automatic or, at most, enabled by a simple provision into the related Agency's establishing Regulation – with no need for any reform of the Statute. This means that a primary law act (or, to be more precise, *the scope of application* of a primary law act) would be effectively modified by a secondary law act; which, while not necessarily being a problem *per se*[20], might end up excluding the CJEU from having a word over the reform process. As a matter of fact, innovations of the EU judicial system are usually guided by the Court thanks to the role it enjoys within the Statute's reform procedure, which envisions a proposal directly submitted by the Luxembourg judges or a mandatory consultation of them[21]; however, if the Agency's establishing Regulation is the only act that needs to be adopted or modified in this case, the ordinary legislative procedure[22] should be enough to do so, thus potentially involving nobody but the 'usual suspects' – Commission, Council and European Parliament. On the other side, no exact answer can be given to the question about which bodies this part of Art. 58a was intended to refer to. A Board which didn't exist before May 1st 2019 would surely be concerned by the provision; but no such Board has been established yet, and the 2024 reform will now provide for a complete listing of all the bodies that satisfy the conditions to activate the filtering mechanism over appeals[23]. It then becomes difficult to fully understand why the reference time limit has not been

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the filtering mechanism "shall also apply to appeals brought against decisions of the General Court concerning a decision of an independent board of appeal, set up after 1 May 2019 within any other office or Agency of the Union".

[20] The envisioned situation doesn't actually look too problematic, based on two main reasons. First, as already specified in the text, the reform envision by this part of Art. 58a of the Statute would not account to a modification of primary law in its substance, but rather to an extension of that provision's scope of application, which appears to be less intense. Second, and most importantly, the Treaties themselves provide for other cases where a reform of primary law is somehow 'delegated' to secondary law acts, thus replicating the same scheme envision in Art. 58a, where primary law explicitly allow for itself to be modified by secondary law. Just to mention an example which is still related to the EU judicial system, Art. 252 TFEU states that "the Council, acting unanimously, may increase the number of Advocates-General" upon request from the CJEU.

[21] As for Art. 281(2) TFEU, when pursuing a reform of the Statute, "[the] European Parliament and the Council shall act either at the request of the Court of Justice and after consultation of the Commission, or on a proposal from the Commission and after consultation of the Court of Justice". The first one of these options is, for instance, the one that led to the adoption of the latest reform; see fn 7 for reference over the CJEU's proposal.

[22] See Art. 294 TFEU for the complete outline of the ordinary legislative procedure.

[23] See below, in this same section, for a more detailed analysis of the reform's substantial content.

moved on to 2024, as the Regulation reforming the Statute is now about to enter into force, or why new potential 'candidate' Boards of Appeal haven't been already included in the listing approach embodied by the first paragraph of Art. 58a. It is true, however, that the only potential candidate in this perspective enjoys such a peculiar position that it its chances of being included in Art. 58a's scope of application are uncertain, to say the least. This would be the soon-to-come Anti-Money Laundering Authority (AMLA), which is set to established in the near future in Frankfurt as one of the first outcomes of the Anti-Money Laundering package proposed by the Commission in 2021[24]. The proposed establishing Regulation[25] for this new Agency envisions, as a matter of fact, an internal body (an 'administrative board of review') entrusted with the mandate to carry out a first-hand internal review of AMLA's administrative decisions. However, this body seems to be comparable only to a certain extent with other Boards of Appeal, as it will probably lack binding powers towards its own Agency: the Commission's proposal has clarified that AMLA's Executive Board "shall take into account the opinion of the Administrative Board of Review Board, but shall not be bound by it"[26], so that an opinion issued by this body will trigger no more than the procedural obligation to "promptly adopt a new decision [which] shall abrogate the initial decision, replace it with a decision of identical content, or replace it with an amended decision"[27]. If this overview is to be confirmed by practice, it is indeed likely that this Board will not find its place into the filtering mechanism over appeals, as it will provide a different (and not as impactful) kind of scrutiny.

As previously anticipated, in the last weeks of 2022 the CJEU submitted a proposal for some new reforms of the Statute[28], triggering a

[24] A review of the whole package of normative measures proposed by the Commission is available at this link: Anti-money laundering and countering the financing of terrorism legislative package - European Commission (europa.eu). Negotiations on the establishment of this new EU Agency are ongoing and currently being finalised, as the Council and the European Parliament have reached a political agreement back in December 2023 (as confirmed in press release 1023/23 of the Council, of December 13th 2023) and finally established AMLA's seat in Frankfurt (as seen in press release 150/24 of 22 February 2024).

[25] European Commission, Proposal for a Regulation of the European parliament and of the Council establishing the Authority for Anti-Money Laundering and Countering the Financing of Terrorism and amending Regulations (EU) No 1093/2010, (EU) 1094/2010, (EU) 1095/2010, 20 July 2021, COM(2021)421 final.

[26] See the Commission's Explanatory Memorandum attached to the proposal, section 'Organisation and governance of the Authority'.

[27] See Art. 62(3) of the proposed Regulation.

[28] See above, fn 7, for the proposal's references.

procedure which involved the European Commission[29] and which is now approaching the final (successful) outcome, as the Council and the European Parliament are just weeks away from adopting the Regulation which will provide for a harmonised modification of both the Statute and the Rules of Procedure of the two Luxembourg jurisdictions[30]. The proposal had its deepest (and certainly most spotlighted) element in the envisioned transferral of (a very limited portion of) the jurisdiction on preliminary rulings to the General Court, in a first-ever attempt to follow up on the judicial architecture that was imagined in Nice more than 20 years ago[31]. Far from the many debates that this proposal has generated since its publication, however, another reform was envisioned by the Court in that same act: namely, an extension of Art. 58a's scope of application to every existing Board of Appeal[32], as well as to those appeals against decisions adopted by the General Court on the basis of an arbitration clause (by virtue of Art. 272 TFEU)[33].

The most immediate effect of this reform (which is set to be approved without further modifications)[34] will clearly be to put an end to most of the interpretative deficiencies regarding the selection of certain Boards of

[29] The European Commission has in fact handed its opinion on the proposal, basically adhering to the needs, the views and the proposals submitted by the CJEU; see Commission Opinion COM(2023)135 final of March 10th 2023 on the draft amendment to Protocol No 3 on the Statute of the Court of Justice of the European Union, presented by the Court of Justice on 30 November 2022.

[30] See the reference mentioned above, fn 8.

[31] On this transferral see ultimately M. BOBEK, *Preliminary Rulings before the General Court: What Judicial Architecture for the European Union?*, in *Common Market Law Review*, 2023; D. SARMIENTO, *On the Road to a Constitutional Court of the European Union: the Court of Justice after the Transfer of the Preliminary Reference Jurisdiction to the General Court*, in *Croatian Yearbook on European law and Policy*, 2023, pp. VII-XVII; J. ALBERTI, *Il trasferimento del rinvio pregiudiziale al Tribunale, all'alba della sua entrata in vigore*, in *Quaderni AISDUE*, 2024, pp. 1-30.

[32] For the sake of accuracy, it is to be remembered that, besides the eight Boards of Appeal covered by the 'filter' (and mentioned above, see fn 12), another similar body exists in the EU legal system, which is the Administrative Board of Review (ABoR) operating within the ECB. However, this Board does not enjoy the power to adopt any binding decision whatsoever and it is, therefore, excluded by both the reform of Art. 58a of the Statute and the analysis presented in this manuscript.

[33] See the Court's request, notably pp. 1-9 and pp. 13-15.

[34] Some amendments have actually been proposed by the European Parliament's Legal Affairs Committee (JURI), endorsed in the provisional agreement reached, in December 2023, by both the Parliament's and Council's negotiators (on this provisional agreement, see briefly Carriages preview | Legislative Train Schedule (europa.eu)) and finally greenlit by the two legislative institutions in March 2024. However, none of the proposed amendments is relevant for the purposes on the analysis developed herein, as none of them concerns the filtering mechanism pursuant to Art. 58a of the Statute, while instead focusing on the transferral of preliminary rulings to the General Court.

Appeal over others. On the one hand, this clearly highlights, even more than now, the role of Boards of Appeal as first recipients of the individuals' need for protection against the EU administration as a whole, and it enhances the general coherence of the filtering mechanism and of the CJEU's review over these quasi-judicial bodies[35]. On the other hand, the approval of the reform leaves an even greater (and irrefutable at this point) confirmation that the previous choice of including only four out of eight boards has always been, basically, an illogical one by the legislator[36].

The new version of Art. 58a, however, also applies to cases where the EU judges are called into play pursuant to an arbitration clause included in a contract concluded by or on behalf of the EU[37]; cases which are connotated, for the purposes of this analysis, by the fact that no Board of Appeal (or adjudication body whatsoever) is involved in the controversy's solution, which is thus provided by the 'traditional' two-tier system composed by the General Court and the Court of Justice. Now, on this essential difference an interesting perspective is offered by the reasons provided by the Court itself in support of the reform. In its proposal, the Court affirms that "cases brought before the General Court under an arbitration clause […] do not require from the General Court anything beyond the application to the substance of the dispute of the national law

[35] Some scholars seem not to agree with this assumption; see, for instance, L. DE LUCIA, *New developments concerning Article 58a of the Statute of the Court of Justice of the European Union*, in *EU Law Live*, 2024 (available at this link: Op-Ed: "New developments concerning Article 58a of the Statute of the Court of Justice of the European Union" by Luca De Lucia - EU Law Live), where the Author basically stresses that a filtering mechanism on appeal procedures would only be needed over IP cases, as the EUIPO Board is the only one which creates such a high number of cases that they need to be filtered; on the contrary, cases stemming from other Boards should be treated as 'traditional' appeals, as they may foster some further developments into the Court's case law. As long as this approach is, without a doubt, statistically accurate and understandably cautious, it is argued here that the pursue of the highest threshold of legal coherence is even more important in this case: limiting the admissibility of appeal procedures is, indeed, such a delicate task that the related procedural rules need to be implemented with general coherence and consistency, which can only benefit from the extension of Art. 58a to all Boards of Appeal.

[36] Interestingly (and, frankly, quite discouragingly) it is the Court itself that acknowledged the illogical nature of that choice: in the aforementioned request for reform of the Statute, while considering the Boards of Appeal that were first excluded by the filtering mechanism's scope of application, the Court openly states that "there is no particular reason justifying their non-inclusion in the abovementioned list"; see notably p. 8 of the request.

[37] By virtue of Art. 272 TFEU, "[t]he Court of Justice of the European Union shall have jurisdiction to give judgment pursuant to any arbitration clause contained in a contract concluded by or on behalf of the Union, whether that contract be governed by public or private law".

to which the arbitration clause refers, [and they] are therefore not in principle capable of raising issues that are significant with respect to the unity, consistency or development of Union law"[38]. In other words, EU judges acknowledge the fact that the extension of the filtering mechanism to these cases implies a major shift as for the rationale of the mechanism itself. A tool the very existence of which has only been justified, so far, by the need to avoid superfluous levels of protection of the individuals' interests, will now (at least partially) be also based on some kind of 'statement of non-relevance' of the actions brought pursuant to arbitration clauses[39]. This leads, ultimately, to the result that Art. 58a of the Statute now embodies a 'twofold soul', becoming applicable to (at least) two groups of cases on the basis of two different rationales: a circumstance which – as it will be more deeply discussed further on in this manuscript[40] – might also have an impact on the institutional positioning of the filtering mechanism within the whole EU judicial system.

3. The functional structure of the filtering mechanism …

Moving on to the structure and the practical functioning of the filtering mechanism, the rationale which the EU institutions have brought in support of the new procedural tool doesn't stop creating some uncertainties.

By virtue of Art. 170a, paragraph 1, of the ECJ Rules of Procedure, it is to the applicant (who wishes to file an appeal against a decision issued by the General Court) to submit a request that the appeal should be allowed to proceed, providing "all the information necessary to enable the Court of Justice to rule on that request". Now, the circumstance by which the filtering mechanism is to be triggered by the appellant[41] (i.e. one of the

[38] The quote is taken from the Court's request, p. 9.

[39] Meaning that the CJEU seems to consider these cases as quite easy to settle, on the one side, and rarely involving questions of a general and systemic relevance for the EU legal order, on the other side. It can be noted, however, that the first of these conditions was never supposed to work as a legal basis within the first version of Art. 58a of the Statute; and the second one is, actually, the very core of the scrutiny that the Court should perform when applying the filtering mechanism to an appeal procedure.

[40] See below, section 5.

[41] While this paper does not offer the proper occasion to go into deep of both the nature and the operational functioning of the review, on this peculiar procedure see C. FARDET, *Le «Réexamen» des décisions du Tribunal de Première Instance*, in *Revue du Marché Commun et de l'Union européenne*, 2004, pp.184-193; H. JUNG, *Une nouvelle procédure devant la Cour : le réexamen*, in C. BAUDENBACHER (ed.), Liber amicorum *en l'honneur de Bo Vesterdorf*, Brussels, 2007, pp. 191-218; C. NAOME, *Procédure «RX» : Le réexamen, par la Cour de justice, d'affaires ayant fait l'objet d'un pourvoi devant la Tribunal*, in *Journal de Droit européen*, 2010, pp. 104-109; A. TIZZANO, P. IANNUCCELLI, *Premières applications de la procédure de «réexamen»*

parties of the first instance proceedings), on the one side, immediately tells this procedural mechanism apart from its potentially similar 'brother', namely the procedure of review over decisions issued by the General Court when stating either on a preliminary reference or on an appeal brought against a decision adopted by the Civil Service Tribunal[42]. As a matter of fact, by virtue of Art. 62 of the Statute, the Court of Justice can be called to perform an exceptional review on the recalled General Court's decisions but, differently than the filtering mechanism which makes the object of this paper, it is to the First Advocate General to trigger the review procedure and eventually submit their request to the Court. This seems to highlight a quite stark difference in the nature of the two procedural mechanisms at hand: while the review procedure was (and will probably still be) interpreted and applied as a 'defensive tool', only activated by the ECJ itself to protect the system from rogue and potentially dangerous interpretations by the General Court, the 'filter' over appeals is (aside from some *caveat* which will be brought up immediately below) an additional arrow into the individuals' quiver to pursue their interests, and it can potentially serve, as such, as a developing push to the whole EU legal system, as well. This view seems to be comforted even by the difference that the review procedure and the filtering mechanism show over the conditions to be met for their successful activation[43], notably the fact that Art. 58a (in principle) allows for the admissibility of an appeal even if it might potentially impact the 'development' of the EU legal order, while Art. 62 only mention, in somewhat of a more 'protective' way, the notions of "unity [and] consistency". On the other side, the triggering role of the appellant within Art. 58a can be certainly regarded as coherent with: *i)* the rationale that's been previously discussed herein, which justifies the essence of the mechanism as lying into the individual interests perspective; *ii)* the fact that this procedural tool provides for a preliminary admissibility

devant la Cour de justice de l'Union européenne, in *Diritto dell'Unione europea*, 2010, pp. 681-705; K. LENAERTS, I. MASELIS, K. GUTMAN, *EU Procedural Law*, Oxford, 2014, pp. 658-664; R. ROUSSELOT, *La procédure de réexamen en droit de l'Union européenne*, in *Cahiers de Droit européen*, 2014, pp. 535-596.

[42] As it can clearly be understood by the scope of application of this provision, the review procedure is currently not operating, as both of the potential preconditions – the transferral of (at least part of) the competence on preliminary references to the General Court and the existence of a Civil Service Tribunal – are not met (anymore). However, it is worth noticing that the same amending proposal which intervenes on the filtering mechanism has also foreseen the transferral of some (strictly limited) competences over preliminary references to the General Court, meaning that the review procedure is set to be 'revived' in the near future.

[43] Which, with regards to the 'filter' on appeals, will be subject to a deeper analysis in the following section, in connection with the relevant Court's case law; see below, section 4.

screening to be performed on appeal procedures which are, by their nature, the most important protection measure for individuals against an error on the interpretation or the application of EU law by the General Court, which may have caused injustice. Nevertheless, a broader look at the procedure's structure reveals that the filtering mechanism might be not so 'individuals-oriented'.

First, as much as the applicant enjoys a relevant triggering role, they also are subject to strict procedural rules, which the Court's case law makes all the stricter. As a matter of fact, the applicant is requested to submit – and, most importantly, prove – which part(s) of the General Court's decision is vitiated by an error on points of law, which would be the reason(s) justifying the appeal and, all the more complicated, why the Court should consider the contested error as having a general relevance beyond the specific case which the applicant is a party of[44]. On top of that, all of this reasoning must be encapsulated in a discouragingly condensed 7-pages-long request[45], as deciding whether the appeal should be allowed to proceed shouldn't charge the Court with such a burden that the workload-cutting purpose of the mechanism is put at stake. When applying these provisions, the Court has also been particularly strict, holding a consistent number of cases inadmissible not only when the applicant doesn't submit the request on due time or infringes the prescribed formal requirements[46], but when the judges consider that the party wasn't able to fully and properly define the legal perimeter which the Court needs to perform its own scrutiny within, as well[47].

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[44] See Art. 170a(1) of the ECJ Rules of Procedure.

[45] See Art. 170a(2) of the ECJ Rules of Procedure.

[46] Court of Justice, order of the vice-president of July 12th 2019, case C-412/19 P, *Pan* v *EUIPO*, ECLI:EU:C:2019:616; Court of Justice, order of the vice-president of September 5th 2019, case C-499/19 P, *Lupu* v *EUIPO*, ECLI:EU:C:2019:683; Court of Justice, order of the vice-president of February 11th 2022, case C-610/21 P, *Svenska Metallkompaniet* v *EUIPO*, ECLI:EU:C:2022:107; Court of Justice, order of the vice-president of February 11th 2022, case C-611/21 P, *Bese* v *EUIPO*, ECLI:EU:C:2022:108; Court of Justice, order of the vice-president of May 12th 2022, case C-300/22 P, *Govern d'Andorra* v *EUIPO*, not published.

[47] Court of Justice, October 10th 2019, case C-577/19 P, *KID-Systeme* v *EUIPO*, ECLI:EU:C:2019:854; Court of Justice, November 5th 2019, case C-622/19 P, *Luz Saúde* v *EUIPO*, ECLI:EU:C:2019:925; Court of Justice, December 5th 2019, case C-664/19 P, *Agencja Wydawnicza Technopol* v *EUIPO*, ECLI:EU:C:2019:1048; Court of Justice, July 6th 2022, case C-253/22 P, *Calrose Rice* v *EUIPO*, ECLI:EU:C:2022:546. It is important, however, to highlight the fact that, while the cases mentioned in this footnote and in the previous one were all rejected as inadmissible, they actually are the result of two different procedures. The cases considered in the previous footnote have been declared inadmissible by order of the vice-president of the Court, who is the only permanent member of the 'filtering' chamber and enjoys the power to adopt such an order when the applicant's request lacks even the most essential formal requirements and was not

Second (and arguably more relevant), the real core of the filtering mechanism is to be found in Art. 58a, third paragraph, of the Statute, which states that an appeal "shall be allowed to proceed, wholly or in part, […] where it raises an issue that is significant with respect to the unity, consistency or development of Union law", thus asking the Court to build its admissibility decisions onto purely general and systemic criteria. Indeed, one should never forget that many of the EU integration process's milestone judgments originated from cases that didn't appear, at a first glance, as impacting the whole EU legal order[48]. Arguably one of the major strengths of the Kirchberg judiciary, it was always for the Court to find a way to infer a general principle of law starting from a claim for the protection of a 'mere' individual interest. However, the phrasing of Art. 58a of the Statute is quite clear in drawing the path for the appeals' admissibility, which is to be founded only insofar as the appeal itself shows a detachment from the individual dimension which gave rise to it.

4. …and the ECJ's case law applying it

The Court's case law – which seems reluctant to identify stable notions to be continuously applied and is keener, instead, on assessing

rectified. In this footnote, on the other hand, the mentioned cases have been decided by order of the chamber as a whole, judging on the admissibility of the appeal on the basis of more substantial requirements. The confusion generated by this procedural overlapping is more evident when the English version of the acts is taken into consideration, than it is with Italian and French versions, which carve a distinction between the different notions of 'irricevibilità' (or '*irrécevabilité*') and '*inammissibilità*' (or '*inadmissibilité*').

[48] See, as some examples, Court of Justice, February 20th 1979, case 120/78, *Rewe* v *Bundesmonopolverwaltung für Branntwein*, ECLI:EU:C:1979:42, where the Court made a history-making application of the ban of restrictions to commerce between Member States, a vital principle to the building of the single market; Court of Justice, April 10th 1984, case 14/83, *Von Colson and Kamann* v *Land Nordrhein-Westfalen*, ECLI:EU:C:1984:153, stating the principle of the so-called 'useful effect' of EU directives; Court of Justice, April 23rd 1986, case 294/83, *Parti écologiste "Les Verts"* v *European Parliament*, ECLI:EU:C:1986:166, establishing the general possibility of legally challenging EU institutions' binding acts; Court of Justice, Novemebr 13th 1990, case C-106/89, *Marleasing* v *Comercial International de Alimentación*, ECLI:EU:C:1990:395, where the obligation of upholding an interpretation consistent with EU law was first cast upon national judges; Court of Justice, November 19th 1991, joint cases C-6/90 and C-9/90, *Francovich and Bonifaci* v *Italia*, ECLI:EU:C:1995:372, where the Court stated the need, as a corollary to the Treaties, of an action of liability against Member States, based on the infringement of EU law; Court of Justice, July 14th 1994, case C-91/92, *Faccini Dori* v *Recreb*, ECLI:EU:C:1994:292, prohibiting the operability of the so-called 'horizontal direct effect'.

each appeal's admissibility on a case-by-case basis[49] – looks arguably even stricter than the text of the provision would require.

As much as the Author undoubtedly agrees with the assumption that lawyers are clearly not mathematicians[50], a first quantitative overview based on some quick numbers might, indeed, prove itself useful. As this manuscript is completed[51], the filtering mechanism has been triggered 188 times since its introduction, as this is the amount of appeal demands which have been caught into Art. 58a's scope of application. Out of these 188 demands, only 7 have been granted admissibility so far, already providing for the impression that the ECJ is upholding this procedural mechanism in a particularly strict way – although coherent with the initial premise that the main goal of the 2019 reform would be to alleviate the Court's workload. Furthermore, a quick glance at the parties involved can suggest a few more considerations. All of the demanded appeals are included in the field of intellectual property, as 186 out of 188 concern judgments (or orders) adopted by the General Court when reviewing the decisions of EUIPO's Boards of Appeal, and the remaining 2 concerned decisions by the CPVO's Board[52] – which, as it is well renown, deals with the subject matter of plants varieties, basically a branch of intellectual property. This undisputed thematic dominion is surely significant[53], as it could spark

[49] This approach is probably induced by the phrasing of Art. 58a itself, which provides the general notions of "unity, consistency or development of Union law", but refuses to substantially define them, therefore leaving it to the Court to establish, within every specific case, whether at least one of these notions can be applied or not.

[50] And the Author himself, given his almost total inability to process any kind of mathematics, is the first living proof of this very assumption.

[51] As previously recalled, the final draft is completed on March 31st 2024 which is, then, the ultimate time reference for the numbers reported herein. Furthermore, every statistic mentioned in this manuscript has been autonomously calculated by the Author based on the CJEU database, as they are not organically provided for in the Annual Reports on the Court's activity.

[52] Court of Justice, September 16th 2019, case C-444/19 P, *Kiku* v *CPVO*, ECLI:EU:C:2019:746; Court of Justice, March 3rd 2020, case C-886/19 P, *Pink Lady America* v *CPVO*, ECLI:EU:C:2020:146.

[53] However, it is worth noting that, in the course of the publication process of this paper, this IP exclusiveness has been broken in Court of Justice, May 28th 2024, case C-79/24 P, *Cruelty Free Europe* v *ECHA*, ECLI:EU:C:2024:430. In this case, the Court was asked to grant admissibility to an appeal brought within the domain of the European chemicals market, regulated by ECHA; see, for the judgment at first instance, General Court, November 22nd 2023, case T-656/20, *Symrise* v *ECHA*, ECLI:EU:T:2023:737. The appeal was not granted admissibility pursuant to Art. 58a of the Statute, but some interesting considerations can nevertheless be anticipated, especially on the conditions laid down for the admissibility to be granted (which are going to be better examined further on, in this same section). It is particularly apparent from the order that the pleas raised by the appellant were too narrow and case-related to satisfy the Court's approach

attention on the IP law's repeated potential to raise 'constitutional' questions related to the unity, consistency and development of EU law; however, the same data have to be balanced with the circumstance that IP law is stunningly dominant already at the first instance stage, being it a highly contentious domain, especially if compared to the other Agencies involved into the filtering mechanism's scope of application[54]. To go even

which, as it will be shortly shown, is extremely strict in asking for potentially general and horizontal implications for the appeal to get through the 'filter'. However, speculations can be made over the fact that the specific controversy, notably in front of the General Court, had highlighted some potential to touch some deep chords of the EU legal order: specifically, the first instance proceedings revolved around *i)* the intertwined relationships between the REACH Regulation, on chemicals, and the cosmetics Regulation; and *ii)* the nature (either absolute or relative) of the prohibition of scientific tests on alive animals. This outline could suggest that, in future similar litigation, an appeal could well be centred on the coordination mechanisms between conflicting primary law sources, or on the definition of the application perimeter of general principles. It is therefore quite interesting, now that the 'IP dam' has been broken, to closely watch the coming developments in the ECJ case law on the matter. Finally, and from a more procedural standpoint, it is the case to highlight that the ECJ's operative application of Artt. 170a and 170b of its Rules of Procedure seems not to have been gifted with the greatest clarity. Specifically, at paras 20-21 of the order at hand, the Court recalled that "an appeal allowed to proceed must contain all the information necessary to enable the Court to give a ruling", and stated that "the appellant does not identify the paragraphs of the judgment under appeal which it seeks to call into question". Further on in paras 21-22, however, the Court held that the appellant "merely states the consequences […] that would flow in general terms from the conclusions reached by the General Court" and "does not explain, even in a succinct manner, how the General Court's assessments are vitiated by an error of law". Now, while the first conclusions recalled here seem to fall into the scope of application of Art. 170a of the ECJ Rules of Procedure, which lays down the formal requirements for the application for leave to intervene to be received by the Court itself, the last ones relate more closely to Art. 170b thereof, which is concerned with the 'substantial' assessment that the ECJ is called to perform to apply the filtering mechanism. The confusion arising from the *mélange* of these profiles is, indeed, not beneficial to a clear unfolding of the procedure in front of the Court, since Artt. 170a and 170b preside two different procedural outlines, and two different procedural outcomes – most importantly, with two very different roles of the vice-president of the Court.

[54] This extreme disproportion is also highlighted in M. F. ORZAN, *Some Remarks on the First Applications of the Filtering of Certain Categories of Appeals before the Court of Justice*, in *European Intellectual Property Review*, 2020, pp. 426-430. Some scholars tend to argue, from this disproportion, that extending filtering mechanism's scope of application beyond the EUIPO BoAs is quite unreasonable, as it might preclude potential judicial innovation in fields where the need for filtering the Court's workload is not justified; see, on this, L. DE LUCIA, *New developments concerning Article 58a of the Statute of the Court of Justice of the European Union, cit*. However, it is argued here (as already done above, fn 36) that the general coherence of the system seems to stand out as a somehow 'higher' value in this respect, thus justifying the imposition of the same procedural path to cases stemming out from all Boards of Appeal. This assumption can be even reinforced now that, as recalled

further, out of the 7 admitted appeals, 4 have been submitted by the concerned EU Office (always EUIPO, in these cases)[55] and 3 by the individuals (typically, companies)[56] affected by the General Court's decision. This statistic might actually be more relevant than what appears at first sight, as in the early operational stages of this procedural tool some part of the legal scholarship had noted that the Court seemed to show a 'preference' towards appeals submitted by the Agencies, and thus had inferred from this remark a stronger public nature of the filtering mechanism, clashing with the mainly private one of the appeal proceeding itself[57]. These considerations, albeit not neglectable, appear now to be less impactful, exactly because of the more equal approach shown by the latest ECJ case law, which seems to be becoming progressively more balanced to these regards. Finally, it is worth noting that: *i)* 2 out of the 7 admitted appeals have now got to a final judgment[58], while the remaining 5 cases are still pending; *ii)* only one of these two judgments (the one deciding the *KaiKai Company* case, see the footnote above for reference) has been adopted by the Court in its *grande chambre* formation; *iii)* only 2 cases so far, a closed one[59] and a pending one[60], have been enriched by the advocate general's opinion. Now, these circumstances create a 'Mexican stand-off' where, in full *spaghetti western* fashion, Art. 58a's admissibility criteria, conditions justifying the use of the grand chamber and requirements for the intervention of the advocate general are facing themselves, clearly

in the previous footnote, some other boards might start to provide more cases to the General Court's registry.

[55] Court of Justice, December 10th 2021, case C-382/21 P, *The KaiKai Company Jaeger Wichmann Gb*R, ECLI:EU:C:2021:1050; Court of Justice, April 7th 2022, case C-801/21 P, *EUIPO* v *Indo European Foods*, ECLI:EU:C:2022:295; Court of Justice, November 16th 2022, case C-337/22 P, *EUIPO* v *Nowhere*, ECLI:EU:C:2022:908; Court of Justice, July 11th 2023, case C-93/23 P, *EUIPO* v *Neoperl*, ECLI:EU:C:2023:601.

[56] Court of Justice, January 30th 2023, case C-580/22 P, *Bonnanwalt* v *EUIPO*, ECLI:EU:C:2023:126; Court of Justice, April 18th 2023, case C-751/22 P, *Shopify* v *EUIPO*, ECLI:EU:C:2023:328; Court of Justice, May 8th 2023, case C-776/22 P, *Studio Legale Ughi e Nunziante* v *EUIPO*, ECLI:EU:C:2023:441.

[57] See, for a take on this position, P. IANNUCCELLI, *L'ammissione preventiva delle impugnazioni contro le decisioni del Tribunale dell'Unione europea ex Art. 58*-bis *dello Statuto: una prima valutazione e le eventuali applicazioni future*, in C. AMALFITANO, M. CONDINANZI (eds.), *Il giudice dell'Unione europea alla ricerca di un assetto efficiente e (in)stabile: dall'incremento della composizione alla modifica delle competenze*, Milan, 2022, pp. 117-141.

[58] Court of Justice, January 30th 2024, case C-580/22 P, *Bonnanwalt* v *EUIPO*, ECLI:EU:C:2024:101; Court of Justice, February 27th 2024, case C-382/21 P, *The KaiKai Company Jaeger Wichmann Gb*R, ECLI:EU:C:2024:172.

[59] Court of Justice, opinion of advocate general Ćapeta, July 13th 2023, case C-382/21 P, *The KaiKai Company Jaeger Wichmann Gb*R, ECLI:EU:C:2023:576.

[60] Court of Justice, opinion of advocate general Szpunar, November 23th 2023, case C-801/21 P, *EUIPO* v *Indo European Foods*, ECLI:EU:C:2023:915.

calling for some reflections on how to coordinate these procedural law institutes. These last issues shall be further deepened after a more substantial analysis of the Court's case law on the filtering mechanism, as that is the only way to fully appreciate how Luxembourg judges interpret and apply the 'filter' pursuant to Art. 58a of the Statute.

Looking now from a qualitative standpoint at the (very few) appeals that have been granted admissibility[61], it is to be noted that a case has been able to 'survive' the filtering mechanism insofar as the legal questions arising from it had the potential to not only go beyond the individual and specific dimension of the single appeal, but also to produce some kind of 'horizontal' impact, affecting the whole EU legal order in its basic existence and functioning. For instance, in 4 out of the 7 admitted cases, this horizontal dimension was founded in the fact that the appealed General Court's judgments risked affecting the relationship between the EU legal order and other 'external' provisions: in one of these cases[62], this risk was entailed by the fact that the General Court's interpretation had the (undesirable) potential to assign direct effect to the Paris Convention for the Protection of Industrial Property, thus violating the EU legislator's and the Member States's autonomy and independence; the other three appeals[63], instead, were based on the effects produced by the UK's withdrawal onto the survival of an individual's subjective position[64] which was pre-existent to Brexit itself, as this situation would potentially affect the principle of territoriality of European trademarks, on the one hand, and the relationships with the 'not-member-anymore' British legal order, on the other hand.

The remaining cases that successfully went through the 'filter' show a slightly more sectorial (but also more interesting, to some extents) vision.

The *Studio Legale Ughi e Nunziante* case and the *Bonnanwalt* case, on their side, marked the starting point of what could become a significative case law, as both of them have been deemed admissible based on questions concerning the conditions to be met by a lawyer in order to

[61] See the cases already cited in fn 56 and fn 57.

[62] In Court of Justice, December 10th 2021, case C-382/21 P, *The KaiKai Company Jaeger Wichmann GbR*, ECLI:EU:C:2021:1050.

[63] Court of Justice, April 7th 2022, case C-801/21 P, *EUIPO* v *Indo European Foods*, ECLI:EU:C:2022:295; Court of Justice, November 16th 2022, case C-337/22 P, *EUIPO* v *Nowhere*, ECLI:EU:C:2022:908; Court of Justice, April 18th 2023, case C-751/22 P, *Shopify* v *EUIPO*, ECLI:EU:C:2023:328.

[64] As, for instance, the rights deriving from a registration or from a declaration of nullity, in cases where these procedures were kickstarted referring (or opposing) to British trademarks; the question was, therefore, if the UK's withdrawal 'erased', as well, the British trademarks that had previously justified either the registration or the nullity of the European ones.

independently and professionally represent a client in front of the EU judiciary itself[65]. The Court seems keen to consider that, whenever an appeal is based on this kind of issues, granting admissibility is necessary as the General Court's interpretation might reverberate its effects on the whole spectrum of actions available in front of the CJEU, thus horizontally affecting the entire judicial activity[66]. This assumption, however, might spread some side effects even further away from the Kirchberg *plateau*, as none of the Agencies included in the filtering mechanism currently requires from the parties to be mandatorily represented by a qualified lawyer within the procedure in front of their Boards of Appeal[67]. Even if the Court's case law on legal representation formally applies to the Luxembourg judges only, and not to the Boards of Appeal, the growing importance of these issues within Art. 58a's perspective might then induce, in the future, some kind of (difficult) harmonization among the Boards' Rules of Procedure.

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[65] Albeit from slightly different perspectives. The *Studio Legale Ughi e Nunziante* case, as a matter of fact, originated from a discrepancy between the Italian legal representation regime and the one required by the EU courts, dealing then with the possibility for the applicant to regularise their position once involved into a procedure in front of the General Court. Concerning the *Bonnanwalt* case, the initial assumption of relevance rendered in the admissibility order has been confirmed in the final judgment as well, where the Court overturned the appealed decision considering it as affected by a misinterpretation of the legal representation regime. Moreover, the approach uphold by the Court seems to be quite conflicting with the well-established case law of the General Court on this subject, as the latter has always been rigorous in assessing potential risks to the lawyer's independence when potentially subject to some forms of control by their own client; see, specifically on this last case, R. TORRESAN, *Le* ius postulandi *(de nouveau) face au mécanisme de 'filtrage' des pourvois, entre exigences de cohérence et coordination procédurale*, in *Review of European Litigation*, 1/2024.

[66] See as stated in para 29 of the *Studio Legale Ughi e Nunziante* order: "*force est de relever qu'une telle question n'est pas liée à un domaine spécifique du droit de l'Union, mais concerne tout type de contentieux porté devant le Tribunal pour lequel est exigée la représentation par un avocat, au sens de l'Article 19, troisième alinéa, du statut de la Cour de justice de l'Union européenne*". The same line of argumentation can be found in para 21 of the *Bonnanwalt* order.

[67] Looking at the Rules of Procedure that each Board of Appeal set out for its own proceedings, this 'softer' approach over legal representation is evident, as all of them remit to the parties the choice to either hire a lawyer or to defend themselves (see, specifically, Art. 9 of ECHA's RoP, Art. 18 of EASA's RoP, Art. 12 of ACER's RoP, Art. 9 of ERA's RoP, Art. 5 of the SRB's RoP and Art. 5 of the ESAs' RoP). Even further, the Boards operating within EUIPO and CPVO explicitly allow a legal person to be represented by one of its employees, or by a subject somehow connected to the company itself (see Art. 119 of Regulation 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark, in *OJ* L 154, 16.06.2017, p. 1 ff. and Art. 82 of Regulation 2100/94 of 27 July 1994 on Community plant variety rights, in *OJ* L 227, 1.09.1994, p. 1 ff.).

Last but not least, in the *Neoperl* case the first instance judgment had reviewed whether the sign which was sought to be registered was, at all, a sign of which a trademark may consist, despite the Boards of Appeal not having dealt with this profile and the parties not having discussed it within the action of annulment. While the General Court had stated that not performing this review would have infringed its mandate as part of the EU judiciary, the Court of Justice considered that performing it, instead, had pushed the judges' activity beyond its jurisdiction and it risked producing systemic negative effects on the nature and scope of the General Court's review over every Board of Appeal[68]. Hence, the general relevance of the appeal was recognised, founding its admissibility.

All in all, in the last three aforementioned cases, the Court seems to have parted from the idea that 'horizontal' effects can only be found in situations impacting on the relationships between the EU legal order and other systems, maybe ushering some new highways for further judicial developments of the filtering mechanism. Despite these evolutions, it remains clear that the mechanism currently operating under Art. 58a of the Statute is, as tautological as it may sound, a filter that filters quite intensely. The Court's approach looks actually so strict that some interpretative lines lead to the appeals' inadmissibility with a certain degree of incoherence. For instance, the Luxembourg judges have repeatedly refused to recognise the existence of a risk "to the unity, consistency or development of Union law" where the appeal was founded on a divergence between the Court of Justice's and the General Court's case law, or within different decisions adopted by the General Court itself[69]. The same restrictive approach is also upheld when the party claims that their appeal should be admitted based on a 'new' point of law, meaning a legal question or principle which the Court has never had the opportunity to state on[70]. On other occasions, the appeal has been deemed inadmissible

[68] See para 34 of the related order, where the Court acknowledges "the cross-cutting nature of the issue of whether the General Court exceeded the established limits of its jurisdiction by de facto altering the decision of the Board of Appeal after examining a plea raised of its own motion".

[69] Court of Justice, February 6th 2020, case C-858/19 P, *NHS* v *EUIPO*, ECLI:EU:C:2020:83; Court of Justice, February 13th 2020, case C-867/19 P, *Confédération Nationale du Crédit Mutuel* v *Crédit Mutuel Arkéa*, ECLI:EU:C:2020:103; Court of Justice, January 17th 2022, case C-599/21 P, *AM.VI. and Quinam* v *EUIPO*, ECLI:EU:C:2022:32; Court of Justice, April 5th 2022, case C-784/21 P, *Kappes* v *Sedus Stoll and EUIPO*, ECLI:EU:C:2022:292.

[70] Court of Justice, October 24th 2019, case C-599/19 P, *Rietze* v *EUIPO*, ECLI:EU:C:2019:903; Court of Justice, November 19th 2019, case C-660/19 P, *Nonnemacher* v *EUIPO*, ECLI:EU:C:2019:996; Court of Justice, April 6th 2022, case C-19/22 P, *Sanford* v *EUIPO*, ECLI:EU:C:2022:262; Court of Justice, June 15th 2022, causa C-120/22 P, *Cyprus* v *EUIPO*, ECLI:EU:C:2022:493.

notwithstanding the existence of different interpretations of the same provision (or principle) in different Member States. A good (and arguably overstretched) example of this trend is offered in the *All Star* case[71], where the Court itself was able to acknowledge not only that several national legal orders provide for different interpretations of the notion of 'well-known fact', but that these differences could put the EU law unity at stake, as well. Nevertheless, the judges stated the following: "*s'il est vrai que des divergences entre les juridictions des États membres seraient susceptibles de compromettre l'unité de l'ordre juridique de l'Union, il n'en demeure pas moins que la procédure du renvoi préjudiciel* […] *a précisément pour but de garantir l'unité d'interprétation du droit de l'Union et de permettre ainsi d'assurer sa cohérence*"[72].

When it comes to cases like the aforementioned ones, it appears that there might be some few good reasons to slightly soften the Court's approach up. As far as (relevant) divergences within the CJEU's case law are concerned, it seems like those could found the appeal's admissibility at least with regards to the "consistency […] of Union law", given that the Treaties themselves assign the mission of ensuring the uniform observance of EU law as exclusively carried out by the Luxembourg judges within their mandate[73]. As for the cases of different (and potentially conflicting) interpretations among Member States, the idea of safeguarding the unity of EU law by the preliminary ruling (instead of the filter mechanism on appeals) doesn't seem completely satisfactory. It is clearly impossible to deny the essential role played by the preliminary ruling when it comes to ensuring uniformity of interpretation throughout the legal systems of all Member States. However, this relevance reaches its peak exactly in those situations where a direct action isn't be available for any reason whatsoever, thus providing a tool that allows that dialogue between national judges and the CJEU which has been defined as a "keystone"[74] to the whole system of judicial protection. On the other hand, once a direct action is not only available, but already pursued as well, the priority should be assigned to the procedural tools which apply specifically to this kind of actions, meaning that the mere existence of the preliminary ruling shouldn't account to a reason for holding an appeal

[71] Court of Justice, September 30th 2019, case C-461/19 P, *All Star* v *EUIPO*, ECLI:EU:C:2019:797.

[72] See para 21 of the mentioned order. The order's text is currently only available in French.

[73] Here, reference needs to be made to Art. 19 TEU, which enlists the Court of Justice of the European Union among EU institutions, broadly defines its structure and requires that it "shall ensure that in the interpretation and application of the Treaties the law is observed".

[74] See Court of Justice, opinion of the Full Court of December 18th 2014, case 2/13, *Adhésion de l'Union à la CEDH*, ECLI:EU:C:2014:2454, para 176.

inadmissible, if the admissibility conditions are met. Hence, in a case where Art. 58a of the Statute is applicable over an appeal procedure, limiting or altering the filtering mechanism's functioning by prioritizing the preliminary ruling risks putting the autonomy of the former (and of direct actions as a whole) at stake.

Now that the Court's understanding of Art. 58a of the Statute has been clarified on a substantial basis through the analysis of the relevant case law, it is possible to add some final procedural remarks. Specifically, some attention should be given to the only two appeals (to date) that have been closed with a final judgment after having been admitted through the 'filter', as they have received two deeply different procedural treatments. On the one side, the *Bonnanwalt* case has been judged by a three-judges chamber and without the advocate general's opinion, despite clearly having been considered important enough to survive Art. 58a; on the other side, the *KaiKai Company* case has piled up the 'full prize', having received advocate general Capeta's opinion[75] and a grand chamber judgment. These circumstances thus call for some reflections on how to coordinate the three procedural tools involved in the mentioned cases, namely the filtering mechanism, the advocate general's opinion and the use of the grand chamber.

A preliminary recall of the legal provision regulating these instruments might provide a useful guidance. As far as the opinion is concerned, it is well renown that in the last few years the Court has acquired, by reform of the Statute, the discretion to decide that a case "shall be determined without a submission from the [a]dvocate [g]eneral", if said case "raises no new point of law"[76]. As for the choice of the *formation jugeant*, the ECJ's Rules of Procedure state that a case shall be assigned to the grand chamber "in so far as the difficulty or importance of the case or particular circumstances are […] such as to require that"[77]. The 'Mexican stand-off' that has been previously anticipated in this same section lies here quite clearly, as the procedural path of an appeal might, indeed, lead it through three different tools, all of which basically evaluating the 'importance' of the case, although each based on its own conditions. On the one hand, the requirements calling for the intervention of an advocate general look narrower than the ones foreseen in Art. 58a, as the existence of "new point[s] of law" is only one of the several (and potentially unlimited) scenarios that could lead to the successful overcoming of the 'filter'; however, it has already been highlighted that the Court seems pretty reluctant to grant admissibility to an appeal on the *sole* basis of a 'new' legal

[75] See above, fn 60, for references.

[76] See Art. 20(5) of the Statute.

[77] See Art. 60(1) of the ECJ's Rules of Procedure.

issue. This means that the novelty of a point – which acts as the only basis for the advocate general to adopt their opinion – is neither a *necessary* condition, nor a *sufficient* one, to justify an appeal's admissibility, at least insofar as the ECJ's case law remain as rigid as it currently is. On the other hand, the grand chamber seems to be lying over requirements that are more closely aligned with the ones of Art. 58a, as it deals with the category of 'importance' which appears to be not so distant from the one of 'significance'. This assumption partially clashes, however, with the *Bonnanwalt* cases, the significance of which was apparently enough to be admitted, but not to be assigned to the *grande chambre*[78]. As it sounds incoherent that the thresholds relating to the two mechanisms are actually different, it is argued here that the Court will probably need to uphold a much frequent use of the grand chamber when judging an appeal that went through Art. 58a of the Statute – otherwise thoroughly explaining its reasons not to do so.

5. A glance over the future: some potential further developments in an institutional perspective

Within these first five years of 'experimental' application of Art. 58a of the Statute, it has already become clear that this mechanism had a relevant impact on the EU judicial system. This impact might not be fully appreciated by strictly quantitative indicators[79], but it certainly is evident when it comes to a qualitative overview. Indeed, the filtering mechanism already pushed a general trend forward, which was already unravelling before its introduction, and which consists in the acquisition of a progressively greater importance by the General Court within the judicial architecture of the Union. Already before 2019, what started as a (narrowly specialised) first instance court had come closer and closer to work as the

[78] It is surely true that these two mechanisms intervene in two different moments of the procedure in front of the Court; however, both the assessment on the admissibility of the appeal and the choice of the formation are basically predictive evaluations, and they are largely based on the same knowledge of the case by the judges. Hence, a swifter coordination seems to be necessary, as proposed in the text.

[79] Although even statistics can be interpreted in different ways. It is true, as already highlighted (see the statistics cited above, in section 4), that Art. 58a of the Statute applied to 188 cases insofar, which is obviously not a major share of the Court's register. However, it is worth recalling, first, that this procedural tool does not apply to every type of action the ECJ deals with, but only to the appeal procedures instead, which account on average for 20-30% of the gross number of cases received; second, that only 7 of those 188 cases have been granted admissibility, clearly revealing the impression of a filtering mechanism which is actually reaching its goals regarding the impact on the Court's workload.

main fulcrum of the whole judicial system, bearing responsibility for the consistency and the development of each EU law sector's case law, crafting the general principles which these sectors refer to and wielding what is usually the 'last word' on cases, given the fairly low number of both introduced appeals and successful appeals[80]. The Court of Justice, on its side, was progressively embracing its role as a constitutional court and focusing on the preliminary rulings in order to maintain a direct dialogue with national judges. Based on this scenario, Art. 58a of the Statute introduced the idea that appeals can also (and, arguably, should) be filtered and progressively removed from the Court of Justice's core activity, thus widening the functional moat existing by the two Luxembourg courts. Now, the reform that's about to enter into force, on the one side, is expanding the filtering mechanism towards its maximum potential over the Boards of Appeal but, on the other side, it is also inducing a strong detachment of Art. 58a from this previously exclusive 'club', applying it to arbitration clauses cases as well and therefore changing the whole mentality behind it[81]. These developments are calling for a gradual, but inevitable, expansion of this structure.

A first step to consider could be to extend Art. 58a's scope of application to another subject characterised by a strong degree of autonomy and a quite consistent workload generated on the CJEU over the years, namely the civil service cases. Looking back to the historical evolution of the EU judiciary, litigation between the Union and its agents has always worked as a leverage to reform and innovation. The creation of the Court of First Instance – today the General Court – was itself the result of long debates and negotiations originally generated by the need for more efficient ways of dealing with the relatively high number of actions brought by the Union's servants[82]; so was the introduction, shortly after the Treaty of Nice, of the first (and only, until it existed) specialised court of the EU, the Civil Service Tribunal[83]; and the same can be said

[80] Each year, between 20 and 30% of the total decisions adopted by the General Court are appealed in front of the Court of Justice; out of these appeals, only 20 to 30% comes out as successful, leading to at least a partial annulment of the first instance judgment. The degree of consistency between the two Luxembourg courts, therefore, can be regarded as particularly high. Further references to these data can be found in the latest judicial statistics for the General Court (https://curia.europa.eu/jcms/upload/docs/application/pdf/2023-03/stats_tribunal_2022_it.pdf) and for the Court of Justice (https://curia.europa.eu/jcms/upload/docs/application/pdf/2023-03/stats_cour_2022_en.pdf).

[81] As already argued above, section 2 of this manuscript.

[82] See the contributions mentioned above, fn 1.

[83] See the contributions mentioned above, fn 2.

about the system of specialised chambers currently operating within the General Court, four out of the ten chambers of which act as recipients for civil service cases[84]. Once again, this litigation sector looks like a fitting candidate to expand the filtering mechanism on appeal procedures, given that: *i)* it is still quite impactful over the CJEU's workload[85]; *ii)* it is relatively easy to isolate from the rest of the actions[86], thus preserving a high threshold in legal certainty for both servants and EU institutions, Agencies or authorities; *iii)* it mainly revolves around strongly individualised demands by servants asking for a better protection of their own interests – frequently related to salaries, career advancements or working conditions – and, therefore, it is less likely to give rise to questions affecting the unity, consistency or development of the whole EU legal order[87], especially in the restrictive interpretation endorsed by the Court and previously reported. Moreover, it seems like there wouldn't be any institutional barrier to the inclusion of civil service cases into Art. 58a's scope of application, not even considering the absence of an adjudication level prior to the Luxembourg courts. While some scholars have highlighted the need for some kind of interinstitutional commission as a body who would deliver a first decision over the controversy between the Union and its servant, then to be appealed in front of the General Court[88],

[84] See the contributions mentioned above, fn 3.

[85] As for 2022 (the judicial statistics for 2023 have not been published yet), 904 cases have been introduced in front of the General Court; 66 out of them (7,3%) concerned civil service matters. Consequently, the General Court closed in that same year 858 cases, 103 of which (12%) were related to controversies between the EU and its agents. As an average, civil service cases in 2022 have registered a duration of 15,6 months. For an attestation of these data, see the General Court's 2022 judicial statistics, available at the following link: CURIA - Statistics concerning the judicial activity of the General Court (europa.eu).

[86] As a matter of fact, in order to confer a case to the civil service litigation sector, it is sufficient that the action itself is based on a contested violation of the Regulation (EEC, EURATOM, ECSC) 259/68 of the Council of 29 February 1968 laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Communities and instituting special measures temporarily applicable to officials of the Commission, in *OJ* L 56, 04.03.1968, p.1 ff.

[87] Although it must be recalled that in some peculiar occasions, some general legal questions were raised in civil service cases as well. A particularly spot-on example of this shall be found in Court of Justice, September 10th 2015, case C-417/14 RX-II, *Missir Mamachi di Lusignano* v *Commission*, ECLI:EU:C:2015:588, and in Court of Justice, judgment of March 26th 2020, joint cases C-542/18 RX-II and C-543/18 RX-II, *Simpson* v *Council*, ECLI:EU:C:2020:232, both of which were able to trigger the activation of the review procedure pursuant to Art. 256(2) TFEU, and Artt. 62, 62a and 62b of the Statute.

[88] For instance, an option of this kind is envisioned in P. IANNUCCELLI, *L'ammissione preventiva delle impugnazioni contro le decisioni del Tribunale dell'Unione europea ex Art. 58*-bis *dello Statuto: una prima valutazione e le eventuali applicazioni future*, in C. AMALFITANO, M.

it is argued here that this reform (for as legitimate as it would certainly be) is simply not necessary. As a matter of fact, the 2024 reform will already provide for the overcoming of that equation where appeals can be filtered only insofar as they are brought in cases that have seen the participation of a Board of Appeal (or of any other adjudication body). Hence, while the EU's agents might understandably not want to give up on a stage where to seek protection of their rights, legally speaking there seems to be no room whatsoever to fear that applying Art. 58a to these cases would result in a violation of the Treaties[89].

CONDINANZI (eds.), *cit.*, pp. 117-141, notably pp. 138-139. Here, the Author proposes the creation of an adjudication committee which could represent both the administrative authority responsible for the adoption of the contested act, and the individual servant who filed the action for annulment. This committee would lie as an intermediate step between the fully administrative review within the responsible authority, already provided for in Regulation 259/68, and the judicial protection offered in front of the General Court.

[89] If the goal is to preserve the high standards of protection offered to EU servants, while still preventing these cases to get to the ECJ too frequently, a better way to do so might rather be the reinforcement of a procedural tool the General Court already possess and inherited from the late Civil Service Tribunal. As a matter of fact, pursuant to Art. 270 TFEU and Artt. 125a-125d of the General Court's RoP, this jurisdiction is entrusted with powers related to the so-called 'amicable settlement' of civil service controversies, a peculiar procedure which allows the General Court to 'examine the possibilities' of settling the dispute by an agreement between the parties, thus excluding the need for the contentious procedure and for the adoption of a judgment. Art. 125a(2) specifically, states that the General Court "shall instruct the Judge-Rapporteur, assisted by the registrar, to seek the amicable settlement of a dispute", with the possibility to trigger this mechanism "at all stages of the procedure". The most interesting feature of this solution is the central role of the judge-rapporteur, who is directly in charge, by virtue of Art. 125a(3) of the General Court's RoP, of exploring any chance of agreement and enjoys incisive powers, towards the parties, to achieve this result. These powers include (but are not limited to) "invit[ing] the main parties to supply information [or] to produce documents […], invit[ing] to meetings the main parties' representatives [or] the main parties themselves [and] hav[ing] contact with each of the main parties separately". Statistics shows that this procedure is barely operational: since the General Court re-acquired jurisdiction over this type of cases from the Civil Service Tribunal (dismissed in 2016), the amicable settlement procedure has only been triggered 24 times. However, once triggered, a satisfactory agreement has been reached in 14 cases (58% of the total), showing a pretty good success rate of the procedure. It is argued here that a far more frequent use of this procedure and some minor structural changes could, indeed, foster a virtuous management of civil service cases, combined with the filtering mechanisms over appeals. The triggering of the recalled procedure could be made mandatory, for instance, by a slight reform of Art. 50a(2) of the Statute and of the relevant Rules of Procedure. In exchange, however, this would allow the General Court to achieve a swift treatment of these cases, as every outcome would essentially be a welcomed one: a successful amicable settlement would close the case in a quick and largely satisfactory way; an unsuccessful one would lead to a judgment, the appeal against which could legitimately be 'filtered' by Art. 58a of the Statute, thanks to the relevant contribution

Finally, looking even further, the moment will probably come in the (not so distant) future to consider applying Art. 58a to *every* appeal procedure, regardless of the concerned subject. As already discussed in this manuscript, the respective roles of the General Court and the Court of Justice are progressively polarizing towards a supreme (administrative) court, as for the former, and a constitutional court, as for the latter. This means that, while the General Court is more and more important as the judge for individuals' claims and protection, the Court of Justice seems keen on loosening – although it should not lose completely – its contact with this kind of litigation, in order to focus on the institutional structure and development of the EU legal order as a whole. The filtering mechanism on appeal procedures seems, then, one of the most appropriate tools to regulate the relationships between the two Luxembourg courts in a way that will achieve an efficient administration of justice and, at the same time, will not sacrifice the high standards of protection of individuals' rights and interests. From the point of view of EU primary law, the introduction of an all-in filtering mechanism should not be worrying as for the risk of violating the right to an effective judicial protection pursuant to Art. 47 CFREU. As noted above in section 2 of this paper, it is to be remembered that this provision clearly requires from the EU legal order to ensure a sufficient threshold of judicial protection to individuals, but it never asks (nor it has ever been interpreted as asking) that this threshold is embodied in a specific structure of the EU judiciary which entails a general right to appeal[90]. Thus, while the existence of an

previously offered by the first instance judge-rapporteur. The strong role of the latter offers, in fact, the guarantee that the amicable settlement is not a mere private deal between the parties, but a procedure under the constant overview of the judicial authority and thus able to still ensure the necessary standards of protection: somehow, not so far from the rationale that first justified the introduction of the 'filter' over appeals. For some contributions from the legal scholarship on the procedure of amicable settlement of civil service cases, see J. S. SCHØNBERG, N. STOCKWELL, *Juges, médiateurs ou négociateurs ? Le rôle du règlement amiable des conflits au sein des juridictions communautaires*, in *Revue trimestrielle de droit européen*, 2003, pp. 415- 440; G. VANDERSANDEN, *Le contentieux de la fonction publique de l'Union européenne : décision judiciaire ou règlement amiable ?*, in *Cahiers de droit européen*, 2010, pp. 569-585; S. GERVASONI, *Le règlement amiable des litiges et les principes du procès administratif : questions/réponses sur les cinq premières années d'activité du Tribunal de la fonction publique de l'Union européenne*, in *Revue universelle des droits de l'homme*, 2011, pp. 66-74; S. VAN RAEPENBUSCH, *Quelques réflexions sur le règlement amiable des litiges portés devant le Tribunal de la fonction publique de l'Union européenne*, in *Revue des affaires européennes*, 2013, pp. 291-298.

[90] As confirmed in the Court's well-established case law; see, for instance, Court of Justice, July 28th 2011, case C-69/10, *Samba Diouf*, ECLI:EU:C:2011:524, para 69; Court of Justice, September 26th 2018, case C-175/17, *Belastingdienst v Toeslagen (suspensory effect of the appeal)*, ECLI:EU:C:2018:776, paras 34-36; Court of Justice, July 29th 2019, case C-654/17 P, *Bayerische Motoren Werke v Commission and Freistaat Sachsen*, ECLI:EU:C:2019:634, para 51. This interpretation is also consistent with the ECtHR case

appeal procedure can't be completely eradicated if not by reforming Art. 256 TFEU[91], the corresponding right can certainly be limited without any reform of the Treaties, obviously insofar as the limitation is proportionate and necessary to satisfy other general objectives of the EU judicial system. In this perspective, the discussion is further fuelled by a fairly recent opinion of advocate general Ćapeta[92], which seems particularly relevant (albeit not completely agreeable). In the context of the admissibility procedure pursuant to Art. 58a of the Statute, and seizing the opportunity to provide a first institutional vision of said provision, the advocate general basically argues that the filtering mechanism over appeals is not intended to constitute an added tool to safeguard the individuals' rights and positions (especially not the right to appeal first instance decisions), but rather to satisfy general interest of the EU legal order as a whole; in this perspective, the advocate general compares Art. 58a to the mechanism known as *certiorari*, operating in front of the Supreme Court of the United States of America[93]. While the institutional vision of the EU filtering mechanism is to be shared, the comparison with its American counterpart feels, frankly, quite misplaced: similarities are certainly present, but the

law, which is well established in not imposing any obligation to the States to set up some kind of appeal (or cassation) mechanism within their own judicial systems; see, for instance, ECtHR, judgment of September 6th 2005, case 61406/00, *Gurepka* v *Ukraine*, ECLI:CE:ECHR:2005:0906JUD006140600, para 51; ECtHR, judgment of April 8th 2008, case 16741/04, *Nurhan Yılmaz* v *Turkey*, ECLI:CE:ECHR:2008:0408JUD001674104, para 21; ECtHR, decision of September 1st 2015, case 23486/12, *Doraldo Baúlde* v *Spain*, ECLI:CE:ECHR:2015:0901DEC002348612, para 18. Moreover, when an appeal mechanism is set up, the ECtHR has hold that States enjoy enough discretion to provide procedural limitations to that appeal, insofar as these limitations won't compromise the essential substance of the right to a fair trial, pursuant to Art. 6 ECHR; see ECtHR, judgment of July 26th 2007, case 35787/03, *Walchli* v *France*, ECLI:CE:ECHR:2007:0726JUD003578703, para 29; ECtHR, judgment of January 13th 2011, case 44078/07, *Evaggelou* v *Greece*, ECLI:CE:ECHR:2011:0113JUD004407807, para 23.

[91] This provision, as a matter of fact, states that decisions adopted by the General Court "may be subject to a right of appeal to the Court of Justice on points of law". Even if the phrasing might be interpreted as the envision a mere possibility (as for the "may"), Art. 256 TFEU actually seems to be providing some kind of 'constitutional shield' to the existence of appeal procedures over the activity of the General Court.

[92] Court of Justice, Opinion of Advocate General Ćapeta, July 13th 2023, case C-382/21 P, *The KaiKai Company Jaeger Wichmann GbR*, ECLI:EU:C:2023:576, paras 28-38.

[93] See, on the US Supreme Court and the *writ of certiorari*, S. CASSESE, *Sulla diffusione nel mondo della giustizia costituzionale. Nuovi paradigmi per la comparazione giuridica*, in *Rivista trimestrale di diritto pubblico*, 2016, pp. 993-1007; S. LIETO, *Decisioni «processuali» e potere implicito della Corte Costituzionale di selezione delle questioni di costituzionalità*, in *Giurisprudenza costituzionale*, 2016, pp. 841-868; C. DELGADO SUÁREZ, *Sui modelli di Corti supreme e la revoca dei precedenti*, in *Rivista trimestrale di diritto e procedura civile*, 2018, pp. 689-709.

certiorari is far more of a discretionary tool, allowing the Supreme Court to deliberately choose the cases that might have a general impact on the whole US legal order, by the so-called logic of 'cherry picking'. This structure doesn't seem to be totally adaptable to the EU judicial system, and the views expressed on this comparison by advocate general Čapeta risk having an eccentric (not to say harmful) effect to the delicate balance thereof: most notably, it is argued here that the Court of Justice shouldn't blindly follow the steps of its American 'counterpart' and abandon its role in delivering justice to individuals, being this function fundamental to foster evolutions of the whole EU legal order.

The advantages of an all-in 'filter' over appeals need to be, in this respect, subject to a more complex, but also further-reaching, assessment.

A generalised filtering mechanism could, on the one hand, offer the chance to sightly loosen the Court's approach to the appeals' admissibility. As a matter of fact, while applying Art. 58a on a greater number of cases (all appeal procedures), admissibility could become a slightly more frequent result, without impacting on the total number of appeals that the Court fully deals with over a year's activity[94]. This would probably allow to provide a remedy to the areas of incoherence which have been previously highlighted in this analysis, hence granting admissibility to appeals based either on the existence of inconsistencies within the CJEU's case law or on different interpretations enforced by different Member States.

On the other hand, turning the filtering mechanism into the main valve between the General Court and the Court of Justice would empower both of their roles within the EU's judicial system. The former would stand as the main (and, most frequently, last) judge to decide on actions brought by individuals, bearing full responsibility for the coherence of the EU legal order in its administrative nature and being subject to the Court's review only in exceptional circumstances, which would call for a re-orientation of general principles. The latter would instead have the opportunity to exercise both of its main functions, right because of the peculiar structure of Art. 58a: deciding which appeals should be

[94] This same idea is endorsed in D. P. DOMENICUCCI, *La relazione prevista dall'Art. 3, par. 1, del regolamento 2015/2422 tra indagini retrospettive di bilancio dell'attività del Tribunale e analisi prospettiche di rilancio del suo ruolo nel contesto della nuova architettura giudiziaria dell'Unione europea*, in C. AMALFITANO, M. CONDINANZI (eds.), *Il giudice dell'Unione europea alla ricerca di una assento efficiente e (in)stabile: dall'incremento della composizione alla modifica delle competenze*, Milan, 2022, pp. 39-77, notably p. 75. Actually, this Author seems positive that any kind of reform of the current filtering mechanism provided by Art. 58a of the Statute would be legitimate and compliant under the broad formulation of Art. 256 TFEU, which recognises the right to appeal "under the conditions and within the limits laid down by the Statute", thus leaving relevant freedom to the latter.

considered admissible would account to a proper constitutional function, as it would be carried out by identifying which legal questions potentially affect the unity, consistency or development of the whole EU legal system; then, once selected the admissible appeals, the Court could still deal with these cases as a supreme court, correcting errors on points of law and looking for the ideal balance between the individuals' need for justice, the administration's need for efficiency and the EU legal order's general interest in a uniform interpretation and application of its principles and provisions.

THE ACTIVITY OF EU AGENCIES' BOARDS OF APPEAL AND THEIR IMPACT ON THE EU JUDICIAL SYSTEM: AN EMPIRICAL RESEARCH

L'activité des Chambres de recours au sein des Agences de l'Union européenne et leur impact sur le système judiciaire de l'UE: une recherche empirique

L'attività delle commissioni di ricorso delle Agenzie dell'Unione europea ed il loro impatto sul sistema giurisdizionale dell'Unione europea: un'analisi empirica

PAOLO GIUSEPPE SILVESTRI*

TABLE OF CONTENTS: 1. Introduction. – 2. A quantitative assessment of BoAs' activity. – 3. Review of CJEU rulings on Agencies' decisions falling outside BoAs' competence. – 3.1. Rulings issued by the GC (and the ECJ) on Agencies' decisions falling outside BoAs' competence. – 4. Average duration of proceedings before BoAs. – 5. Duration of proceedings before the CJEU. – 5.1. Length of proceedings before the GC (and the ECJ) in absence of prior review by a BoA (in months). – 6. Conclusive remarks.

1. Introduction

Workload and length of proceedings have always been the main driver of each reform of the EU Judiciary. The growing competences of the former European Communities and the further enlargement in the early 2000s prompted a debate on the structural changes which the European judicial architecture ought to undergo in order not to succumb to its own success[1]. Such a priority led to the adoption in a brief timespan of several reforms of the Protocol No 3 on the Statute of the Court of

* PhD Candidate at the University of Ferrara.

1 R. CRANSTON, *Helping the Court to Function Effectively*, in A. DASHWOOD, A. C. JOHNSTON (eds.), *The Future of the Judicial System of the European Union*, Oxford, 2001, p. 56; M. C. REALE, *Alcune osservazioni sulla riforma della giustizia comunitaria*, in B. NASCIMBENE (ed.), *Il processo comunitario dopo Nizza*, Milan, 2003, p. 107.

Justice of the European Union[2] whose *rationale* and solutions have sparked off scepticism, if not open criticism[3].

Against this backdrop, the role of EU Agencies' Boards of Appeal (hereinafter, 'BoAs') is often overlooked. However, the conclusion of the experience of specialised Tribunals established pursuant to Article 257 TFEU and a renewed characterization of the General Court (hereinafter, 'GC') as a *generalist* instance caused the request for specialised review to be channelled through the activity of 'hybrid' bodies, such as the Boards of Appeal, formally placed outside the EU judicial architecture, yet projected into a more judicial dimension by recent reforms of the CJEU Statute[4].

While data on the CJEU's activities are publicly available since many years on[5], far less information are provided on those of EU Agencies' BoAs. However, over the last years these bodies have been performing an increasing role in the EU system of judicial protection. According to *Aquind*, they must perform a full review over the Agencies' decisions, so as to balance the limited nature of the review conducted by the EU Courts over complex technical, scientific and economic assessments and, thus, to enhance the overall protection offered to individuals[6]. Moreover,

[2] See Regulation (EU, Euratom) 2015/2422 of the European Parliament and of the Council of the 16 December 2015 amending Protocol No 3 on the Statute of the Court of Justice of the European Union, in *OJ* L 341, 24.12.2015, p. 16 ff.; Regulation (EU, Euratom) 2016/1192 of the European Parliament and of the Council of 6 July 2016 on the transfer to the General Court of jurisdiction at first instance in disputes between the European Union and its servants, in *OJ* L 200, 26.07.2016, p. 137 ff.; Regulation (EU, Euratom) 2019/629 of the European Parliament and of the Council of 17 April 2019 amending Protocol No 3 on the Statute of the Court of Justice of the European Union, in *OJ* L 111, 25.04.2019, p. 1 ff.; Regulation (EU, Euratom) 2024/2019 of the European Parliament and of the Council of 11 April 2024 amending Protocol No 3 on the Statute of the Court of Justice of the European Union, in *OJ* L 12.08.2024.

[3] On the doubling of the General Court's members, F. DEHOUSSE, *The Refom of the EU Courts (II). Abandoning the Management Approach by Doubling the General Court*, in *Egmont Papers*, 2016, p. 55; A. ALEMANNO, L. PECH, *Thinking justice outside the docket: A critical assessment of the reform of the EU's court system*, in *Common Market Law Review*, 2017, p. 129 ff., p. 157; A. ARNULL, *The Court of Justice Then, Now and Tomorrow*, in M. DERLÈN, J. LINDHOLM (eds.), *The Court of Justice of the European Union. Multidisciplinary perspectives*, Oxford, 2020, p. 12; on the transferring to the General Court of the competence to render preliminary ruling on certain subjects, C. AMALFITANO, *Il futuro del rinvio pregiudiziale nell'architettura giurisdizionale dell'Unione europea*, in J. ALBERTI, G. DE CRISTOFARO (eds.), *Il rinvio pregiudiziale come strumento di sviluppo degli ordinamenti*, Pisa, 2023, p. 39.

[4] J. ALBERTI, *The Threshold Guardians. The future of EU Agencies' Boards of Appeal in light of the recent reforms of CJEU Statute*, in *REALaw*, 2023, p. 67 ff., p. 72.

[5] Detailed information is uploaded on a yearly basis by the Court of Justice. The overview statistical trend in 2023 may be retrieved at the following link: https://curia.europa.eu/jcms/jcms/Jo2_7032/en/.

[6] General Court, November 18th 2020, case T-735/18, *Aquind* v *ACER*,

according to Article 58a of CJEU Statute (entered into force in 2019 for the BoAs of EUIPO, CPVO, EASA and ECHA[7] and soon to be extended also to those of ACER, ESAs, SRB and ERA, thanks to the further reform of the CJEU Statute which is set to enter into force on September 1st 2024)[8] they are also entitled to reduce the workload of the CJEU, delivering decisions that could be appealed before the GC but not before the European Court of Justice (hereinafter, 'ECJ') unless they raise "an issue that is significant with respect to the unity, consistency or development of Union law".

Against this framework, this contribution follows up a previous similar work[9]and aims at assessing the magnitude of litigation before BoAs by delivering data on their activity. In particular, the number of yearly adjudicated cases by the BoAs will be assessed, noting how many procedures were concluded with the repeal of contested decisions or the dismissal of the appeal. Information on proceedings' duration will be presented as well, taking into account time limits, whenever set out by establishing Regulations. This will allow to compare BoAs' performance with statistics on proceedings before the CJEU. Indeed, swiftness has been one of the main factors fostering the institution and consolidation of BoAs, hence, it amounts to a parameter of legitimacy of the devolution process they are being part of. This contribution therefore conducts an empirical analysis on BoAs' responsiveness, which serves as one of the indicators of the quality of their output. For this latter purpose, BoAs' decisions and CJEU's rulings are organised according to the date of the final decision.

Furthermore, the research also aims at investigating the impact of BoAs' activity over the CJEU's overall workload, assessing the number of appeals brought before the GC and the ECJ, as well as the acceptance by the EU Judges, monitoring whether and to what extent BoA's decisions have been confirmed or not by the CJEU. The issue of the 'untapped potential' is also addressed, investigating the volume and nature of litigation falling out of BoAs' competence and arriving directly before the CJEU. Since the timeframe of the present research stretches from January 1st 2018 to December 31st 2023, the impact on this latter issue given by

ECLI:EU:T:2020:542, para 69. The ruling was upheld by Court of Justice, March 9th 2023, case C-46/21 P, ECLI:EU:C:2023:182.

[7] Regulation (EU, Euratom) 2019/629 of the European Parliament and of the Council of 17 April 2019, *cit*.

[8] Regulation (EU, Euratom) 2024/2019 of the European Parliament and of the Council of 11 April 2024, *cit*.

[9] J. ALBERTI, *The draft amendments to CJEU's Statute and the future challenges of administrative adjudication in the EU*, in *Federalismi*, 2019, p. 16.

the entry into force of Article 58a of CJEU Statute will also be taken into account[10]. For a detailed account of the application of the filter, the research was conducted on the *Curia* database.

As to the methodology implemented, the research relies on the Common Database of EU Agencies' Boards of Appeal for BoAs' decisions and subsequent judicial developments[11]. The official database of the CJEU (*Curia*) has also been consulted in order keep track of pending proceedings and recently rendered judgments and orders which might be of interest. Finally, official reports published by Agencies have been used to gather information on their activity.

2. A quantitative assessment of BoAs' activity

The reader should be advised that, given the main purpose of the research – and whenever it is not stated otherwise (such as for EUIPO) – sections concerning judgments and orders by the CG and the ECJ do not report the total amount of decisions related to BoAs' activity on that specific year, rather how many cases decided by the BoA on that year have subsequently been under scrutiny by the GC and by the ECJ and the following outcome, notwithstanding the date of the final judgement. Decisions stemming from relaunched procedures following an annulment by the CJEU are deemed as the result of autonomous procedure.

a) EUIPO's Boards of Appeal

Data on BoAs' activity is taken from Official Statistics published by EUIPO[12]. Data on CJEU's rulings are taken from EUIPO Database *eSearch Case Law*. As the information provided here is simply a re-elaborated version of official statistics, decisions are organised accordingly.

[10] For a theorical approach on the new filter, R. TORRESAN, *Filtering appeals over decisions originally taken by Boards of Appeal: Rationale, impact and potential evolution of Article 58a of the CJEU Statute*, in this *Volume*, p. 129.

[11] The database provides comprehensive information on litigation before Boards of Appeal as well as further development of single cases before the EU courts. The tool is open access at https://boa.europeanlitigation.eu/.

[12] https://www.euipo.europa.eu/it/about-us/the-office/what-we-do/statistics.

Year	**BoAs decisions**		**GC decisions**		**Filter (Art. 58a)**		**ECJ decisions**	
	Appeal upheld	*Appeal rejected*	*Appeal upheld*	*Appeal rejected*	*Appeal allowed*	*Appeal rejected*	*Appeal upheld*	*Appeal rejected*
2018	**2 600**		**342**		**--**	**--**	**63**	
	634	1 855	53	215			5	58
2019	**2 514**		**303**		**0**	**28**	**61**	
	557	1 596	47	215			8	53
2020	**2 558**		**248**		**0**	**34**	**29**	
	620	1 559	47	157			11	18
2021	**2 687**		**320**		**1**	**46**	**2**	
	690	1 644	59	213			0	2
2022	**2 490**		**300**		**2**	**39**	**8**	
	548	1 619	26	195			0	8
2023	**2 621**		**273**		**4**	**45**	**4**	
	653	1 806	25	204			1	3

According to data provided by the Agency, most of decisions issued concerned *inter partes* proceedings under the EUTMR[13] (2, 515 in 2023, 2, 328 in 2022, 2, 598 in 2021, 2, 415 in 2020, 2, 402 in 2019, 2, 497 in 2018).

The ECJ has made extensive use of the filter under Article 58a of the Statute since its introduction in 2019. Such a strict implementation not only did prevent further pressure on the Court, but also caused a plunge in the number of cases under scrutiny. It is premature to conduct an assessment on the systemic relevance of admitted cases and on their outcome. In fact, the first decision following a leave for an appeal was rendered in February 2024, annulling the previous General Court's judgment[14].

[13] Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark, in *OJ* L 154, 16.06.2017, p. 1 ff.

[14] Court of Justice, February 27th 2024, case C-382/21 P, *EUIPO* v *The KaiKai Company Jaeger Wichmann Gbr*, ECLI:EU:C:2024:172. See also M. COLI, *The Court of Justice rules on the first appeal allowed under Article 58a of the Statute and confirms the restrictive character of the appeals' 'filter'*, in *Review of European Litigation*, 2/2024.

b) CPVO's BoA

Year	**BoA decisions**		**Appeals before GC**		**Filter (Art. 58a)**		**Appeals before ECJ**	
	Uphold	*Reject*	*Upheld*	*Rejected*	*Allowed*	*Rejected*	*Upheld*	*Rejected*
2018	**2**		**1**		**0**	**0**	**0**	
	0	2	0	1			0	0
2019	**2**		**1**		**0**	**1**	**0**	
	1	1	0	1			0	0
2020	**2**		**2**		**0**	**1**	**0**	
	0	2	0	2			0	0
2021	**3**		**0**		**0**	**0**	**0**	
	2	1	0	0			0	0
2022	**3**		**0**		**0**	**0**	**0**	
	0	3	0	0			0	0
2023	**2**		**1** (pending)		**0**	**0**	**0**	
	0	2	--	--			0	0

Caseload before the CPVO's BoA is chronically scarce, except for delimited surges. For example, back in 2016 the Board issued 21 decisions[15].

So far, the Court of Justice has adopted two orders of inadmissibility pursuant to Article 58a Statute, all related to actions brought against BoA's decisions prior to the timeframe object of the present study[16]. Therefore, contrary to the methodology implemented in the rest of the research, here such decisions are labelled on the basis of the date of their issuing.

[15] J. ALBERTI, *The draft amendments to CJEU's Statute, cit.,* p. 18.

[16] Court of Justice, September 16th 2019, case C-444/19 P, *Kiku* v *CPVO*, ECLI:EU:C:2019:746; March 3rd 2020, case C-886/19 P, *Pink Lady America* v *CPVO*, ECLI:EU:C:2020:146.

c) EASA's BoA

Year	**BoA decisions**		**Appeals before GC**		**Filter (Art. 58a)**		**Appeals before ECJ**	
	Uphold	*Reject*	*Upheld*	*Rejected*	*Allowed*	*Rejected*	*Upheld*	*Rejected*
2018	**1**		**1**		**0**	**0**	**0**	
	0	1	0	1			0	0
2019	**0**		**0**		**0**	**0**	**0**	
	0	0	0	0			0	0
2020	**0**		**0**		**0**	**0**	**0**	
	0	0	0	0			0	0
2021	**0**		**0**		**0**	**0**	**0**	
	0	0	0	0			0	0
2022	**1**		**0**		**0**	**0**	**0**	
	0	1	0	0			0	0
2023	**1**		**0**		**0**	**0**	**0**	
	0	1	0	0			0	0

The only action brought before the General Court did not lead to any decision on the merit, as the appeal was discontinued[17].

d) ERA's BoA

Year	**BoA decisions**		**Appeals before GC**		**Appeals before ECJ**	
	Uphold	*Reject*	*Upheld*	*Rejected*	*Upheld*	*Rejected*
2018	**0**		**0**		**0**	
	0	0	0	0	0	0
2019	**0**		**0**		**0**	
	0	0	0	0	0	0
2020	**0**		**0**		**0**	
	0	0	0	0	0	0
2021	**2**		0		**0**	
	2	0	0	0	0	0
2022	**0**		**0**		**0**	
	0	0	0	0	0	0
2023	**0**		**0**		**0**	
	0	0	0	0	0	0

[17] General Court, September 11th 2018, case T-371/18, *Reiner Stemme Utility Air System GmbH* v *EASA*, ECLI:EU:T:2018:553.

From its introduction in 2016 the Board has had little to no cases pending before it, except for two cases concluded in 2021, both concerning conformity-to-type authorisations, which allow the placing on the market of locomotives. In both the case was ultimately remitted to the Agency.

The upcoming extension of the admissibility filter pursuant to Article 58a Statute to ERA's decisions is unlikely to affect the ECJ.

e) ECHA's BoA

Year	**BoA decisions**		**Appeals before GC**		**Filter (Art. 58a)**		**Appeals before ECJ**	
	Uphold	*Reject*	*Upheld*	*Rejected*	*Allowed*	*Rejected*	*Upheld*	*Rejected*
2018	**9**		**0**		**0**	**0**	**0**	
	6	3	0	0			0	0
2019	**11**		**1**		**0**	**0**	**0**	
	6	5	0	1			0	0
2020	**16**		**2**		**0**	**1**	**0**	
	7	9	0	2			0	0
2021	**12**		**2** (1 pending)		**0**	**0**	**0**	
	4	8	0	1			0	0
2022	**9**		**0**		**0**	**0**	**0**	
	2	7	0	0			0	0
2023	**11**		**1** pending		**0**	**0**	**0**	
	5	6	--	--			0	0

The only ECJ's order stating on the admissibility under Article 58a Statute relates to a BoA's decision first issued back in 2020. However, the order refusing the appeal to proceed was rendered just recently[18].

ECHA Agency has made use of the possibility to rectify or withdraw in its entirety the initial decision, as provided for by Article 93(1) of the REACH Regulation. In some cases, the appeals were dismissed due to supervened amendment to the original decision by the Agency by integration of an allegedly lacking motivation[19]. However, this does not entail a new approach by the Agency, as other examples can be found in

[18] Court of Justice, May 28th 2024, case C-79/24 P, *Cruelty Free Europe* v *ECHA*, ECLI:EU:C:2024:430.

[19] Decision of ECHA Board of Appeal of 22 August 2022 in case A-005-2022, *Arkema France S.A., France* v *ECHA*; decision of ECHA Board of Appeal of 6 October 2022 in case A-007-2022, *SoftOx Solution AS* v *ECHA*.

previous case law[20]. Even more interesting, in one case the dismissal was justified upon the fact that the contested decision had been revoked by the Agency itself due to "deficencies in the Agency's assessment of the relevant available information"[21].

f) SRB's Appeal Panel

Year	**BoA decisions**		**Appeals before GC**		**Appeals before ECJ**	
	Uphold	*Reject*	*Upheld*	*Rejected*	*Upheld*	*Rejected*
2018	**17**		**1**		**0**	
	12	5	0	1	0	0
2019	**15**		**0**		**0**	
	4	11	0	0	0	0
2020	**8**		**0**		**0**	
	2	6	0	0	0	0
2021	**1**		**0**		**0**	
	0	1	0	0	0	0
2022	**3**		**0**		**0**	
	2	1	0	0	0	0
2023	**9**		**0**		**0**	
	5	4	0	0	0	0

The Table depicts a not homogenous trend, marked by a quite intense activity from 2017 to 2019, followed by an overall lightening in the following years.

The occasional surges might be correlated with higher workload that hit the Appeal Panel after important resolution decisions adopted by the SRB. In fact, while it is true that the adoption of resolution schemes is not *per se* an act subject to challenge before the Appeal Panel, nonetheless it prompts the filing of requests of access to documents by concerned investors. This has repercussions on the duration of proceedings as well, as it will be further discussed below.

In spite of a marginal gain in 2023 (9 cases concluded), one might infer that the workload before the Appeal Panel has been decreasing over

[20] For further references, see A. VOLPATO, E. MULLIER, *The Board of Appeal of the European Chemicals Agency at a Crossroads*, in M. CHAMON, A. VOLPATO, M. ELIANTONIO (eds.), *Boards of Appeal of EU Agencies Towards Judicialization of Administrative Review?*, Oxford, 2022, p. 90.

[21] Decision of ECHA Board of Appeal of 25 April 2023 in case A-002-2023, *Velsicol Chemical Ireland Ltd., Ireland* v *ECHA*.

the last years. This is further confirmed by the latest activity of the Panel: in 2024 four decisions have been issued so far. This might suggest that the latest resolution decision will not pave the way to another surge in the Appeal Panel's activity.

g) ESAs' Joint Board of Appeal (JBoA)

Year	**BoA decisions**		**Appeals before GC**		**Appeal before ECJ**	
	Uphold	*Reject*	*Upheld*	*Rejected*	*Upheld*	*Rejected*
2018	**0**		**0**		**0**	
	0	0	0	0	0	0
2019	**2**		**0**		**0**	
	1	1	0	0	0	0
2020	**3**		**0**		**0**	
	0	3	0	0	0	0
2021	**3**		**0**		**0**	
	0	3	0	0	0	0
2022	**1**		**0**		**0**	
	0	1	0	0	0	0
2023	**1**		**1** (pending)		**0**	
	0	1	--	--	0	0

h) ACER's BoA

Year	**BoA decisions**		**Appeals before GC**		**Appeals before ECJ**	
	Uphold	*Reject*	*Upheld*	*Rejected*	*Upheld*	*Rejected*
2018	**1**		**1**		**1**	
	0	1	1	0	0	1
2019	**4**		**1**		**0**	
	1	3	1	0	0	0
2020	**7**		**3**		**2** pending	
	2	5	1	2	**--**	**--**
2021	**7**		**8** (7 pending)		**0**	
	1	6	0	1	0	0
2022	**4**		**2** (pending)		**0**	
	1	3	--	--	0	0
2023	**6**		**5** (pending)		**0**	
	0	6	--	--	0	0

All seven pending appeals introduced in 2021 contested the same Decision[22]. From a substantive point of view, it would not appear that the *Aquind* judgement has led to an increased rate of annulments, but rather to a stricter duty to state motivation and, consequently, a deeper scrutiny from the Board.

3. Review of CJEU rulings on Agencies' decisions falling outside BoAs' competence

The 'untapped potential' of Agencies' BoAs has been already widely discussed by scholars and it refers to the possibility to extend the BoAs' powers to all the acts adopted by the Agency to which it belongs (and not only a selection thereof), to actions others than that of annulment, to engage into a more innovative approach on the capability of technical acts to produce legal effects, so as to expand the reviewability of EU Agencies' soft law[23].

Indeed, by broadening the BoAs' mandate not only the CJEU would be further discharged of its workload, but a thorough review of more Agencies' acts would be ensured as well, especially whenever their adoption entails complex technical or scientific assessments. In such domains, the CJEU has always refrained from plunging into a comprehensive review, limiting itself to the ascertainment of a 'manifest error' or a 'misuse' of the discretion conferred to the body. Conversely, technical expertise provided by Boards may constitute a remedy to such blind spots, improving Agencies' accountability[24].

As the theorical aspects have already been discussed, this research intends to delve into the quantitative aspect, focusing in particular on how many acts adopted by EU Agencies are challenged directly before EU Courts, bypassing BoAs. As Boards have always been designed to deal

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[22] Decision of ACER Board of 28 May 2021 in case A-001-2021, *Commission de regulation de l'énergie (CRE) et al.* v *ACER*.

[23] For an overview, C. TOVO, *Le agenzie decentrate dell'Unione europea*, Naples, 2016, p. 353; J. ALBERTI, *Le agenzie dell'Unione europea*, Milan, 2018, p. 213. On the ESA's JBoA and the SRB's Appeal Panel, M. CHAMON, D. FROMAGE, *Between Added Value and Untapped Potential: the Boards of Appeal in the field of EU Financial Regulation*, in M. CHAMON, A. VOLPATO, M. ELIANTONIO (eds.), *Boards of Appeal of EU Agencies, cit.*, p. 30. On the reviewability of ESMA's soft law under Article 263 TFEU, M. VAN RIJSBERGEN, *Legitimacy and Effectiveness of ESMA's soft law*, Cheltenham, 2021, p. 256.

[24] On the financial regulatory framework, M. BOŽINA BEROŠ, M. BEROŠ, *The Single Resolution Board: What about Accountability?*, in J. POLLAK, P. SLOMINSKI (eds.), *The role of EU Agencies in the Eurozone and Migration Crisis*, London, 2021, p. 140. On the gaps within ECHA's BoA competence, A. BARTOSCH, *Sogelma II*, in *Europäische Zeitschrift für Wirtschaftsrecht*, 2010, p. 441.

with litigation triggered by non-privileged applicants, actions before the CJEU brought by Member States are not taken into account, as they do not amount to an example of 'untapped potential'. Still, the numbers are negligible as currently two cases are pending against ACER, both brought by Germany[25] and only two rulings involving ECHA have been delivered so far[26]. Case T-540/20, *France* v *SRB*, was recently closed on July 20th 2024, hence, it falls outside the scope of research.

It bears noting that some domains have been excluded from the scope of research. First of all, as this contribution intends to focus on direct actions, preliminary rulings questioning Agencies' acts validity have not been included. While we acknowledge the existence of important precedents, such as the *FBF* case[27], for the sake of homogeneity – and given a more complex traceability of preliminary proceedings – this contribution only addresses direct actions. The litigation on civil service matters is purposely excluded from the scope of research as well, since this domain is typically dealt with by the CJEU as an autonomous policy field. Judgments are classified according to date of their issuing.

3.1 Rulings issued by the GC (and the ECJ) on Agencies' decisions falling outside BoAs' competence

The following Table refers to cases already decided by the GC and by the ECJ. The rulings taken by the latter are mentioned in brackets.

Year	**EUIPO**	**CPVO**	**EASA**	**ERA**	**ECHA**	**SRB**	**ESAS**	**ACER**
2018	0	0	0	0	5	2	0	0
2019	0	0	0	0	5 (1)	3	0	0
2020	0	0	0	0	3	3 (1)	0	0
2021	0	0	0	0	3 (1)	1 (6)	1	0
2022	0	0	0	0	2	7 (4)	0	0
2023	0	0	0	0	1 (3)	19 (1)	0	0

The following Table offers a more detailed overview, pointing out the outcome of the rulings rendered by the GC and by the ECJ. As in the table before, the latter ones are those in brackets.

[25] General Court, appeal of May 2nd 2019, case T-283/19, *Germany* v *ACER*; appeal of September 28th 2023, case T-612/23, *Germany* v *ACER*.

[26] General Court, September 20th 2019, case T-755/17, *Germany* v *ECHA*, ECLI:EU:T:2019:647; September 15th 2021, case T-127/20, *France* v *ECHA*, ECLI:EU:T:2021:572.

[27] Court of Justice, July 15th 2021, case C-911/19, *Fédération bancaire française (FBF)* v *Autorité de control prudentiel et de résolution (ACPR)*, ECLI:EU:C:2021:599.

Year	**ECHA**		**SRB**		**ESAs**	
	Upheld	*Rejected*	*Upheld*	*Rejected*	*Upheld*	*Rejected*
2018	**5**		**2**		**0**	
	1	4	0	2	0	0
2019	**5 (1)**		**3**		**0**	
	0	5 (1)	3	0	0	0
2020	**3**		**3 (1)**		**0**	
	0	3	3	0 (1)	0	0
2021	**3 (1)**		**1 (6)**		**1**	
	0	3 (1)	0 (2)	1 (4)	0	1
2022	**2**		**7 (4)**		**0**	
	0	2	0 (2)	7 (2)	0	0
2023	**1 (3)**		**19 (1)**		**0**	
	0	1 (3)	7	12 (1)	0	0

The Tables above show that a significant part of litigation arising from ECHA's and SRB's decisions eludes the remittal of the respective BoAs.

As to rulings issued in respect of ECHA, they mostly pertain to decisions adopted pursuant to Articles 57 and 59 and including certain substances in Annex XIV of Regulation (EC) No 1907/2006[28] (13 out of 24). The second most relevant topic is the accordance of tariffs reduction for SME (5 out of total).

According to the *Curia* database, 3 cases are currently pending before the CJEU, 2 concerning substances evaluation[29] and 1 on access to documents.[30]

The Tables also deliver empirical validation of doubts raised in respect of the narrow jurisdiction of the SRB Appeal Panel[31], providing a quantitative perspective on the topic. In fact, cases mostly concern

[28] Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evalutation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC, in *OJ* L 396, 30.12.2006, p. 1 ff.

[29] See cases T-167/23, Borealis *Agrolinz Melamine Deutschland and Cornerstone v. ECHA* and case T-163/23, *Fritz Egger and others v. ECHA*.

[30] See case T-1101/23, *AQ v. ECHA*.

[31] D. RAMOS MUÑOZ, M. LAMANDINI, *Law and Practice of financial appeal bodies (ESAs' Board of Appeal, SRB Appeal Panel): A view from the inside*, in *Common Market Law Review*, 2020, p. 119 ff.

decisions on banks resolutions and *ex ante* contributions. In its latest Official Report[32] the Agency mentions that out of 250 pending cases before the CJEU on the 31st December 2023 almost a half (121) concerned SRB decisions taken in the context of the exercise of the resolution powers in relation to *Banco Popular Espanol*, *ABLV*, *PNB Banka* and *Sberbank*. 126 actions concerned decisions in the matter of *ex ante* contributions[33]. The huge disproportion between pending *affaires* and cases closed per year points out the bottleneck caused to the CJEU by the activity of the SRB. This has caused actions first introduced in 2017 to be adjudicated after more than 5 years.

The only decision pertaining to the ESAs is General Court, order of October 10th 2021, in case T-760/20, *Stasys Jakeliunas* v *ESMA*, adjudicating on the Agency's refusal to start an inquiry on potential violation of Union law.

4. Average duration of proceedings before BoAs

As to the length of the proceedings before BoAs, it bears noting that several Agencies' establishing Regulations set forth a specific time frame within which the BoA has to take the final decision. As further detailed below, however, this term is often related to the sheer deliberative part of the proceedings, i.e. to the time in which the BoA has to draft the final decision after the conclusion of the written and oral part.

Therefore, the question on the overall length of the proceedings before BoAs remains open and it has been here addressed through a case-by-case analysis that calculates the overall duration from the notice of appeal to the date of final decision. Relaunched procedures following an annulment by the CJEU are deemed as autonomous proceedings. Moreover, whenever the relevant Regulation or established practice sets a *dies a quo* other than the lodging of the appeal, this is also taken into account and presented in a different Table. As for EUIPO, given the lack of official statistics and the huge amount of yearly workload managed by the latter, following the methodology used by the Common Database on EU Agencies' Boards of Appeal this research has covered only the decisions taken by the Grand Board.

[32] SRB 2023 Annual Report, p. 51, retrievable at https://www.srb.europa.eu/system/files/media/document/2024-06-28_Annual-Report-2023.pdf.

[33] *Ibid.*

a) Overall length of proceedings before BoAs (expressed in months, from the lodgement of the appeal to the final decision)

Year	**EUIPO Gran Board**	**CPVO**	**EASA**	**ERA**	**ECHA**	**SRB**	**JBoA**	**ACER**
Time limits	*none*	*3 months*[34]	*none*	*3 months*[35]	*none*	*1 month*[36]	*2 months*[37]	*4 months*[38]
2018	22,6	12,3	9,7	--	13,4	6,3	--	2
2019	26,1	12,6	--	--	11,1	5	3,8	2,3
2020	37,1	30,7	--	--	21,8	2,5	2,3	4,2
2021	40,1	11,8	--	3,4	11,8	5,2	2,6	3,9
2022	42,1	11,9	9	--	12,4	7,8	3,2	6,9
2023	45,1	30,8	7	--	12,5	3,6	2,1	6,8

No relevant distinction could be observed between proceedings concluded with the dismissal or the upholding of the appeal.

Particularly interesting are the relevant differences among BoAs. Duration ranges from a mere couple of months (see, for instance JBoA and ERA) up to almost 4 years (see latest EUIPO Gran Board trends). This might be the result of both technical complexity of cases under scrutiny and workload which the Board is charged with. Indeed, a more far-reaching competence of the Board might be correlated with longer

[34] Article 52(1) of the Regulation (EC) No 874/2009 of the European Commission of 17 September 2009 establishing implementing rules for the application of Council Regulation (EC) No 2100/94 as regards proceedings before the Community Plant Variety Office, in *OJ* L 251, 24.09.2009, p. 3 ff.

[35] Article 62(1) of the Regulation (EU) 2016/796 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Railways and repealing Regulation (EC) No 881/2004, in *OJ* L 138, 26.05.2016, p. 1 ff.

[36] Article 85(4) of the 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, in *OJ* L 225, 30.07.2014, p. 1 ff.

[37] Article 60(2) of the Regulations (EU) Noo 1093/2010, 1094/2010, 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (EBA, ESMA, EIOPA), in *OJ* L 331, 15.12.2010, p. 12 ff.

[38] Article 28(2) of the Regulation (EU) No 2019/942 of the European Parliament and of the Council of 5 June 2019 establishing a European Union Agency for the Cooperation of Energy Regulators, in *OJ* L 158, 14.06.2019, p. 22 ff.

proceedings (see EUIPO, CPVO, ECHA, as opposed to JBoA and Appeal Panel).

Another aspect worth discussing is a seemingly inconsistent trend over the years. In fact, some columns present either a progressive surge or consecutive rises and dips. EUIPO's trend could be easily explained by the structural high demand of registrations under the EUTMR (as well as, of course, the specificity of the chamber under scrutiny in this research, namely the Grand Board). In other cases, such as ECHA's, this is due to both organisational and exogenous factors. Indeed, the 2023 Annual Report from the Chairman of the Board of Appeal provides clarifications on the 2020 'anomaly': complexity of the cases, *in itinere* changes to the composition of the Board and restrictions resulting from Covid caused delays[39].

On the other hand, the progressive rise pertaining to procedures before ACER's BoA might hint at a correlation with the *Aquind* judgement[40]. Such ruling – and the duty of full review which is prescribed therein – might have led to a more cautious approach by the BoA, resulting in a stretched duration. As a matter of fact, proceedings introduced in 2021 and 2022 had a duration which is in stark contrast with that of the previous years, in spite of a comparable workload (see above, at para 1). This trend might suggest that the Board aligned with the GC's indications on the scope of review well before the final word on the *Aquind* case given by the ECJ on the appeal case decided in 2023. Such an interpretation could explain the climb from 2, 3 months in 2019 to 6, 8 months in 2023. This correlation may be better visualized arranging gathered data according to the date of the filling of the appeal, as presented in the table below.

Year	**Avg. duration before ACER BoA (in months)**
2018	2
2019	3, 6
2020	3, 82
2021	6, 8
2022	7, 7
2023	4, 2

[39] https://echa.europa.eu/documents/10162/27315551/mb_20_2023_annual_report_boa_chair_en.pdf/6d4dcb14-6a41-dc76-5ab0-6d138da26aac?t=1690522609786.

[40] General Court, November 18th 2020, case T-735/18, *Aquind* v *ACER*, para 69.

As to 2023, the proceedings[41] were in the wake of previous BoA's decisions and CJEU rulings. The fact that the investigation had already been carried out and that the GC provided indications on point of law might account for shorter time required to issue the final decision (3 months the former, 5 months and 13 days the latter). This makes the data for 2023 not as much reliable and representative.

Conversely, the statistics related to the ECHA BoA – which also has to apply high standards of review in line with the *BASF* judgement which has been the blueprint for *Aquind*[42] – do not show similar extensions in the duration of proceedings. Even though the reasons may well be founded simply in the peculiarities of the cases and in the differences among the two policy fields, it seems relevant to point out that ECHA's BoA has a permanent nature (i.e., the majority of members is employed by the Agency on a full-time basis). This certainly helps this body in better handling its workload.

As regards the SRB, the procedures before its Appeal Panel show the same inconsistencies as to duration. The trend is marked by occasional increases, such as in 2018 (6, 3 months), 2021 (5, 2 months) and 2022 (7, 8 months). The causes may be further assessed by organizing cases on the basis of the date of their introduction and carrying out a comparison with the adoption of the most relevant resolution decisions by the Single Resolution Board.

Year	**Duration of the appeal from its lodging (in months)**
2018	6, 3
2019	2, 5
2020	2, 64
2021	5
2022	7, 8
2023	3, 33

The Table enables the reader to locate more accurately the origin of backlogs. In fact, the most time expensive cases were introduced back in 2018 and 2022. Resolution Decisions of *Banco Popular* and *Sberbank* date back respectively to 2017 and 2022. This, together with the fact that in 2017, 2018, 2019 and 2023 the SRB has adopted more decisions compared

[41] Decision of ACER Board of Appeal of 21 April 2023 in case A-004-2019_R, *MEKH and FGSZ* v *ACER*; decision of ACER Board of Appeal of 7 July 2023 in case A-003-2019_R, *BNetzA* v *ACER*.

[42] General Court, September 20th 2019, case T-125/17, *BASF* v *Germany*, ECLI:EU:T:2019:638.

to other years shows that sudden workload increase indirectly linked to resolution decisions negatively impacted on swiftness granted by the Appeal Panel.

Finally, the limited workload of the EASA and ERA's BoAs makes it difficult to describe a trend.

b. Do BoAs respect the maximum length of the proceedings set forth in their establishing Regulations (if any)?

As anticipated above, some Regulations provide that the proceedings before BoAs shall not exceed specific time-limits and, to this end, establish a *dies a quo* other than the lodging of the appeal. In the case of EASA, despite lacking a clear legal basis, by established practice the appeal is deemed to have been lodged after the conclusion of an interlocutory phase in occasion of which the Agency may revoke, modify or hold its decision. For the CPVO Board of Appeal, the starting point is the end of the oral proceeding.[43] For the SRB Appeal Panel, the time limit starts from the completion of evidence by the parties.[44]

The following Table calculates the length of the proceedings starting from that other circumstance, assessing whether BoAs respect the time limits set forth in their establishing Regulation.

Year	**EUIPO**	**CPVO**	**EASA**	**ERA**	**ECHA**	**SRB**	**JBoA**	**ACER**
2018	*As above*	0,5 months	6,7 months	*As above*	*As above*	20 days	*As above*	*As above*
2019		2,5 months	--			15 days		
2020		2,1 months	--			10, 2 days		
2021		0,7 months	--			14, 3 days		
2022		2 months	7 months			20 days		
2023		2 months	6,3 months			2, 5 days		

[43] Article 52(1) of the Regulation (EC) No 874/2009 of the Commission, *cit.*

[44] Article 20 of the Rules of Procedure of the SRB Appeal Panel, available at https://www.srb.europa.eu/en/about/srb-appeal-panel/procedure.

The imposition of a *dies a quo* other than the lodging of the appeal – whether be it by provision (CPVO and SRB) or by established practice (EASA) – significantly curbs down the duration. This is especially true for CPVO's BoA and the SRB Appeal Panel, whose time limit refers to the sheer deliberative part. More in detail, before the Appeal Panel the deliberative part only accounts for a marginal fraction of the total duration of the proceeding. This may suggest that the investigation phase is the most time expensive.

5. Duration of proceedings before the CJEU

Another aspect worth assessing is the impact in terms of swiftness of a prior review carried by a BoA on the following appeals before the CJEU. The Tables below show the differences in length between appeals contesting a decision issued by a Board of Appeal and other actions brought directly before the EU Judiciary (last column on the right). It bears noting that data on direct actions before the CJEU are extracted from the 2022 and 2023 Annual Reports drafted by the Court of Justice.

a) Length of appeals before the GC against BoAs' decisions (in months)

Year	**EUIPO Gran Board**	**CPVO**	**EASA**	**ERA**	**ECHA**	**SRB**	**ESAs**	**ACER**	**Avg. GC**
2018	16,6	--	1,7	--	--	--	--	--	20
2019	--	--	--	--	31,1	--	--	27,7	16,9
2020	--	14,6	--	--	21,1	--	--	20,9	15,4
2021	--	15,6	--	--	--	--	--	--	17,3
2022	--	--	--	--	--	--	--	34,9	16,2
2023	10,1	--	--	--	32,1	--	--	28,4	18,2

As to SRB's Appeal Panel, only a single order from the CJEU could be reviewed. Case T-514/18, *Antonio della Valle Ruiz et al.* v *SRB*, was first introduced by appeal in August 2018. The action was ultimately discontinued by the claimants, leading to removal from the register by order of January 18th 2024[45]. No decision on substantive matters have been taken.

[45] General Court, January 18th 2024, case T-514/18, *Della Valle Ruiz and other* v *SRB*.

b) Length of further actions before the ECJ against a GC ruling delivered on the basis of a BoA decision (in months)

Year	**EUIPO Gran Board**	**CPVO**	**EASA**	**ERA**	**ECHA**	**SRB**	**ESAs**	**ACER**	**Avg. ECJ**
2018	--	--	1,6	--	--	--	--	--	13,4
2019	18,5	--	--	--	--	--	--	--	11,1
2020	--	--	--	--	--	--	--	--	13,8
2021	--	--	--	--	--	--	--	--	15,1
2022	--	--	--	--	--	--	--	--	11,9
2023	--	--	--	--	--	--	--	24,5	13,9

From these data, Boards of Appeal stand out for delivering swift decisions. In spite of a general trend towards the extension of proceedings' duration, BoAs' responsiveness is still far greater than that of EU Courts. Nonetheless, whenever a decision issued by a BoA is further challenged before the GC, the time frame significantly stretches, as far as 34,9 months. Moreover, this trend seems to concern mainly those Agencies (and respective BoAs) involved in highly technical scientific and economic assessments, namely ECHA and ACER.

On the one hand, this is not surprising, given the fact that BoAs have been established exactly for reaching these results (sometimes setting forth specific time-limits, as discussed above) and given their very limited workload. On the other hand, the increased resources brought by the doubling of the General Court as well as the fact that both EU Courts can rely upon the preliminary assessment of facts and findings made by the BoAs raise some doubts on the former's efficiency, at least in the highly technical policy fields in which BoAs operate.

Moreover, the added value given by these latter bodies is demonstrated also by the further increase in the average length of the proceedings pending before EU Courts in absence of a prior review by a BoA (which happens in the cases, discussed above, where the power to review the legitimacy of an act of those Agencies has not been given to BoAs, falling directly and solely within the jurisdiction of the EU Judiciary).

5.1. Length of proceedings before the GC (and the ECJ, in brackets) in absence of prior review by a BoA (in months)

Year	**EUIPO**	**CPVO**	**EASA**	**ERA**	**ECHA**	**SRB**	**ESAs**	**ACER**
2018	--	--	--	--	19,9	21,2	--	--
2019	--	--	--	--	21 (18,7)	41,3	--	--
2020	--	--	--	--	15,5	39,2 (13,4)	--	--
2021	--	--	--	--	24,4 (25,1)	25,3 (17,7)	9, 8	--
2022	--	--	--	--	19,9	53,1 (17)	--	--
2023	--	--	--	--	13,2 (23,5)	36,1 (13)	--	--

As already discussed above, the most relevant – and time expensive – litigation before the CJEU stems from SRB's decisions, which for the most part elude the Appeal Panel's jurisdiction. The results of the research show that serial litigation prompted by banks resolution may take many years to be addressed by the GC in the first place. Moreover, as the majority of pending cases still concern the *Banco Popular* resolution, it is likely that future statistics might reach even higher values. While the current absence of comparable case law before the Appeal Panel prevents any attempt to forecast how much time would take the appellate body to adjudicate on matters of banks resolutions, one can not neglect that the Appeal Panel still enjoys greater technical specialization as well as human resources capable of tackling such task. Moreover, contrary to the constant flow of appeals brought before the CJEU, the Appeal Panel's activity is densely concentrated in defined timeframes, allowing for the adoption of the necessary organisational measures. In any case, as entrusting the Appeal Panel with a far reaching competence would require substantial amendments to the founding Regulation, the body's structure could be re-devised accordingly, for example requiring a full-time commitment from its members. These considerations may persuade that endowing the Appeal Panel with the power to review all SRB's decisions would indeed positively affect responsiveness.

The second most relevant source of litigation are decisions adopted by ECHA. Actions brought against the introduction of a substance in the List under Annex XIV (Article 57 and 59 of the REACH Regulation) led to the longest proceedings, lasting up to almost 3 years.

6. Conclusive remarks

The quantitative analysis of BoAs workload in the years 2018-2023 has confirmed the great diversity which characterizes the functional and operational aspect of such bodies. Workload is massively concentrated in field of intellectual property, whereas in other sectors, such as aviation and railway, litigation is almost non-existent. In addition to that, the analysis of the cases that are brought directly before EU Courts, circumventing the review by BoAs, has demonstrated that these latter bodies do have a certain untapped potential, particularly in the fields of chemicals, banking resolution and finance. Expanding the acts reviewable by BoAs in these policy fields would contribute in easing the pressure on the CJEU, while enhancing the overall review offered to individuals, ensuring an extra level of specialised scrutiny.

These remarks further shore up the objections which have been raised in regard to the extension of the filter under Article 58a Statute of the Court of Justice to ACER, SRB, the ESAs and ERA. If BoAs' powers and competences are not expanded, such reform seems to be set to produce marginal results, at least from a purely quantitative perspective.

Overall, BoAs have proven to be a valuable resource when it comes to address highly technical assessments and regulatory measures adopted by Agencies. This is demonstrated by the low rate of appeals and subsequent dismissals by the GC.

Research on proceedings' length shows that most of the BoAs abide by the time limits set forth by their establishing Regulations, outperforming the General Court. This holds true even in the light of the discussed impact of *Aquind*. This suggests that BoAs can amount to a fast side-track to traditional means of judicial protection. However, length considerably stretches whenever BoAs' decisions are further challenged before the GC. Nonetheless, as it was already noted above, most of the litigation is closed before the Boards without the need for the CJEU to state on the matter, thus offering to individuals a swift and valuable response to their needs.

PART II

BOARDS OF APPEAL, STANDARD OF REVIEW AND THE RIGHT TO AN EFFECTIVE JUDICIAL PROTECTION

ROUNDTABLE DEBATE

STANDARD OF REVIEW AND THE RIGHT TO AN EFFECTIVE JUDICIAL PROTECTION: A REFLECTION FROM THE EUIPO'S PERSPECTIVE

Lo standard di controllo e il diritto a una tutela giurisdizionale effettiva: una riflessione dal punto di vista di EUIPO

Le niveau de contrôle et le droit à une protection juridictionnelle effective : une réflexion du point de vue de l'EUIPO

GORDON HUMPHREYS*

TABLE OF CONTENTS: 1. Introduction. – 2. How does the EUIPO Boards of Appeal scrutinise Agency decisions? – 3. How Article 58a of the Statute of the Court of Justice changed the level of scrutiny at the EUIPO Boards of Appeal? – 4. Are the EUIPO Boards of Appeal equipped to perform a deep(er) scrutiny? – 5. Has *Aquind* affected the relationship between the EUIPO Boards of Appeal and the General Court?

1. Introduction

This contribution will follow the agenda prepared by Prof. Alberti for coordinating the debates of the Roundtable and, thus, I will address those issues one by one.

2. How does the EUIPO Boards of Appeal scrutinise Agency decisions?

The EUIPO Boards of Appeal are composed of five individual Boards. Four Boards deal exclusively with trade mark matters and are each composed of four members and one chairperson. One Board deals with design cases and is composed of members from various trade mark Boards

* President *ad interim* of the EUIPO Board of Appeal. The views and opinions expressed in this article are those of the author. They do not purport to reflect the views or opinions of the Agency.

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who come together *ad hoc* for the design cases. Trade mark cases represent the main area of business (with design decisions constituting some 106 appeal decisions out of 2621 decisions notified by the Boards in 2023). Currently, the chairperson of the second Board of Appeal also acts as chairperson of the design Board.

In all regular decisions, a Board sits as a panel of three members (two members and one chair)[1]. The chairperson of each Board participates in all decisions taken by his or her Board. The two other members of the panel rotate from among the members of the individual Board concerned. There are also single member decisions (which, in practice, are reserved for inadmissibility decisions and decisions that formally close proceedings where the parties have reached a negotiated settlement). In addition, decisions of the Grand Board are taken as a panel of nine.

Decisions are taken by majority. Members of the Boards of Appeal are both independent and neutral insofar as decision taking is concerned[2]. Independence is not absolute. The Boards are regarded as a department of the EUIPO – both managerially speaking and administratively speaking. However, decision-making independence is guaranteed by a number of safeguards. For example, members and the chairpersons that sit on the three-person panels must recuse themselves if they feel that there is any conflict of interest, and they may be objected to by the parties. It is also possible for the parties to object to their participation on the ground of lack of neutrality. In either case, the remaining members of the Board, or a different panel, will decide on whether that objection is sustainable or not.

Any party who is adversely affected by a decision taken before the first instance of the EUIPO may file an appeal against that decision. Appeals are firstly assessed for their admissibility by the Board of Appeal.

The work of the EUIPO Boards of Appeal is divided into *ex parte* and *inter partes* cases. The majority of the work performed involves *inter partes* appeals. Based on 2023 figures, it currently stands at about 73% of the work of the Board, meaning that most proceedings before the Boards of Appeal are adversarial. The corollary of that is that the Board seized of an *inter partes* case can only look at the facts and arguments brought by the parties on appeal. Obviously, the Board can also rely on well-known facts – that is, facts that are known by everybody and, to that extent, can go to beyond the facts and arguments adduced. In addition, the Boards apply the case of both the Court of Justice and the General Court, and also have

[1] See Article 165(2) of the Regulation (EU) n. 2017/1001 of the European Parliament and of the Council of 14 June 2017, on the European Union trade mark, in *OJ* L 154, 16.06.2017, p. 1 ff.

[2] *Ivi* Article 166.

a vast body of their own case law going back to 1997, with which they strive to be to be consistent. Nevertheless, subject to these additional considerations, the decision-taking Board must stay within the confines of the facts, arguments (claims), and evidence brought forward by the parties in their appeal.

For *ex parte* cases, the situation is different. The decision-taking Board is able to make a *de novo* assessment of the case and is not simply bound to a control of legality[3]. However, the new assessment cannot, in principle, be *reformatio in pejus* – meaning that the appellant should not be put in a worse position than had the appeal not been made.

In *ex parte* cases, there is only one party to the proceedings, namely, the applicant for an EU trade mark or design. While, in this context, the decision of the Agency to refuse registration of such IP rights is based on one or more so-called 'absolute grounds', it is possible for the Board to raise another absolute ground of refusal that may substitute or be in addition to those already raised. In those circumstances, the deciding Board has the possibility of either pursuing the examination and assessment of that new ground itself (so-called 'functional continuity')[4] or, alternatively, of remitting the case to the first instance examiner for further prosecution. Remittal is also quite common where the contested decision has an insufficient statement of reasons (including contradictory reasoning), such that neither the appellant nor the Board is in a position to fully understand the reasons and assess their correctness. In addition, reasons should be stated in the Board's decision as to why it is exercising its discretion in one way or another.

There is also the possibility of cross appeals in *inter partes* cases. This is because in such cases there is not necessarily always a winner and a loser. Oppositions and cancellations may be partially successful – meaning that the contested trade mark may be refused or cancelled for certain goods and services it covers but not for everything.

One of the biggest challenges faced by the Bords is the admissibility of belated evidence in *inter partes* cases. There is a discretion to accept it or not. Generally-speaking, if the evidence that is brought forward on appeal supplements what has already been adduced at first instance, then it is admissible. If it is completely new, then it is likely to be inadmissible – unless it was not previously available. However, the boundary between

[3] See Article 165(2) of the Regulation (EU) n. 2017/1001, of the European Parliament and of the Council of 14 June 2017, on the European Union trade mark, *cit.*

[4] The principle of functional continuity was first affirmed by the General Court in the judgment of June 8th 1999, case T-163/98, *The Protector and Gamble Company* v *OHIM (Baby-Dry)*, ECLI:EU:T:1999:145, para 38, due to the appointment and removal procedures of the members of the EUIPO Boards of Appeal.

new and supplementary (i.e. building on evidence that has been previously raised) is not always easy to determine. This a factor that distinguishes us from the General Court, where no new, supplementary or any other sort of belated evidence can be admitted.

Finally, in taking the best quality decisions it can, the Boards must be mindful of multiple considerations, including factors such as: fulfilling the duty to state reasons by ensuring clarity and precision and avoiding contradictory reasoning, observing the right to be heard and the right of defence, integrating into the application of EU trade mark and design law considerations from other areas of law such as freedom of expression, taking account of public interest considerations, smooth administration and procedural economy.

The need for quick resolutions, combined with the sheer volume of work, must be carefully balanced with quality. Part of that quality consideration is the need for clarity and simplicity. While self-representation (i.e. acting without a legal representative) before the Boards is not the norm, it is a possibility. Board decisions must be understandable to laypersons.

In some respects, the life of the EUIPO Boards of Appeal is made easier than that of their counterparts in other Agencies by the fact that the subject matter of the decisions at the EUIPO is not technical. Even designs are not usually overly technical, since it is the outward appearance of the design that is primarily considered. Therefore, there is little excuse for over complication and over use of legal or technical jargon.

3. How Article 58a of the Statute of the Court of Justice changed the level of scrutiny at the EUIPO Boards of Appeal?

The EUIPO BoAs has always been in-depth. Perhaps the great difference between the subject-matter dealt with by the EUIPO BoAs, as compared with that handled by the Boards in other Agencies, is that trademarks, and even designs, are not as technical. Nevertheless, the EUIPO BoAs have made some 'tweaks' to the level of scrutiny performed. There is a realisation that the importance of the filtering role performed by the EUIPO BoAs has increased significantly. It is now very difficult to further appeal judgments of the General Court (in cases originating from the EUIPO) to the Court of Justice. That means that the EUIPO and its Boards must sit out and significantly reduce the number of disputes that come before the General Court (which already amount to about a third of the Court's case load), otherwise that Court could be flooded.

Bearing in mind that almost 90% of appeals go no further than the EUIPO Boards of Appeal, it is important to reassure parties that there is

a full and fair appeal process. Therefore, one of the things being considered is the need to increase the number of oral hearings that take place before the EUIPO Boards of Appeal. In addition, the General Court changed its practice of almost always automatically holding oral hearings and decided to grant them only upon request of the parties and when justified. This led the EUIPO to believe would be fewer oral hearings. However, it actually seems that oral hearings are nearly always granted when requested by the parties and that the General Court, in trade mark and design matters at least, is actually having slightly more oral hearings than before. So, perhaps the pressure on the EUIPO BoAs to hold more oral hearings to compensate for the General Court, has been lifted for the time being.

Greater use is also being made of the Grand Board, which is an enlarged board of nine members. The president of the BoAs sits as chairperson and all four chairpersons of the individual Boards sit as members on every case of the Grand Board. In addition, four ordinary members, drawn on a rotating basis from the individual Boards, make up the remainder of the composition of that Board.

Cases are referred to the Grand Board where there is diverging case law of either the Boards themselves or of the General Court, or where the issues to be determined are of particular legal or other importance. Decisions of that Board are binding on the individual Boards and on the first instance of the EUIPO. It is therefore a wonderful tool for ensuring coherence and consistency.

Further efforts to promote greater coherence and consistency have materialised in the creation of the 'Consistency Circles' within the Boards. These 'Circles' study and analyse specific trade mark and design legal topics in-depth and try to identify case law trends and prevailing principles. These findings are recorded in 'Consistency Circle' reports on chosen topics. Certain members of individual Boards have volunteered to head these 'Circles' and are assisted by support staff (including legal assistants) from within the BoAs.

In addition, networks – such as the Judicial Quality Assurance and Legal Practice Panel (comprised of IP judges from Member State courts) and the Appeal Bodies Network (composed of the appellate organs of national IP offices in the EU) – feed into the Consistency Reports, with comments and input. This further contributes to making sure that the reports are as useful as possible, even though they are designed as an aid to research and are in no way intended to act as guidelines or instructions for members or chairpersons.

Ensuring a high degree of predictability is fundamental from the perspective of the parties. If they see us as the EUIPO Boards of Appeal

being coherent and consistent, they may be less inclined to appeal further to the General Court. The higher the quality of decisions of the Boards, the less chance there is of success before the General Court. At present, of the 11% of decisions of the Boards that are appealed to the General Court, over 87% of them were upheld in the judgments of that Court.

Where annulments occur, they are usually on procedural matters. The Boards strive to learn from the judgments of the of the General Court and try to reduce the margin for making errors.

The EUIPO is a party to all appeals before the General Court. The Agency generally defends the decisions of the Boards. However, they do not necessarily have to defend if they think that the deciding Board has taken a route that has departed from Office practice in a way that is unreasonable, or which could cause problems for first instance examiners. In such cases, they may either not enter a defence, or they may state that they 'leave the matter to the wisdom of the court'. At present, the EUIPO agents work under the managerial leadership of the Boards of Appeal and meetings are held to try and coordinate the position to be adopted in cases that are considered sensitive. Efforts are made to arrive at a common understanding, and, if necessary, votes are cast by the chairpersons and other senior staff as to whether a particular case will be defended and the manner of that defence.

As more IP competences start to come to the EUIPO in the future through legislation in the areas of geographical indications, standard essential patents and supplementary patent certificates, the Boards may find that the subject-matter they are involved with becomes more technical. Whether this will have ramifications for the level of scrutiny currently performed, remains to be seen. It may also increase the use of alternative dispute resolution (particularly mediation and conciliation), currently offered to parties coming before the Boards of Appeal and thus act as a further filter to reduce the volume of appeals going from the EUIPO BoAs to the General Court.

4. Are the EUIPO Boards of Appeal equipped to perform a deep(er) scrutiny?

As can be seen from the above, the reply to the question if the EUIPO Boards of Appeal are equipped to perform a deep(er) scrutiny can only be in the affirmative.

The BoAs benefit from a high-quality staff, with very rigorous selection and appointment procedures for the president, chairpersons and members. The members and chairpersons of EUIPO BoAs are fully independent and their mandate lasts for 5 years, renewable for successive

5-year periods up until retirement age is reached. The mandate of the president of the BoA is for a term of 5 years and may only be renewed once[5]. They fall within the scope of Protocol n. 7 of the TFEU on Privileges and Immunities and/or the EU Staff Regulation, even though not as officials of the EU but as temporary staff – with all the safeguards that this implies.

All the members currently have a legal background. While it is theoretically possible to have one (or even two) technically qualified members in the regular three-person decision-taking panel, this does not happen in practice. In the whole 27 years of existence of the EUIPO BoA there has only been one non-legally qualified member. That person was qualified as an architect.

All staff are IP specialists and some have even been national judges in this area. There is no distinction between legally and technically qualified members, except that non-legally qualified persons may not take single member decisions (see above). It is possible that upcoming new legislative initiatives that would confer competence on the EUIPO for different types of IP, such as geographical indications (GIs), supplementary patent certificates and standard essential patents, would require the EUIPO BoAs to rethink the need for technical expertise in the composition of Boards. While the matter is still to be discussed in-depth, there is some questioning by user groups whether the BoAs will put in place a specialist Board for GIs, in the wake of the new Regulation (EU) n. 2023/2411 on craft and industrial product GIs[6], and the expected revamping of the agricultural product, food, wine and spirits GI Regulations into one codified Regulation.

In any event, greater use of the Grand Board, oral hearings (including hybrid options), consistency circle reports and automated IT tools to facilitate drafting will all serve to ensure that the BoAs can continue to take a deep-dive into cases. Clearly, it is not easy to balance the sheer volume of appeals (2621 notified decisions in 2023, produced by 20 rapporteurs) with the need for quality excellence.

Indeed, volume is a factor that weighs heavily in the work equation. It must be borne in mind that, last year, some 0.27 mio IPRs (trademarks and designs) were either filed directly at the EUIPO or designated the EU (thereby triggering the EUIPO's intervention). For both trademarks and

[5] See Article 166(2) of the Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark, *cit.*

[6] Regulation (EU) 2023/2411 of the European Parliament and of the Council of 18 October 2023 on the protection of geographical indications for craft and industrial products and amending Regulations (EU) 2017/1001 and (EU) 2019/1753, in *OJ* L 56, 27.10.2023, p. 1 ff.

designs, China is the top filer – with over 14% of trade marks being applied for by Chinese parties and nearly 25% of designs.

While Chinese parties have so far shown themselves to be reluctant litigants, that may change. To-date, Chinese parties rarely defend opposition or cancellation actions and hardly ever appeal. It would seem that, instead, they simply re-file the contested trade mark or another sign. State subsidies for trade mark protection (even abroad) and increases in attorney fees for defending IP office proceedings (as compared with mere filing work) may explain that behaviour. However, Chinese government subsidies have (and in some instances already have) come to an end. The knock-on effect may then well be to encourage Chinese parties to re-think their strategy and to start becoming more aggressive in their defence of their IP registrations at the EUIPO.

Whether the discontinuation of subsidies would discourage the current high volumes of Chinese applications at the EUIPO, remains to be seen. Nevertheless, one could probably expect that appeals of existing applications or registrations that are contested would become more likely. Combined with the new IP registration competences that are contemplated for the EUIPO, the net effect would be even higher volumes of appeals for the BoAs.

Given that nearly 90% of all appeals go no further than the BoAs, it follows that the Boards help shape EU trade mark and design law. Yet shaping that law is becoming increasingly more difficult as the complexity of cases increases. Although the subject-matter the EUIPO BoAs face is less technical than that coming before the Boards of other Agencies, the legal difficulty of appeal cases is growing. Party submissions are becoming more voluminous. The quantities of evidence adduced are also significantly higher than in the past, resulting in Board decisions that are lengthier (averaging some 30 pages for appeal decisions regarding cancellation of trade marks).

Why is this? The probable causes are twofold: the maturity of the trade mark register and AI. The EUIPO started to register trademarks almost 30 years ago.

Regarding the first consideration, one must have in mind that once a trade mark has been on the register for a minimum of 5 years, it may be put to proof of use. The same applies to earlier rights that are used to challenge EU trade mark applications. As time passes, more and more trademarks become vulnerable to being put to proof of use. That use requirement necessitates adducing evidence that the registered trade mark has been used for each and every product and service for which it is registered. Since there is no requirement to use a mark at the time of application, applicants tend to apply for more goods and services than they

will actually end-up using. Naturally, they will endeavour to demonstrate use of their mark for as many goods and services as possible. That endeavour often results in voluminous documentation and considerable debate about whether actual use of a particular product has been shown or whether it is in fact use of a sub-category (e.g. evidence may tend to demonstrate use of a registration covering 'clothing' for 'men's underwear' only).

As to the second consideration, the body of case law in trademarks and designs that has been generated by the Court of Justice, the General Court and the EUIPO BoAs has grown exponentially over the last two decades. The possibilities that advance in AI offer for making increasingly more precise searches mean that litigants before the Boards cite more case law than ever before and may even draw on other areas of law, such as human rights. The net result is an increase in argumentation, with the consequent need for the decision-taking Board to address each and every argument.

The effect of AI is a two-way street for both parties to appeal proceedings and the decision-taking Board itself. While possibilities for legal research are enhanced for practitioners, the BoAs are also harnessing the potential of AI. One recent example is the goods' comparison tool that is currently available to EUIPO examiners in opposition and cancellation cases and is now being developed to adapt to the needs of the BoAs. Essentially, this tool automatically trawls through all available decisions of the EUIPO in which the same or similar goods and services (to the ones at issue in a particular case) have already been compared in a previous case. The tool identifies the previous cases, the result of the comparison and, in the event of any divergence, expresses in percentage terms the support for a particular conclusion. In addition, the Boards have fed a number of paragraphs cited verbatim from key judgments into templates that can be used by rapporteurs, if they so wish, to facilitate the drafting of decisions. Relevant conclusions regarding case law trends and principles identified in 'Consistency Circle Reports' are also included in topic-specific templates for the same purpose.

The end result of all these efforts is that BoAs are currently coping well with the workload and delivering decisions in a timely manner (averaging 4.2 months for absolute grounds and 5.2 months for relative grounds in 2023).

Nevertheless, in making an in-depth scrutiny of case files, it can sometimes be seen that a decision offering a binary solution is not going to give satisfaction to the parties. For this reason, the Boards promote friendly settlements and actively encourage parties to avail of mediation and conciliation services offered, at no additional cost, by the EUIPO and

its Boards. While alternative dispute resolution is unlikely to ever be the main activity of the BoAs, it is a useful adjunct to the services offered to disputants and serves as an additional filter between the EUIPO and the General Court.

5. Has *Aquind* affected the relationship between the EUIPO Boards of Appeal and the General Court?

The short answer would be 'not so much'. Nevertheless, the EUIPO prides itself in having obtained first place for several years in World Trademark Reporter 'IP Office Innovation Ranking' and in aiming to be a centre of excellence in IP matters. The BoAs also try to provide the best possible service they can to the parties that come before them and thus play a full part in the image of the EUIPO. That means striving to render 'quality' decisions on appeal.

A 'quality' decision is one that is timely, makes a proper analysis of the legal issues raised, contains clear, logical and readily understandable reasoning as well as being coherent and consistent with existing relevant case law. Deep scrutiny of appeal cases is clearly an integral and vital part of that process and has always been the norm at the Boards.

The low cost of appeal to the BoAs (EUR 720 for trade mark cases and EUR 800 for designs) ensures that they continue to be a quick, accessible and inexpensive resolution forum for trade mark and design registration disputes.

The EUIPO BoAs are fully cognisant of their role as gatekeepers. An effective filtering system between the cases coming before the EUIPO and those that go on to the General Court is vital. Without it, the General Court would be in danger of being overloaded with cases that did not merit judicial intervention and were even frivolously appealed.

Just as the Court of Justice has sought to severely restrict appeals from the judgments of the General Court, so the EUIPO BoAs must ensure that only the most meritorious cases go to the General Court. To do that, the BoAs must inspire the parties coming before them with the maximum possible confidence in the professionalism and competence of this decision-making body. An in-depth scrutiny by the BoAs of the decision given by first level examiners at the EUIPO is non-negotiable.

With parties coming from all across the globe, decisions of the EUIPO BoAs may sometimes even attract media attention (e.g. trade marks concerning the war in Ukraine, such as the recent *RUSSIAN WARSHIP, GO F*CK YOURSELF* case R 438/2023-1)[7]. As a key

[7] Decision of the First Board of Appeal of EUIPO of 1 December 2023 in case R

component of the EU trade mark and design dispute resolution mechanism, it is incumbent on the BoAs to demonstrate very high standards. That cannot happen without in-depth scrutiny of every case that comes before the BoAs with a view to delivering pragmatic, legally sound decisions.

438/2023-1, now being appealed before the General Court (case T-82/24).

RAMIFICATIONS OF THE *AQUIND* JUDGEMENTS FOR 'NON-PERMANENT' BOARDS OF APPEAL

Le implicazioni della giurisprudenza Aquind
per le commissioni di ricorso 'non permanenti'

Les conséquences de la jurisprudence Aquind
pour les chambres de recours 'non permanentes'

MARCUS NAVIN-JONES*

TABLE OF CONTENTS: 1. Introduction - 2. 'Permanent' vs 'non-permanent' Boards of Appeal. - 3. Fundamental legal duty of all EU Boards of Appeal. - 4. Disconnect between non-permanent Boards of Appeal and outside bodies/institutions/courts. - 5. Non-permanent Boards of Appeal: operational arrangements. - 6. *Aquind* judgements. - 7. Securing functional independence. - 8. The potential gap between what BoAs must legally do and what they are able to do in reality. - 9. Harmonised approach? - 10. Future.

1. Introduction

Currently there are approximately 8 EU Boards of Appeal affiliated to separate EU Agencies (BoAs)[1]. Of these, 6 are so-called 'non-permanent' Boards of Appeal, and 2 so-called 'permanent' Boards of Appeal[2]. The majority of the EU Boards of Appeal are therefore non-permanent Boards of Appeal. Despite this, academic and legal debate surrounding Boards of Appeal is often dominated by a focus on the so-

* Vice-President of the CPVO Board of Appeal and former Alternate Member of the ECHA Board of Appeal. The views and opinions expressed in this paper are those of the author. They do not purport to reflect the views or opinions of the Agencies.

[1] These include: (*i*) EUIPO Boards of Appeal; (*ii*) ACER Board of Appeal; (*iii*) ECHA Board of Appeal; (*iv*) EASA Board of Appeal; (*v*) ERA Board of Appeal; (*vi*) CPVO Board of Appeal; (*vii*) the Joint Board of Appeal of the ESAs; (*viii*) the Appeal Panel of the SRB.

[2] The permanent Boards of Appeal being: (*i*) the EUIPO Boards of Appeal; and (*ii*) the ECHA Board of Appeal.

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called 'permanent' Boards of Appeal. Debate surrounding the non-permanent Boards of Appeal can be more limited.

The *Aquind* Judgments are important for all Boards of Appeal. However, the *Aquind* Judgments may be of most importance, and have the most significant ramifications, for the so-called 'non-permanent' Boards of Appeal. This article focuses on the ramifications of the *Aquind* Judgments on non-permanent Boards of Appeal, in particular the challenges facing non-permanent Boards of Appeal in the wake of those Judgments.

2. 'Permanent' vs 'Non-permanent' Boards of Appeal

Labels are often unhelpful and can create misunderstandings. Dividing EU Boards of Appeal into permanent and non-permanent Boards of Appeal is, itself, perhaps not useful. It may, for example, give the impression that a Board of Appeal can only operate on a permanent or non-permanent basis, when, in reality, this is not per se the case. A Board of Appeal can operate on 'semi-permanent' basis where, for example, at least one of the BoA members work full-time[3].

Nonetheless, the general current practice is to categorise a Board of Appeal as either having a permanent structure (i.e. as a 'permanent' Board of Appeal), or not (i.e. as a 'non-permanent' Board of Appeal).

A permanent Board of Appeal is, generally speaking, a Board of Appeal where everyone of its members[4] is employed by the Agency on a full-time basis[5] and where it has support staff working in the registry and elsewhere, also working on a full-time basis. The EUIPO Boards of Appeal are therefore a permanent Board of Appeal – employing approximately 160 people on a full-time basis[6]. The ECHA Board of Appeal is also therefore a permanent Board of Appeal – employing approximately 12 people on a full-time basis[7].

[3] Where, for example, the BoA chairperson is employed on a full-time basis.

[4] As opposed to alternate members.

[5] The Agencies have also decided to appoint individuals to work in support functions (such as in the registry, or as researchers etc) on a full time or permanent basis.

[6] This number includes: 1 President of the EUIPO BoAs; 4 chairpersons of the EUIPO BoAs; 15 members of the EUIPO BoAs; legal assistants; administrative assistance and other persons (including seconded national experts, trainees and interims etc). It also includes: those individuals working at EUIPO BoA registry (currently approximately 19 persons); those working in the EUIPO BoA president's cabinet (currently approximately 19 persons); and those working within the EUIPO BoA KIS (currently approximately 12 persons).

[7] This number includes: chairperson, the legally qualified member, the scientifically qualified member, the registrar, the 4 legal advisors, the 1 scientific advisor, and the 3

In contrast, a non-permanent Board of Appeal is, generally speaking, a Board of Appeal where its affiliated Agency has taken the view that neither the chairperson, nor any member of the Board of Appeal, should be employed on a full-time basis, and which is not supported with any full-time assistance. As such, in reality, non-permanent Boards of Appeal essentially do not exist at all, unless a Board of Appeal is convened to decide a specific appeal case. When convened to decide an appeal case, the Board of Appeal is then generally restricted in its ability to operate and function, confined to solely and only deciding the appeal case in question. Non-permanent BoAs are, therefore, not generally able to operate independently from the Agency, by taking decisions on their own general affairs. They generally cannot, for example, take decisions on: (*i*) how the Board of Appeal itself should operate generally (e.g. how the BoA should interact with other Agency and outside bodies, how the BoA budget is decided and allocated, how staff are appointed, whether BoA members receive training, whether the BoA is involved cases before the EU Courts, etc); (*ii*) how the BoA itself processes appeal cases (e.g. what its Rules of Procedure should be); (*iii*) what measures are put in place to ensure BoA members adhere to EU law (including requirements to ensure deliberations are secret, compliance with Regulation (EU) n. 2016/679, etc); and (*iv*) how BoA registry should operate and whether it should report to the BoA or the Agency. Instead, these are decisions taken by the Agencies themselves.

Why some Boards of Appeal currently find themselves operating as non-permanent Boards of Appeal, rather than permanent Boards of Appeal, or vice-versa – is an interesting question.

In the case of the EUIPO Boards of Appeal, those BoAs currently receive more than 2.500 appeal cases per year[8]. This number is approximately 25 times more cases than all the other Boards of Appeal put together. It would, of course, be currently impossible to operate the EUIPO BoAs using any other structure than a permanent one[9].

In the case of the ECHA Board of Appeal, in 2007 when the ECHA Board of Appeal was initially established, ECHA[10] estimated that there would be a very significant number of appeal cases[11]. The Board of Appeal

legal/administrative assistants.

[8] In 2021, the number of appeal cases filed before the EUIPO BoAs was approximately 2,231. In 2022, the number of appeal cases filed before the EUIPO BoAs was approximately 2,536. In 2023, the number of appeal cases filed before the EUIPO BoAs was approximately 2,535.

[9] Although with the advent of artificial intelligence, this could be an open question.

[10] Together with the European Commission.

[11] In the 2007, the ECHA Staff Model document set out the estimated number of appeal cases which the ECHA Board of Appeal would receive. These estimations

was therefore initially established with a permanent structure to address the predicted wave of appeal cases. In reality, the predicted number of appeal cases never materialised[12]. Its permanent structure today, could therefore be regarded as a result of historic circumstance, more due to accident than by design, but this would not be correct. Although the number of appeal cases has not materialised, the impact, complexity and importance of the appeal cases has necessitated its permanent organisational model.

At the same time, some of the non-permanent Boards of Appeal often deal with a comparable number of appeal cases, sometimes receiving more appeal cases, than Boards of Appeal with permanent structure. Moreover, the appeal cases dealt with by the non-permanent Boards of Appeal are in no way less complex than those dealt with by the permanent Boards of Appeal, where, for example, written legal and technical submissions can be thousands of pages in length. In many situations, appeal cases dealt with by non-permanent BoAs concern issues of high financial value – exceeding the financial value of appeal cases dealt with by permanent BoAs.

3. Fundamental legal duty of all EU Boards of Appeal

There is increasing legal consensus on the fundamental role and duties of all Boards of Appeal. All EU Boards of Appeal must decide cases independently and impartially. When deciding cases, all EU Boards of Appeal must conduct a review of the facts and law of a sufficient legal standard. That is to say, the quality of the BoA review (i.e. the nature, standard and intensity of the BoA review) must be sufficiently high and thorough, to fulfil the legal requirements. Given the legal consensus on these points, it would seem to naturally follow that EU Boards of Appeal should be put into a position where they are able to function independently so as to decide appeal cases in an independent and impartial manner. It would also seem to follow, that EU Boards of Appeal should be given the resources (time, personnel, finances, etc) to allow them to carry out reviews of sufficient legal quality.

It is in this context that non-permanent Boards of Appeal, and their respective Agencies, should likely consider the *Aquind* Judgments. More

predicted that, for example, in 2010 the ECHA BoA would receive more than 500 appeal cases, and that in 2011, 2012, 2013 the ECHA BoA would receive approximately 200 appeal cases in each of these years.

[12] In reality, the ECHA BoA has only ever received a significantly lower overall number than initially expected. In 2010, for example, there was approximately 1 case filed. In 2011, 2012 and 2013 the ECHA BoA received, in total, less than 50 appeal cases.

specifically, the *Aquind* Judgments require non-permanent Boards of Appeal to consider whether they are able to fulfil their fundamental legal role and discharge their onerous legal duties – given the organisational and administrative arrangements that EU Agencies have put in place. Or whether, alternatively, the legal requirements are now so high and onerous that there is now a mismatch between what is legally expected of non-permanent Boards of Appeal, and what they can reasonably deliver in reality – given the administrative and operational arrangements their Agencies have put in place.

4. Disconnect between non-permanent Boards of Appeal and outside bodies/institutions/courts

Non-permanent Boards of Appeal, like permanent Boards of Appeal, now form part of the EU legal justice system[13]. Appellants, and the public at large, therefore, rightly expect and depend on EU Boards of Appeal to deliver the rule of law. However, there is, generally, a significant disconnect between non-permanent Boards of Appeal and other parts of the EU justice system – particularly the Courts. Currently, there is no independent auditor or review committee of EU Boards of Appeal to ensure they are able to function independently. The general understanding of how EU Boards of Appeal in general operate can be limited. This disconnect can be particularly challenging for non-permanent Boards of Appeal. Communications between Boards of Appeal and EU Institutions (such as the Commission and Courts) is generally between permanent Boards of Appeal and those bodies – not involving direct engagement with non-permanent Boards of Appeal. Where EU Institutions engage with Agencies on Board of Appeal issues, they most often engage with the registry of Boards of Appeal – not non-permanent Boards of Appeal themselves.

One particular problem for non-permanent Boards of Appeal is the defence of their decisions before the EU Courts. For permanent Boards of Appeal, where their decisions are challenged before the EU Courts, their Agencies generally involve the permanent Boards of Appeal in those cases. This is often not the case for non-permanent Boards of Appeal. Instead, for many non-permanent Boards of Appeal, where their decisions are challenged before the EU Courts, their respective Agencies generally do not involve the Board of Appeal. This means that the interaction

[13] Having, for example, been included in Art. 58a of the Statute of the Court of Justice of the European Union (Regulation (EU, Euratom) n. 2019/629 of the European Parliament and of the Council of 17 April 2019, amending Protocol N. 3 on the Statue of the CJEU, in *OJ* L 111, 25.04.2019, p. 1 ff.).

between non-permanent BoA and EU Courts – concerning their very own BoA decisions – is generally non-existent. It also means that the non-permanent BoA decisions are particularly vulnerable to being undermined, as their defence before the EU Courts is often left to individuals or bodies who do not agree with the BoA decision and have no vested interest in upholding them per se.

5. Non-permanent Boards of Appeal: operational arrangements

The disconnect between the outside bodies and persons (including the EU Judiciary) and with members of non-permanent Boards of Appeal can be so stark as to mean the fundamental facts and challenges faced by non-permanent Boards of Appeal is not clearly understood and, indeed, misunderstood. Non-permanent Boards of Appeal are regarded as operating in the same way as permanent Boards of Appeal. Outside bodies and persons may labour under the misconception that, for example non-permanent BoA members are: employed on a full-time basis; remunerated for all their work; protected in the discharge of their duties by the EU Staff Regulations or some other legal measures. However, this is not the case in reality. Outside bodies and persons may believe that the administrative and operational arrangements in place – dictating how a Board of Appeal operates and functions in reality and whether it operates with functional independence – have been put in place by the Board of Appeal itself. However, again, this is generally not the case.

6. *Aquind* judgements

The *Aquind* Judgments follow the *BASF* and *Germany* Judgments and, before that, the *Ralf Schräder* Judgments[14]. Indeed, the Ralf Schräder Judgments are, perhaps, the starting point in understanding the evolution of what EU Boards of Appeal are, and what they are legally required to do, when deciding appeal cases.

What the *Aquind*, *BASF*, and *Germany* Judgments serve to illustrate, perhaps above all else, is that the review that Boards of Appeal must carry out when deciding appeal cases is not the same as the examination conducted by Courts. Boards of Appeal cannot generally conduct the

[14] See General Court, September 20th 2019, case T-125/17, *BASF Grenzach* v *ECHA*, ECLI:EU:T:2019:638; General Court, September 20th 2019, case T-755/17, *Germany* v *ECHA*, ECLI:EU:T:2019:647; General Court, September 18th 2012, joined cases T-133/08, T-134/08, T-177/08 and T-242/09, *Ralf Schräder* v *CPVO*, ECLI:EU:T:2012:430, paras 137 and 190 and Court of Justice, May 21st 2015, case C-546/12 P, *Ralf Schräder* v *CPVO*, ECLI:EU:C:2015:332, para 73.

same assessment as the Courts directly applying the same legal tests, and assess the facts and evidence in the same way as the Courts. Instead, Boards of Appeal have been endowed with specific discretionary powers, technical expertise, and review functions and must exercise those powers of review. This means that Boards of Appeal must, in principle, go further, in certain assessments, in their review of the facts and evidence than the courts, and also apply what are, effectively, more stringent tests in determining whether an Agency decision should be vitiated. In short, Boards of Appeal must conduct 'deep dive', in-depth assessments, particularly in certain areas of Agency decision-making – where the assessments are deeper and more in-depth than those generally expected of the Courts.

In the *Aquind* Judgments, the EU Courts compared a non-permanent Board of Appeal with a permanent Board of Appeal. Indeed, the EU Courts went one step further than that, and seemingly supported the operational and administrative arrangements in place *vis-à-vis* the non-permanent BoA on the basis that the permanent BoA received a *significantly higher* number of cases than the non-permanent BoA[15]. This is likely of particular concern to non-permanent Boards of Appeal.

It is clear that one of the permanent Boards of Appeal, specifically the EUIPO Boards of Appeal, receive a significantly higher number of appeal cases as compared to any other EU Board of Appeal. Indeed, it could be argued that the EUIPO Boards of Appeal receive a significantly higher number of appeal cases as compared to all the other Boards of Appeal put together. However, it is difficult to see that the ECHA BoA receives a 'significantly higher' number of appeal cases as compared to some of the non-permanent BoAs, such as, for example, the CPVO BoA and ACER BoA. ECHA BoA members themselves have stated that it is the complexity and importance of the appeal cases brought before the ECHA Board of Appeal which justify its permanent structure, not, per se, the number of cases it receives[16]. According to the current records, in 2023 the CPVO BoA (a non-permanent BoA) received more appeal cases that the ECHA BoA (a permanent BoA)[17]. For the EU Courts to seemingly take the view that the permanent structure of the ECHA BoA is justified on the basis that it receives a 'significantly higher' number of appeal cases (and to apparently imply that other BoAs should remain non-permanent as they, according to the Courts, do not) – is therefore problematic.

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[15] General Court, November 18th 2020, case T-735/18, *Aquind Ltd* v *ACER*, ECLI:EU:T:2020:542, para 66.

[16] See in this *Volume* A. BUCHET, *The Board of Appeal of the European Chemical Agency. Structure and Power of Review*, p. 221.

[17] See IAAPN 2023 Scoreboard.

7. Securing functional independence

Permanent Boards of Appeal have been better able, than their non-permanent counterparts, to secure administrative and operational arrangements with their respective Agencies, which ensure they are able to function independently. This should not be regarded as coincidental. For non-permanent Boards of Appeal, there is often little clarity on the competences and responsibilities of the Board of Appeal as opposed to the Agency. To minimise costs, Agencies can be inclined not to involve non-permanent BoAs even in BoA appeal cases themselves – but to retain operational control of the BoA and the BoA appeal cases. Agencies with non-permanent BoAs may treat members of their BoAs as outside experts, as opposed to Agency staff. It may be challenging for members of non-permanent BoAs to establish and maintain functional independence from their respective Agencies, in an environment where they are not informed of what is going on by Agency bodies which do not report to the BoA but the Agency – such as the BoA registries.

8. The potential gap between what BoAs must legally do and what they are able to do in reality

Fundamentally, Agencies decide how their Boards of Appeal are allowed to function and operate in reality. Agencies decide what operational and administrative arrangements are in place which Boards of Appeal must to adhere to in practice. Where the EU Courts hand down Judgments which unambiguously clarify and set out the very significant and onerous legal duties incumbent on Boards of Appeal, including the quality of the reviews which they are required to conduct, it is still, in reality, for the Agencies to decide whether the Boards of Appeal will be put into a position to comply with those legal duties in practice. Where EU Courts go one step further, and do not merely clarify the very onerous legal duties which Boards of Appeal must comply with – but start to seemingly support or legitimise the non-permanent nature of a particular BoA (and/or the administrative arrangements in place), it may tip the balance against non-permanent BoAs: requiring them to adhere to onerous legal requirements without non-permanent BoAs being able to actually achieve compliance with those onerous legal requirements due to the operational and administrative arrangements put in place by their Agencies. In other words, it risks pushing non-permanent BoAs into an impossible situation, where, on the one hand, they are legally required to conducted deep-dive assessments (even more in-depth than those carried out by EU Court in certain instances), and where, on the other hand, the

non-permanent BoAs also are required to retain, in full, their non-permanent status and operate under exactly the same administrative arrangements – where it is those very administrative arrangements which prevent the BoAs from conducting the independent and in-depth assessments required by law.

9. Harmonised approach?

They should be put into a position where they are able to decide cases independently and impartially, and where they are able to carry out thorough and deep-dive reviews consistent with the *Aquind* Judgments. The question is: how should Boards of Appeal achieve this in practice?

Non-permanent Boards of Appeal are comprised of individuals working geographically outside of their Agencies and who live and work throughout the EU. Given the absence of a permanent physical seat, it should raise fewer problems for non-permanent BoAs to join together and pool resources so that, for example, non-permanent Boards of Appeal: (*i*) used one single, central registry; (*ii*) used a common IT system for the submission of documents; (*iii*) used the same physical premises for oral hearings and ADR; (*iv*) used the same translators; (*v*) used the same website/communications tools/summary of cases/announcement of cases; (*vi*) developed common tools such as common Rules of Procedure, common template documents, (*vii*) developed common employment and financial agreements which are kept up-to-date so that BoA members are not left out-of-pocket for expenses incurred in their work, and remunerated fairly for all the work they do. This type of harmonised approach would likely ultimately save costs and enable more consistency amongst non-permanent Board of Appeals in their decision-making procedures. It would also likely significantly assist non-permanent Boards of Appeal, who generally find it more difficult to secure operational and administrative arrangements with their Agencies, ensuring they are able to operate with functional independence.

10. Future

The *Aquind* Judgment clearly illustrates the heavy legal duties now on Boards of Appeal to carry out in-depth, deep-dive assessments into Agency decisions. The requirements for Boards of Appeal to carry out these assessments, and to do so independently and impartially, is therefore in no doubt. This brings with it, particular concerns for non-permanent Boards of Appeal. Can they actually do these types of assessment in reality? Do they have the resources (time, finance, personnel, etc)? Can

they do these types of assessment in reality – in a truly independent and impartial way?

One of the particular concerns for non-permanent Boards of Appeal is that their members are not, per se, Agency or EU staff – covered by the EU Staff Regulation[18]. Therefore, there is nothing in place, per se, to stop vexatious or other litigants from taking action against individual BoA members if they disagree, or take issue with, BoA decisions or actions. They may, for example, sue BoA members in their personal names or submit requests for BoA members to be removed from BAR lists – preventing BoA members from practising law in the future. In other words, when lawfully discharging their BoA duties, non-permanent BoA members may be subjected to legal and administrative action, in their personal capacities (and face the risk of personal financial loss and other personal damage), which judges and/or EU Agency staff – would not. It is therefore particularly important for non-permanent members to find a way of ensuring their BoA, and they themselves, are able to comply with the onerous legal duties now clearly evident from the *Aquind* Judgments.

In the absence of any harmonised approach, each Board of Appeal will need to work out its own way of trying to ensure its Agency has in place operational and administrative arrangements which secure a degree of functional independence for the BoA – thereby allowing it decide cases independently. Non-permanent Boards of Appeal have begun to work together to try and agree recommendations and best practices in this area. Non permanent Boards of Appeal (and I in particular) have, for example, established a Working Group within the EU BoA Inter-Agency Appeal Proceedings Network (IAAPN). However, progress on these issues has been modest. Whereas non-permanent BoAs have worked extensively to draft detailed documents and agree recommendations and best practices – the name of the Working Group still has not been resolved as between permanent BOAs and non-permanent BoAs. The challenges faced by permanent Boards of Appeal are generally not the same as the challenges faced by non-permanent Boards of Appeal. IAAPN BoA structures in place are generally geared towards the needs of the permanent Boards of Appeal, not the non-permanent Boards of Appeal. Communications between Boards of Appeal (as single group of entities) and EU Institutions continues to be between permanent Boards of Appeal, where non-permanent Boards of Appeal cannot directly contribute to discussions. It may therefore be necessary for non-permanent Boards of Appeal to

[18] Regulation (EEC) n. 31, laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community, in *OJ* L 45, 14.06.1962, p. 1385.

consider other alternative routes and forms of collaboration to address the specific challenges relevant to them.

In any event, the ability for all Boards of Appeal, including non-permanent BoAs to decide cases independently and in compliance with EU law (including the *Aquind* Judgments) is important. It is important for the members of the Boards of Appeal themselves, as, currently, they are personally exposed. It is important for Boards of Appeal and parties in BoA appeal proceedings (including Agencies). But is it perhaps of most important for the EU justice system itself. Where the first decision-making body in the EU justice system is unable to independently deliver the rule of law – it erodes confidence in that system. It is also problematic for the EU justice system (particularly the Courts) to require EU Member States to respect EU requirements obliging them to ensure national decision-making bodies are essentially independent[19], when it may not be possible to conclude that parts of EU justice system itself operate in this way. It is therefore incumbent on the EU justice system (including the EU Courts) and the EU Institutions, to have in place, amongst other things: (*i*) means of communicating directly with non-permanent BoAs, (*ii*) measures to ensure the independence on non-permanent BoAs is independently monitored and guaranteed, and (*iii*) measures in place to ensure non-permanent BoAs have the resources they need (personnel, financial, etc) to discharge their legal duties in practice. It is likely that only with these measures in place that non-permanent BoAs will be able to fully address the challenges they now face in the wake of the *Aquind* Judgment.

[19] See, for example, Article 9a of Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (EIA Directive), in *OJ* L 26, 28.01.2012, p. 1.

THE *AQUIND* JUDGMENTS AND THEIR IMPACT ON THE WORK OF THE EASA BOARD OF APPEAL

La giurisprudenza Aquind *e il suo impatto sull'attività delle commissioni di ricorso di EASA*

La jurisprudence Aquind *et son impact sur l'activité de la commission de recours de l'AESA*

MICHAEL SÁNCHEZ RYDELSKI*

TABLE OF CONTENTS: 1. Introduction. – 2. Intensity of review of EASA Board of Appeal decisions. – 2.1 The *Heli-Flight* case. – 2.2 The *Issoire* case. – 2.3 The *APA* case. – 2.4 The *Fly Baghdad* case. – 3. The adversarial nature of appeal proceedings. – 4. How well equipped is the Board of Appeal to discharge its review duties? – 5. Conclusion.

1. Introduction

The *Aquind* judgments[1] have raised some debate among Boards of Appeal as to their duties to review Agencies' decisions. In these judgments the Court of Justice of the European Union (CJEU) required the Boards of Appeal[2] to exercise a scrutiny of decisions adopted by the respective Agencies, which goes beyond an examination of manifest errors. In the opinion of the CJEU, Boards of Appeal must conduct a full review of the Agencies' decisions.

What led to this conclusion can, *inter alia*, be summarised as follows: Boards of Appeal are administrative review bodies, internal to the

* Chairman of the EASA Board of Appeal. The views and opinions expressed in this Article are those of the author. They do not purport to reflect the views or opinions of the Agency.

[1] See General Court, November 18th 2020, case T-735/18, *Aquind Ltd* v *ACER,* ECLI:EU:T:2020:542; Court of Justice, March 9th 2023, case C-46/21 P, *ACER* v *Aquind*, EU:C:2023:182.

[2] Namely the Boards of Appeal of ACER, ECHA and EASA.

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Agencies, but they enjoy a degree of independence. They are not judicial in nature, although they perform quasi-judicial functions through adversarial proceedings. Being composed of lawyers and technical experts, Boards of Appeal are better placed to dispose of appeals against decisions, which are of technical nature. As the General Court held: "[...] the system of appellate bodies is [...] an appropriate means of protecting the rights of [the parties concerned] in circumstances where [...] the Court has consistently held that review by the EU judicature must be limited to examining whether the exercise of a broad discretion in the assessment of complex scientific, technical and economic facts has been vitiated by a manifest error of appraisal"[3]. In other words, the review carried out by the General Court is not the same as the one carried out by the Boards of Appeal, whose specialisation enables them to carry out an in-depth examination of the challenged decisions. Finally, a full review makes it possible at a later stage for the General Court to carry out the judicial review incumbent upon it.

The importance of some Boards of Appeal has been indirectly reinforced by the introduction of Article 58a into the Statute of the ECJ[4]. According to that Article, the admissibility of appeals brought against decisions of the General Court, concerning decisions adopted by the Boards of Appeal[5], is contingent upon evidence that such an appeal is important to the unity, consistency or development of EU law. This means that Boards of Appeal decisions are in principle only subject to an appeal to the General Court.

This contribution will focus on how the *Aquind* judgments impact the work of the EASA Board of Appeal. It will look at the intensity of reviews of relevant cases adopted so far by the EASA Board of Appeal. It will then address which factors determine the intensity of review. And, finally, it will consider whether the EASA Board of Appeal is sufficiently equipped to discharge its review duties.

2. Intensity of review of EASA Board of Appeal decisions

Since its existence, the EASA Board of Appeal has had only seven

[3] General Court, November 18th 2020, case T-735/18, *Aquind Ltd* v *ACER*, *cit.*, para 51.

[4] See Regulation (EU, Euratom) n. 2019/629 of the European Parliament and of the Council of 17 April 2019, amending Protocol N. 3 on the Statute of the CJEU, in *OJ* L 111, 25.04.2019, p. 1 ff., as recently amended.

[5] Note that this provision, which originally involved only the appeals decisions from the BoA of EUIPO, CPVO, ECHA, and EASA, has now been extended, in a generalized manner, to all existing Boards, as well as progressively to those of any new institution.

cases, which led to final decisions[6]. This low number of cases does not really come as a surprise. Recital 3 of Commission Regulation (EC) 104/2004 already stated: "it is expected that the number of appeals will be quite limited [...]"[7]. Reasons for this low number of cases could be: (*i*) the broad consensus amongst stakeholders on the regulatory framework in the aviation sector; (*ii*) a possible lack of knowledge of the right to initiate appeal proceedings; and (*iii*) the possible high appeal charges, which are calculated in relation to the turnover of the appellant. However, regardless of this low number of cases, the few cases adopted so far demonstrate a certain tendency towards a more detailed review by the Board of Appeal of the Agency's decisions.

2.1 The *Heli-Flight* case

In the *Heli-Flight* case[8], the first decision adopted by the Board of Appeal in 2012, the Board of Appeal's review of the Agency's decision displayed a 'hands-off' approach. This case concerned a decision of the Agency rejecting an application for approval of flight conditions for a particular helicopter. The appellant was the exclusive distributor of this helicopter type in Germany. In support of its application, the appellant referred, *inter alia*, to the fact that the helicopter received a type certificate from the Federal Aviation Administration of the United States of America. The producer of the helicopter applied to EASA for an EU type certificate. In the on-going procedure evaluating that application, EASA voiced safety concerns, namely regarding the hydraulic system of the flight control system, under the standard known as CS-27. In view of these concerns, EASA could not even grant a limited approval of flight conditions for this type of helicopter. The appellant submitted that since the helicopter was in use no technical incidents were reported that casted

[6] See decision of EASA Board of Appeal of 7 September 2023 in case AP/20/2023, *Fly Baghdad Company for Aviation Ltd*; decision of EASA Board of Appeal of 19 December 2022 in case AP/17/2022, *Aviones Piezas y Accesorios (APA) S.L.*; decision of EASA Board of Appeal of 19 April 2018 in case AP/10/2017, *Reiner Stemme Utility Air-Systems GmbH*; decision of 21 November 2014, *Issoire Aviation* in case AP/06/2013; decision of EASA Board of Appeal of 17 January 2014 in case AP/04/2013, *Robinson Helicopter Company*; decision of EASA Board of Appeal of 30 April 2013 in case AP/03/2012, *Stephen Luck*; and decision of EASA Board of Appeal of 17 December 2012 in case AP/01/2012, *Heli-Flight GmbH & Co. KG*. All of these decisions are available on the EASA website and the Common Database on EU Agencies' Boards of Appeal.

[7] Commission Regulation (EC) n. 104/2004 of 22 January 2004, laying down rules on the organization and composition of the Board of Appeal of the European Aviation Safety Agency, in *OJ* L 16, 23.01.2004, p. 20 ff.

[8] See decision of 17 December 2012, *Heli-Flight GmbH & Co. KG*, *cit.*

doubts on the reliability of the hydraulic system and even a failure of the hydraulic system would not entail that the helicopter was not airworthy anymore. The appellant also submitted that the Agency was not sufficiently specific about the faults that it found with the helicopter and it did not give the appellant an opportunity to respond to the Agency's concerns.

The Board of Appeal recalled that when an issue at dispute concerned a complex technical assessment, the Agency enjoyed a margin of appreciation[9]. Based on this approach, the Board of Appeal did not review the technical assessment of the Agency on which the rejection was based. The approach taken rather demonstrates that the Board of Appeal followed a so-called 'manifest error test'. The Board of Appeal stated that the appellant called upon the Board "to decide which opinion is better"[10]. However, the Board of Appeal concluded that it could not see from the elements presented that the Agency was wrong. Finally, the Board of Appeal held that the rejection was sufficiently substantiated, since the Agency identified the device and the standard it had concerns with and it also stated the risk that the device gave rise to[11].

The *Heli-Flight* case was challenged before the General Court[12]. However, the General Court did not take issue with the Board of Appeal's intensity of review in that case. To the contrary, at the time, the General Court endorsed the approach taken by the Board of Appeal and only limited itself to the review whether the Board of Appeal committed a manifest error. In relation to the manifest errors of assessment said to have been made by the Board of Appeal, the General Court reiterated at the outset what powers of review the European Union judicature had over EASA decisions such as the Board of Appeal decision[13]. The General Court held: "since the assessment of whether an aircraft is capable of safe flight constitutes a complex technical assessment, the level of judicial review applicable to it must be the limited review of the European Union judicature [...] What the European Union judicature must review is therefore the existence of any manifest errors of assessment"[14]. As a matter of fact, the 'internal review process' between the Agency and the Board of Appeal was not really an issue in this case. The case was finally

[9] *Ivi* para 63.

[10] *Ivi* para 79.

[11] *Ivi* para 87.

[12] General Court, December 11th 2014, case T-102/13, *Heli-Flight* v *EASA*, ECLI:EU:T:2014:1064.

[13] *Ivi* paras 88 and 89.

[14] *Ivi* para 90.

appealed to the Court of Justice[15], but again, the internal review process was not addressed in the proceedings before the Court of Justice.

However, regardless of the CJEU's initial approach regarding the intensity of review and the subsequent case-law development, EASA's Board of Appeal developed over time on its own motion a review process, which demonstrates a more detailed scrutiny of the Agency's decisions.

2.2 The *Issoire* case

The *Issoire* case, which the Board of Appeal decided in 2014, is an example where the Board already had a 'closer look' at the challenged Agency decision[16]. This case concerned the following facts: in 2013 the appellant lodged an application with the Agency for approval of a major change to this type certificate, to install a propeller with a reduced diameter to improve aircraft performance, and to introduce structural modifications to the propeller to enhance its vibration characteristics. On behalf of EASA, the French Civil Aviation Authority assessed the compliance of the major change with the applicable certification specifications and environmental protection requirements. Subsequently, the Agency issued the major change approval based on the assessment made by the French Civil Aviation Authority. The approval accepted the technical modifications to the propeller but kept the original noise emission values of the unmodified aircraft. The appellant submitted that the noise emission values should have been set at a lower level. The appellant referred in that regard to the values that resulted from a test conducted by a private company. However, in EASA's opinion, the values resulting from that test could not be taken into account, as the procedural rules governing the test were not followed. The subject matter of the appeal was thus whether EASA was right in disregarding the values resulting from the test of the private company.

The Board of Appeal remarked at the outset that the appellant did not provide the Agency or the French Civil Aviation Authority with the necessary documentation, for example a noise test plan, which is necessary to determine the level of involvement of the two authorities in the compliance finding process[17]. Further, the appellant did not inform the Agency or the French Civil Aviation Authority about the date and place for the planned noise tests[18]. Therefore, the authorities could not witness

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[15] Court of Justice, January 28th 2016, case C-61/15 P, *EASA* v *Heli-Flight*, ECLI:EU:C:2016:59.

[16] Decision of 21 November 2014, *Issoire Aviation*, *cit.*

[17] *Ivi* para 42.

[18] *Ivi* para 43.

the tests, as provided for under the relevant regulations. In view of these circumstances, the Board of Appeal concluded that the Agency took, on the basis of the information in its possession, the decision less onerous on the appellant[19]. Thus, it appeared to the Board that not only had the Agency acted within the limits of the applicable provisions but, within those limits, it had also sought to take full consideration of the interests of the appellant, and it has acted in accordance with the principle of proportionality[20].

2.3 The *APA* case

Another example of an even more detailed scrutiny of an Agency decision is the *APA* case, which the Board of Appeal decided in 2022[21]. This case concerned an EASA decision, which partially suspended the Design Organisation Approval (DOA) privileges issued to the appellant. The partial suspension was the result of an audit the Agency carried out at the premises of the appellant. The audit was conducted to assess the appellant's compliance with the requirements of the relevant regulations and performed by assessing examples of the appellant's work and interviews with the appellant's staff. Concerning the audit, the appellant submitted that the outcome of the audit be cancelled, as the audit came as a surprise and that it felt discriminated against by having been selected and assessed in the audit.

In order for the Board of Appeal to assess whether the audit was conducted correctly and whether the right conclusions were drawn from that audit, the Board of Appeal requested, on its own motion, full access to the file. Consequently, the Board of Appeal went through all relevant documents to assess, for example, whether the procedure was correctly conducted, whether the questions to the appellant's staff were adequate to test their abilities and whether the correct conclusions were drawn from the replies received. This review did not imply a *de novo* assessment, but a detailed review of the facts and evidence before the Board of Appeal in that case[22]. The Board of Appeal found that the contested decision was proportionate, as it only led to a partial suspension and not to a revocation of the DOA, and that the appellant had various opportunities to be heard before the contested decision was adopted. With regard to the appellant's request to cancel the audit, the Board of Appeal held that the appellant could not claim that the audit came as a surprise, because the appellant

[19] *Ivi* para 45.
[20] *Ivi* para 46.
[21] Decision of 19 December 2022, *Aviones Piezas y Accesorios (APA) S.L.*, *cit.*
[22] *Ivi* paras 67 to 74.

was notified well in advance and the Agency, both before and after the audit, was in regular communication with the appellant concerning the audit. The Board of Appeal did also not share the appellant's unsubstantiated view that it was discriminated against by having been selected and assessed in the audit. On this point, the Board of Appeal found that the entire procedure before, during and after the audit was conducted by the Agency in a transparent, fair and non-discriminatory manner[23].

2.4 The *Fly Baghdad* case

The last case worth mentioning is the latest Board of Appeal decision adopted in 2023 in the *Fly Baghdad* case[24]. This case concerned, *inter alia*, an EASA decision to refuse the appellant's application for a Third Country Operator (TCO) authorisation. The Agency carried out a TCO assessment to determine whether the appellant complied with the applicable requirements of the regulatory framework. The assessment was completed in accordance with an agreed programme and covered quality and safety management, airworthiness, and flight operations. The TCO assessment was primarily based on documentation provided by the appellant, followed by a physical technical consultation meeting. As a result of this assessment, and subsequent correspondence with the appellant, the Agency stated that it could not establish a sufficient level of confidence in the appellant and concluded that further assessment of the application at that stage would not result in the issuance of an authorisation. Consequently, the application for a TCO authorisation was refused. The appellant requested that the Agency either cancelled the TCO application or that it revoked in whole or in part the decision to refuse the application.

The Board of Appeal reviewed the assessment made by the Agency in detail. The Board of Appeal observed in this context that all findings, which were made as the result of the assessment, were well substantiated and documented. However, the Board of Appeal also noted that the appellant did not actually dispute these findings and, on the contrary, the appellant accepted the findings made by the Agency[25].

3. The adversarial nature of appeal proceedings

Considering that ultimately the intensity of the review will depend largely on the pleas made by the appellants, it is important to recall the

[23] *Ivi* para 76.
[24] Decision of 7 September 2023, *Fly Baghdad Company for Aviation Ltd.*, *cit.*
[25] *Ivi* para 56.

adversarial nature of the appeal proceedings. How far the review goes will depend on how good the pleas are. If the pleas are well substantiated, and accompanied by good evidence, they would prompt the Board of Appeal to likely go far in its review. Conversely, if the pleas are not well substantiated, then the review may remain at a certain level. Hence, it will be very much a case-by-case assessment and the Board of Appeal will, to a certain extent, be determined by the pleas to assess how far the review should go.

This has also been confirmed by the General Court in *Aquind*, when the Court held: "accordingly, as regards the 'intensity of the review' to be carried out, the review of errors of assessment must be conducted only in relation to the questions raised by the appellant and therefore does not encompass matters falling outside the ambit of the appeal or, by definition, complex economic and technical matters which were not raised in the appeal and which are not covered by the evidence submitted by the appellant"[26]. Consequently, the review will be 'guided' by the pleas made. Having said this, the Board of Appeal would take-up matters of public policy concerns on its own motion, if decisions are, for example, vitiated by errors of a missing competence, serious procedural errors or a lack of reasoning; and the General Court confirmed such an approach[27].

Additionally, the 'manifest error test' notion seems a rather misleading description of the required intensity of review. I would submit that a difference between an 'error of assessment' and a 'manifest error of assessment' cannot be objectively described. For example, the General Court would be reluctant to establish an error and qualify it as 'non-manifest'. Either there is an error or there is none. As we know from the General Court, for example, in State aid or competition cases, the Court can go very far in its assessment and will not necessarily limit itself to 'manifest errors'.

Although, the 'manifest error test' may become a 'convenient escape clause', when confronted with, for example, two different expert opinions of a highly technical nature. However, in such a situation the *Aquind* judgments are not obliging the Boards of Appeal to decide which opinion is the better one. The jurisprudence of the CJEU requires the Boards of Appeal 'only' to review the facts and evidence on which the Agency decision was based and assess whether the Agency has drawn the correct conclusions from these facts and evidence. In other words, the Boards of Appeal are not required to conduct their own inquiry and start a *de novo*

[26] General Court, November 18th 2020, case T-735/18, *Aquind Ltd* v *ACER*, *cit.*, para 81.

[27] See General Court, September 9th 2019, case T-125/17, *BASF* v *ECHA*, ECLI:EU:T:2019:638, para 65.

assessment of the case[28]. By contrast, as the General Court held: "the Board of Appeal is to confine itself to examining whether the arguments put forward by the applicant are such as to demonstrate the existence of an error vitiating the contested decision"[29]. Being confined to the arguments put forward by the appellant does not prevent the Board of Appeal from examining pleas calling into question the findings in that challenged decision and therefore carefully reviewing the facts and evidence on which these findings are based. Again, such an assessment will depend on a case-by-case basis and require the expertise of the Appeal Board members to review complex technical cases, which brings me to my last point, namely how well the Board of Appeal is equipped to discharge its review duties?

4. How well equipped is the Board of Appeal to discharge its review duties?

In the *Aquind* judgments the Court of Justice confirmed the General Court's conclusion that the EU legislature intended to provide the Boards of Appeal with the necessary expertise to allow them to carry out assessments of complex technical and economic facts[30]. The Court of Justice therefore held that the composition of the Boards of Appeal meets the requirements necessary to enable them to conduct a full review of decisions[31].

Further, the Court of Justice also endorsed the General Court's conclusion that the fact that the members of some Boards of Appeal, unlike those of other Boards of Appeal, are employed part time (with only nominal remuneration) and not full time, cannot affect the intensity of the review, which they are required to conduct[32].

The EASA Board of Appeal consists of one legally qualified member, who is the chairperson, and two technically qualified members, with three alternates to replace them in their absence. The chairperson, the other members and their alternates are appointed by the Agency's Management Board from a list of qualified candidates established by the European Commission. The technically qualified members and their alternates must

[28] *Ivi* paras 59, 112 and 119. However, the General Court draws a distinction between the ECHA Board of Appeal and the EUIPO Board of Appeal, the later which is required to carry out a *de novo* assessment (para 94 ff.).

[29] *Ivi* paras 60, 65, 86, 103 and 134. See also case General Court, September 20th 2019, case T-755/17, *Germany* v *ECHA*, ECLI:EU:T:2019:647, paras 60, 87 and 93.

[30] Court of Justice, March 9th 2023, case C-46/21 P, *ACER* v *Aquind*, ECLI:EU:C:2023:182, *cit.*, para 64.

[31] *Ivi* para 63.

[32] *Ivi* para 70.

have a university degree or an equivalent qualification and must have substantial professional experience in the field of certification, in one or more technical disciplines, such as, for example: (*i*) flight/performance; (*ii*) structure; (*iii*) hydro-mechanical systems; (*iv*) rotor/transmission systems; (*v*) electrical/lightning; (*vi*) avionics/software; (*vii*) power plant installation/fuel systems; (*viii*) cabin safety/environmental systems; (*ix*) noise/emissions; and (*x*) continued airworthiness/airworthiness directives as applied to various products, their parts and appliances[33].

These are only some examples and, bearing in mind the growing spectrum of tasks the Agency is entrusted with, the review of these different technical disciplines will be challenging for only two technically qualified members on the Board of Appeal. It is also regrettable that the chairperson is not entrusted with the power to select for each case the best-qualified technical members out of the 'pool' of members and alternates to ensure the best composition of the Board to hear a case. In this context, inspiration can be drawn from the Board of Appeal of the Community Plant Variety Office (CPVO), where the chairperson can select for each case the other members and their respective alternates from a list of qualified members[34]. Creating a greater flexibility in the composition of the Board of Appeal would also have the side-effect that the alternates would be more involved in the actual work of the Board. In addition, it is also not explicitly foreseen that for complex cases the Board could be extended by two more members. Again, this is, for example, possible for the Board of Appeal of the CPVO[35].

The members of the EASA Board of Appeal work on a part-time basis, and they are getting paid per case. The remuneration per case is based on an Agency's Management Board decision dating back to 2006 and foresees a daily rate of EUR 400 for members and EUR 500 for the chairperson and rapporteur of the case, with a maximum remuneration per case of ten days. In order to continue to attract the most qualified experts, a revision of the current daily rates should be envisaged. Further, the remuneration ceiling may pose problems in highly complex cases, when ten days are actually quite quickly consumed, bearing in mind the different stages and length of the proceedings, which may involve the organisation and conduct of oral hearings.

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[33] Article 2(2) and the Annex to Commission Regulation (EC) n. 104/2004 of 22 January 2004, *cit.*

[34] Article 46(2) of Council Regulation (EC) n. 2100/94 of 27 July 1994 on Community plant variety rights, in *OJ* L 227, 01.09.1994, p. 1 ff.

[35] *Ivi* Article 46(3).

5. Conclusion

The jurisprudence of the CJEU on the intensity of reviews of Boards of Appeal is putting a 'high burden' on the experts serving on these Boards. Whether the EASA Board of Appeal is sufficiently equipped for discharging its review duties, in order to live up to the requirements set by the CJEU, will remain a constant challenge, given the spectrum of expertise required and the fact that only two experts serve on the Board. So far, the EASA Board of Appeal has developed over the years a more detailed review of the Agency's decisions. However, the intensity of the review in each of these cases was ultimately determined by the quality of the appellants' pleas. The EASA Board of Appeal is mindful of its review duties and will endeavour to continue complying with them in future cases.

THE BOARD OF APPEAL OF THE EUROPEAN CHEMICALS AGENCY. STRUCTURE AND POWER OF REVIEW

La commissione di ricorso dell'Agenzia europea per le sostanze chimiche. Struttura e poteri in fase di scrutinio

La chambre de recours de l'Agence européenne des substances chimiques. Structure et pouvoirs de contrôle

ANTOINE BUCHET*

TABLE OF CONTENTS: 1. Introduction. – 2. Structure. – 2.1. Legislative and regulatory framework. – 2.2. Main characteristics. – 2.3. Organisation. – 2.4. Scope of competence. – 2.5. Procedure. – 3. Standard of review. – 3.1. Prelude in Helsinki. – 3.2. Consecration in Ljubljana. – 3.3. Remaining issues.

1. Introduction

Without having the intention to take the opposite view of the opinion recently expressed by Advocate General Campos Sánchez-Bordona in a landmark case[1], it is important to underline at the outset that the common characteristics shared by all the EU Agencies' appeal bodies cannot entirely eclipse the existence of actual differences in their structure and functioning. Therefore, before examining what standard of review is applied by the Board of Appeal of the European Chemicals Agency (ECHA), it appears necessary to understand how it works and over what types of decisions it exercises its power of review.

* Chairman of the ECHA Board of Appeal. The views and opinions expressed in this article are those of the author. They do not purport to reflect the views or opinions of the Agency.

[1] Opinion of Advocate General Campos Sánchez-Bordona, September 15th 2022, case C-46/21 P, *ACER* v *Aquind Ltd*, ECLI:EU:C:2022:695.

2. Structure

2.1. Legislative and regulatory framework

The ECHA has been founded by Regulation n. 1907/2006 (REACH Regulation)[2]. Under Art. 76(1)(h) of the REACH Regulation, the Board of Appeal is one of the bodies composing ECHA. The establishment of the Board of Appeal forms part of an overall approach, adopted by the EU legislature since several years, to provide EU Agencies with review bodies where they have been given decision-making powers on complex technical or scientific issues capable of directly affecting the legal situation of the parties concerned[3].

The provisions regarding the Board of Appeal and its powers are not very much developed in the REACH Regulation. Those provisions are implemented in a more detailed manner in two separate instruments: the Commission Regulation n. 1238/2007 (Regulation on qualifications)[4], dealing with the members' regime, and the Commission Regulation n. 771/2008 (Rules of Procedure)[5], concerning the organisation and functioning of the Board.

2.2. Main characteristics

The Board of Appeal is an internal independent body of ECHA, composed of three members, two of whom are legally qualified, and one of whom is technically qualified. The REACH Regulation and the Rules of Procedure ensure that the three members are independent and impartial[6]. The Regulation on qualifications specifies that chairpersons and

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[2] Regulation (EC) n. 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals, in *OJ* L 396, 30.12.2006, p. 1 ff.

[3] Court of Justice, March 9th 2023, case C-46/21 P, *ACER* v *Aquind Ltd*, ECLI:EU:C:2023:182, para 56.

[4] Commission Regulation (EC) n. 1238/2007 of 23 October 2007 laying down rules on the qualifications of the members of the Board of Appeal of the European Chemicals Agency, in *OJ* L 280, 24.10.2007, p. 10.

[5] Commission Regulation (EC) n. 771/2008 of 1 August 2008 laying down the rules of organisation and procedure of the Board of Appeal of the European Chemicals Agency, in *OJ* L 206, 02.08.2008, p. 5 ff. The Rules of Procedure have lastly been amended by Commission implementing Regulation (EU) n. 2016/823 of 25 May 2016 in *OJ* L 137, 26.05.2016, p. 4 ff.

[6] See Articles 89 to 94 of the Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council

legally qualified members must be graduates in law and have recognised experience in EU law. Technically qualified members must hold a university degree or an equivalent qualification and have substantial professional experience in hazard assessment, exposure assessment or risk management with regard to human health or environment risks of chemical substances or in related fields.

The Board of Appeal is a permanent structure within the Agency[7]. The three full-time members have alternates, who replace them in their absence. There are currently nine alternates (one alternate chairperson, three alternate technically qualified members and five alternate legally qualified members).

All members – and their alternates – are appointed by the Management Board of ECHA from a list of suitable candidates prepared by the Commission, following public calls for expression of interest[8], for a five-year term, renewable once for an identical period[9]. The full-time members are staff members of the Agency, appointed as temporary agents, and are subject to the Staff Regulations of officials and the conditions of employment of other servants of the European Union[10].

The alternate members are not staff members of the Agency. When working and deciding on appeals lodged before the Board of Appeal, the alternate members must respect a certain number of rules that are enumerated and described in a Code of conduct[11]. They receive an appropriate level of remuneration for the services they provide when designated to act in appeal cases[12].

Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC, in *OJ* L 396, 30.12.2006, p. 1-849 (REACH Regulation) and Articles 1 to 3 of the Rules of Procedure (available at: https://echa.europa.eu/documents/10162/7614610/FINAL_MB_33_2020_Revised_MB_Rules_of_Procedure_MB58.pdf/eccf6f4b-b81f-ae6a-02b0-f77d2794714c?t=1593783174334).

[7] See Recital 4 of Commission implementing Regulation (EU) n. 2016/823 amending the Rules of Procedure, *cit.*

[8] The latest calls are available here for chairperson, technically qualified member and legally qualified member respectively.

[9] Art. 89 and 90 of the REACH Regulation; see also the Regulation on qualifications.

[10] See the last consolidated version of the staff Regulations, published in *OJ* L of 1 January 2024. See in particular Title II of the conditions of employment, concerning temporary staff (p. 190).

[11] The Code is available at this link: https://echa.europa.eu/documents/10162/17085/code_of_conduct_en.pdf/8bad6751-8dcb-4c87-a049-fd5729d680fa.

[12] Decision of the Management Board of ECHA on the remuneration, available at this link:

As they are not part of the ECHA staff, the alternate members of the Board of Appeal are not as such covered by the seventh Protocol on the privileges and immunities of the European Union[13], although they are performing tasks of a crucial importance in adopting decisions that are decisions of an Agency of the European Union. Some of the alternate members are staff members of other organs or institutions of the European Union and are therefore working under the umbrella of the seventh Protocol[14], but this is not a pre-condition to become an alternate member, and many of them do not fall within the scope of the protections offered in particular by Articles 11, 12 and 13 of that Protocol[15].

The full-time members conclude contracts of employment with the Agency in accordance with the Staff Regulations (Art. 2(f)). They are therefore bound by the Staff Regulations, and the measures adopted by the Management Board of the Agency, in agreement with the Commission, to implement the rules contained in the Staff Regulations.

However, certain special rules apply to the members of the Board of Appeal.

In the course of their five-year mandate, members may be removed from office only by the Commission – after obtaining the opinion of the Management Board – and only on serious grounds[16]. Such a situation has never occurred so far.

Furthermore, administrative arrangements, signed by the Executive Director of ECHA and the chairperson of the Board of Appeal, ensure the independence of the members of the Board of Appeal[17]. For example,

https://echa.europa.eu/documents/10162/2200121/mb_40_2020_remuneration_boa_aam_en.pdf/27e474f2-fab2-f016-3a60-4c63e824247e.

[13] Attached to the Treaties, and published in its latest version in *OJ* C 202, 07.06.2016, p. 1 ff.

[14] When an alternate member is a member of the EU civil service, and is therefore subject to the EU Staff Regulations, that member does not perceive any additional remuneration for the tasks performed for the Board of Appeal of ECHA. In practice, ECHA concludes a service level agreement with the EU organ or institution that employs that alternate member, notably to include the tasks of alternate member of the Board of Appeal of ECHA in the job objectives defined by the organ or institution of origin. This ensures that the alternate member is available more easily when required.

[15] In the past, some alternate members have expressed concerns in this respect, notably as regards the absence of immunity from legal proceedings in respect of acts performed by them in their official capacity, including their words spoken or written, and as regards the taxation of their income by National Authorities.

[16] Art. 90(4) of the REACH Regulation. A decision to such effect can be taken by the Commission, after obtaining the opinion of the Management Board.

[17] Available at this link: https://echa.europa.eu/documents/10162/17085/boa_administrative_arrangements_en.pdf/1e59d915-e2f0-403c-87b9-badeff483f56.

full-time members are subject to annual performance appraisal and contract renewal in accordance with the usual procedures for ECHA staff. However, due to their independent position, the Executive Director is not involved in the appraisal of their tasks or the renewal of their contract, which are decided only by the Management Board. Other specific rules apply to the potential reclassification of a member to a higher grade, as a promotion cannot be decided in a process where the Executive Director of the Agency would have a predominant role.

Due to their independence, members cannot and should not be held responsible for their opinions and the content of their deliberations.

Since 2009, a total of nine individuals have been appointed as full-time members of the Board of Appeal in various roles (2 chairpersons, 3 technically qualified members, 4 legally qualified members).

2.3. Organisation

Each appeal is decided by three members of the Board of Appeal, where at least one member is legally qualified and at least one member is technically qualified[18]. Each member is independent from the others and there is no hierarchical relationship among them. Equal voting rights are explicitly established by law[19].

Any new appeal case is automatically, and by default, allocated to the three full-time members. Should one of the full-time members have a conflict of interest or be unavailable for any reason (for example, due to an extreme workload or to health issues), he or she may ask the chairperson to replace him or her and designate an alternate in the pending case[20].

The possibility to have recourse to additional members is also provided in the REACH Regulation and in the Rules of Procedure, in order to ensure that appeals can be processed at a satisfactory rate. This is to cover situations where there would be a need for a more structural reinforcement of the Board of Appeal, not to replace a member in one or several ongoing cases, but to allocate new cases to additional members, creating a kind of 'second chamber', because of a temporary or more long-lasting increase in the number of appeals filed. Such a decision is taken by the chairperson, after consultation of the Management Board[21]. This

[18] Art.1(1), second sub paragraph, of the Rules of Procedure.

[19] See Art. 89(5) and 90(2) of the REACH Regulation.

[20] Art. 90(5) to (7) of the REACH Regulation; Art. 2 and 3 of the Rules of Procedure.

[21] Art. 89(3), second subparagraph, of the REACH Regulation; Art. 1(4) of the Rules of Procedure.

possibility has so far never been used by the Board of Appeal of ECHA, as the workload has been kept within manageable boundaries.

A registry is established under the auspices of the Board of Appeal[22]. The registry currently consists of a registrar (heading it), four legal advisors, one scientific advisor, and three administrative and legal assistants. They are tasked with supporting activities of the Board of Appeal.

In practice, the registry has a double function. On the one hand, it is responsible for managing and implementing different steps of the appeal procedure (e.g., public announcements, notifications, hearing organisation). Where the applicable rules and procedures so provide, the registry seeks instructions from the chairperson as regards procedural measures to be taken in a case. On the other hand, the legal and scientific advisors in the registry support the members of the Board of Appeal in their substantive work on appeals (e.g., research, memoranda, drafting decisions).

Since their amendment by the Commission in 2016, the Rules of Procedure provide that the registrar is appointed by the chairperson, who has managerial and organisational powers to give directions to the registrar on matters relating to the exercise of the functions of the Board of Appeal[23]. This is also reflected in the Administrative Arrangements, which state that the registrar is the head of unit of the registry and reports to the chairperson. The Executive Director takes formally the relevant decisions and actions based on joint proposals from the chairperson and the director for resources who will ensure coherence with the general rules of the Agency[24].

2.4. Scope of competence

The REACH Regulation places many of the individual decisions adopted by ECHA under the competence of its Board of Appeal[25]. Similarly, several decisions adopted by ECHA under the Biocidal Products Regulation (BPR Regulation)[26] fall within the remit of competence of the

22 Art. 5(1) of the Rules of Procedure.

23 Art. 5(5) of the Rules of Procedure.

24 Administrative Arrangements, p. 4-5.

25 Art. 91(1) of the REACH Regulation. There are some exceptions, such as decisions on the verification of the declared company size of registrants, and related invoices, under Art. 13(4) of Commission Regulation (EC) n. 340/2008 of 16 April 2008 on the fees and charges payable to the European Chemicals Agency, in *OJ* L 107, 17.04.2008, p. 6 ff.

26 Regulation (EU) n. 528/2012 of the European Parliament and of the Council of 22 May 2012 concerning the making available on the market and use of biocidal products,

Board of Appeal. It is not excluded that, in the future, ECHA will get more decision-making powers, allocated by new legislative instruments, which might then confer additional review powers on its Board of Appeal.

However, the Board of Appeal is not conceived as an internal review mechanism before which *any* decision taken by the Agency would be challenged; its scope of jurisdiction is limited and precisely described by the REACH Regulation. In fact, one could say that, in principle, all decisions of the Agency are directly challengeable before the EU Courts, under the conditions set out in the Treaties, except those that are explicitly listed in the REACH and BPR Regulations as falling within the remit of competence of the Board of Appeal[27]. For those decisions, litigants must submit their appeals first to the Board of Appeal, which is not an alternative dispute resolution mechanism, but a mandatory procedural step before having the right to have recourse to the EU judicature. Decisions of the Board of Appeal can then be challenged before the General Court and, if permission is granted, the judgment of the General Court can be appealed to the Court of Justice[28].

The legislative history of the REACH Regulation suggests that the Board of Appeal was initially expected to deal with a large number of relatively straightforward cases every year[29]. The cases before the Board of Appeal have turned out to be a small fraction of the expected number[30], but the impact, complexity and importance of each case has turned out to be considerably greater, both from a legal and scientific or technical point of view.

The REACH Regulation has put in place an extremely complex system of legal rules of various origins which mix and sometimes intermingle. The provisions of the main legislative instrument refer to long and dense technical annexes which themselves refer to binding test-methods, supplemented by non-binding guidance documents. The

in *OJ* L 167, 27.06.2012, p. 1 ff. See the list of decisions actionable before the Board of Appeal in Art. 77(1).

[27] The list of decisions that can be appealed before the Board of Appeal is subject to a strict interpretation. See General Court, May 8th 2018, case T-283/15, *Esso Raffinage*, ECLI:EU:T:2018:263, paras 33 to 37.

[28] See Art. 94 of the REACH Regulation and Art. 58a of the Statute of the Court of Justice.

[29] See for example Art. 88(2) and Art. 89(1) of the Commission's legislative proposal (COM(2003) 644 final): the appeal, together with the statement of the grounds thereof, was to be filed within 1 month of the notification of the Agency decision, and the Board of Appeal was supposed to examine whether the appeal is well-founded within 30 days of the appeal being filed.

[30] This is confirmed by the initial resource planning for the Board of Appeal and its registry, which has been prepared by the Commission at the time of the drafting of its legislative proposal.

interplay between those rules and guidelines appears to be a fertile source of litigation.

But appeals that are filed against Agency decisions and brought before the Board of Appeal raise questions which very often go beyond the framework of legal interpretation and relate to the relevance of the scientific choices which are made by ECHA in its decisions, particularly in the context of the evaluation of chemical substances. In assessing whether the Agency correctly took into consideration all the relevant circumstances of a case before exercising its power of discretion, the Board of Appeal must often verify, in light of the pleas and arguments submitted by the appellant, whether the decision being challenged is based on sufficient and correctly articulated scientific data. This work requires not only time and expertise, but also an acute understanding of the legal and scientific elements of the files[31].

2.5. Procedure

The appeal procedure is modelled on the procedure for actions for annulment before the General Court. In principle, it consists of a written part and an oral part (hearing).

When an appeal case is filed, it is assigned to the three full-time members, except where there is a need to have recourse to alternate or additional members, as previously explained. One of the three members is designated as rapporteur by the chairperson, taking into consideration the need to ensure a balanced distribution of workload between members[32]. The rapporteur is closely involved in the management of the appeal procedure in that case and makes proposals to the other members as to any procedural steps to be carried out and prepares a draft of the final decision.

Each appeal case is also assigned to a legal advisor and a scientific advisor by the registrar. The advisors serve as a bridge between the Board of Appeal and the registry in each case. Both advisors support and advise the rapporteur for the case and the other members in any manner necessary.

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[31] For a more developed analysis of the case-law of the Board of Appeal, see A. FASEY, L. BOLZONELLO, *Administrative precedent and the application of the REACH Regulation - The Board of Appeal of the European Chemicals Agency at ten years*, in *ICRL*, 2019, p. 120 ff.

[32] Art. 4 of the Rules of Procedure. The chairperson can also fulfil that function. In practice, the cases are generally divided in three equal portions, except where it is necessary to consider the complexity of certain types of cases, such as those related to substance evaluation.

In general, any decision that the Board of Appeal adopts during the appeal proceedings, such as an intervention decision, needs to be adopted by the three members taking part in that appeal case. However, in limited circumstances, where the Board of Appeal needs to adopt a procedural measure supporting the advancement of an appeal proceedings (e.g., extension of time limits, requesting observations from the parties), in case of absence of one member, the other two present members can decide on that measure.

In addition, under the REACH Regulation and the Rules of Procedure, the chairperson is also competent to adopt certain decisions on his or her own (decisions on the admissibility of an appeal, confidentiality requests, requests for extension of the defence and decisions to close an appeal following the withdrawal of an appeal).

After the hearing in each case – or, if there is no hearing, after the end of the written part of the procedure – the three members of the Board of Appeal deciding in that case meet to deliberate, that is to say to determine the outcome and content of the final decision. The legal and the scientific advisor who are assigned to that case are usually also invited to attend the deliberations.

Following the deliberations, the rapporteur, supported by the legal advisor and the scientific advisor, prepares a draft decision in accordance with the outcome decided collegially. The rapporteur shares this draft decision with the other two members, who provide written comments.

The remainder of the procedure is not firmly structured. The process of drafting, discussion and commenting continues until all members are satisfied with the decision (unanimity) or until it becomes clear that a vote is necessary (majority voting).

If a vote is necessary, the rapporteur votes first and the chairperson votes last, unless the rapporteur is also the chairperson who then votes last[33]. Abstentions are not permitted[34]. In line with practice of the EU Courts, dissenting votes or separate opinions, or even the fact that a vote took place, are not recorded in the decision nor made public by any other means. These elements are covered by the secrecy of deliberations. There is only one decision, the one adopted collegially by the Board of Appeal.

3. Standard of review

As it was the first time the Court of Justice was asked to rule on the standard of review applied by an EU Agency's Board of Appeal, the

[33] See Art. 20, first subparagraph of the Rules of Procedure.

[34] See Art. 19 and Art. 20 of the Rules of Procedure.

judgment delivered on 9 March 2023 in the *Aquind* case had a great impact and had been abundantly commented. The outcome was eagerly awaited in Helsinki by the ECHA legal community, not because it was going to address a new question, but because the Court of Justice was indirectly invited to confirm or overturn the position already taken by the General Court almost three years before as regards the Board of Appeal of ECHA. In other terms, the fate of the ECHA's appeal body was to be sealed in a case concerning the ACER's appeal body[35].

3.1. Prelude in Helsinki

In two important cases[36], the General Court was invited already in 2019 to draw the perimeter of the power of review of the Board of Appeal of ECHA. Does the Board of Appeal's review power involve an entire re-examination of the scientific assessments underlying the decision of the Agency that is challenged, in the light of the most relevant data and, where appropriate, data which become apparent during the appeal proceedings, as claimed by *BASF Grenzach* in the first case? On the contrary, taking a diametrically opposite view, is the Board of Appeal solely competent to review aspects other than the substantive assessments, namely in particular potential breaches of the Rules of Procedure, as argued by Germany in the second case? What are, in essence, the scope and intensity of the review that the Board of Appeal is required to carry out of ECHA decisions?

Both the *de novo* evaluation advocated by *BASF Grenzach* and the minimalist approach championed by Germany have been rejected by the General Court in the judgments delivered on 20 September 2019, which confirmed and validated the practice followed since several years by the Board of Appeal of ECHA.

The scope of the review

As regards the scope of review, the General Court first underlined that the procedure before the Board of Appeal of ECHA has an adversarial nature. Its subject is determined by the pleas put forward by the appellant in the context of the action before that Board. In the examination of the merits of such an action, that Board confines itself therefore to an examination of whether the pleas put forward by the

35 In particular in view of the many comparisons made before the General Court and the Court of Justice between ACER and ECHA.

36 General Court, September 20th 2018, case T-125/17, *BASF Grenzach* v *ECHA*, ECLI:EU:T:2019:638 and General Court, September 20th 2018, case T-755/17, *Federal Republic of Germany* v *ECHA*, ECLI:EU:T:2019:647.

appellant are capable of demonstrating that the decision contested before it is vitiated by an error, and the pleas which must be raised of its own motion[37].

An action before the Board of Appeal against an ECHA decision may only seek to examine whether the evidence submitted by the appellant is capable of showing that that decision is vitiated by error. Therefore, in the context of such an action, the appellant may not confine itself to claiming that the result of the assessment on which that decision is based should have been different, but it must put forward arguments to show the existence of errors vitiating the scientific assessment on which the decision in question is based.

However, the Board of Appeal's competence to examine pleas seeking to demonstrate the existence of substantive errors vitiating an ECHA decision cannot be limited to the mere examination of procedural errors.

The members of the Board of Appeal are appointed on the basis of the experience and expertise they possess in the field of chemical safety, natural sciences or regulatory and judicial procedures. In accordance with the Rules of Procedure and the Regulation on Qualifications, at least one member is to be legally qualified and at least one member is to be technically qualified. The latter is to hold a university degree and to have substantial professional experience in the scientific fields that are relevant to assess the technical elements of the decisions actioned before the Board of Appeal. The Board of Appeal thus has the necessary expertise at its disposal to carry out itself assessments of scientific evidence. Its expertise seeks to ensure that a balanced assessment of both legal and technical aspects can be carried out.

A restrictive approach – as the one advocated by Germany before the General Court – would have the result that the Board of Appeal of ECHA could not fully perform its function, which is to limit litigation before the EU Courts, whilst guaranteeing a right to an effective remedy. As is apparent from the reform of the Statute of the Court of Justice[38], the introduction of rules concerning the admission of appeals in cases which have already been considered twice is based on the consideration that, in cases concerning decisions of the Board of Appeal of the ECHA, it is

[37] See, for an example of a public policy plea raised by the Board of Appeal of ECHA of its own motion: decision of ECHA Board of Appeal of 28 February 2023 in case A-013-2021, *Gruber Chem GmbH, Germany* v *ECHA*.

[38] Recital 4 of Regulation n. 2019/629 of the European Parliament and of the Council of 17 April 2019 amending Protocol n° 3 on the Statute of the Court of Justice of the European Union, in *OJ* L 111, 25.04.2019, p. 1 ff.

possible for them to be considered twice, namely initially by that Board and, subsequently, by the Court.

An approach in accordance with which the Board of Appeal would not be competent to examine pleas which seek to demonstrate the existence of substantive errors vitiating an ECHA decision would not be capable of ensuring an effective remedy for the purposes of Art. 47(1) of the Charter of Fundamental Rights of the European Union.

Where there is a right of appeal before the Board of Appeal, the EU Courts could only rule on an action for annulment of the decision of that Board. The initial decision of the Agency is not at issue before the EU Courts. An action for annulment of a Board of Appeal decision relates therefore to the lawfulness of such a decision. If adopted, the minimalist approach would have seriously affected the relevance of the right to appeal before the General Court.

Firstly, it would not be possible, before the General Court, to validly criticise the Board of Appeal for failing to examine pleas, the examination of which would lay outside its competence. Secondly, even assuming that the ECHA decision would be vitiated by a substantive error, such an error would not be capable of calling into question the lawfulness of the decision of the Board of Appeal at issue.

The intensity of the review

As regards the intensity of the review carried out by the Board of Appeal, the General Court first noted that the review carried out by the EU Courts is indeed limited where it involves the assessment of highly complex scientific and technical facts. Regarding such assessments, the EU Courts are limited to reviewing whether they are vitiated by a manifest error, a misuse of powers or whether the author of the decision clearly exceeded the limits of its discretion[39].

The General Court held that that case-law does not apply to the review carried out by the Board of Appeal of ECHA. From the qualifications that the REACH Regulation and its implementing rules require from the members of the Board of Appeal, it must be deduced that the legislature intended to provide that Board with the necessary expertise to allow it to itself carry out assessments of highly complex scientific facts.

Therefore, the review, by the Board of Appeal, of scientific assessments in an ECHA decision is not limited to verifying the existence

[39] See Court of Justice, July 21st 2011, case C-15/10, *Etimine SA v Secretary of State for Work and Pensions,* ECLI:EU:C:2011:504, para 60 and the case-law cited thereof.

of manifest errors[40]. On the contrary, in that regard, by relying on the legal and scientific competences of its members, that Board must examine whether the arguments put forward by the applicant are capable of demonstrating that the considerations on which that decision of the ECHA is based are vitiated by error.

3.2. Consecration in Ljubljana

In the *Aquind* case, the EU Courts have not been asked to rule again on the scope of the power of review of the Board of Appeal of ACER. It seems that it is now accepted that the EU Agencies' appeal bodies do have jurisdiction to assess whether substantive errors have been committed by their respective Agencies and are not limited to review alleged procedural flaws. Only the intensity of review was at issue in this landmark case.

Before the General Court, *Aquind*, the applicant, argued that the Board of Appeal of ACER limited its review, when examining its appeal against the initial decision of the Agency, to manifest errors of assessment. It was indeed clear from the proceedings that the Board of Appeal of ACER asserted that the intensity of its review of complex economic and technical assessments was the same as the intensity of the EU judicature's limited judicial review of the same assessments. *Aquind* submitted that such limited review constituted an infringement of the Regulation establishing ACER[41].

It is important to note that to uphold the appeal and conclude that the Board of Appeal of ACER must go beyond the assessment of manifest errors of assessment, the General Court repeatedly referred to the system put in place by the REACH Regulation. According to the General Court, as it is the case for the Board of Appeal of ECHA, the composition of the Board of Appeal of ACER, through the presence of current or former

[40] It is worth mentioning that in the context of the classification of chemical substances, a recent judgment of the General Court has been appealed by France on the ground that the General Court exceeded the limits of judicial review by going beyond an assessment of manifest error and by substituting its own assessment for that of the Committee for Risk Assessment of the European Chemicals Agency. See case C-71/23 P, an appeal brought against a judgment of the General Court, November 11th 2022, joint cases T-279/20, T-283/20 and T-288/20, *CWS Powder Coatings* v *Commission*, ECLI:EU:T:2022:725.

[41] See Art. 19(5) of Regulation (EC) n. 713/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity, in *OJ* L 211, 14.08.2009, p. 1 ff. This Regulation has been replaced by Regulation (EU) n. 2019/942 of the European Parliament and of the Council of 5 June 2019 establishing a European Union Agency for the Cooperation of Energy Regulators, in *OJ* L 158, 14.06.2019, p. 22 ff.

senior staff of the national regulatory authorities, competition authorities or other national or Union institutions with relevant experience in the energy sector, proves that the EU legislature intended to provide that board with the necessary expertise to allow it itself to carry out assessments of complex technical and economic facts relating to energy.

In addition, as it is the case for the Board of Appeal of ECHA, the fact that the EU legislature has expressly stated that the Board of Appeal of ACER is to enjoy the same powers as those available to ACER itself clearly confirms that it intended to confer on that Board the task of reviewing the decisions of the Agency with an intensity which cannot be confined to that of a limited review. According to the General Court, it would be contrary to the very nature of appellate bodies within Agencies for those bodies to conduct the limited review reserved to the Courts of the European Union.

The arguments by which ACER has tried to differentiate itself for the Board of Appeal of ECHA have all been rejected by the General Court. In particular, the General Court held that the fact that the members of the Board of Appeal of ECHA, unlike the members of the Board of Appeal of ACER, are employed full-time, has no bearing on the intensity of their review. Likewise, the General Court was unconvinced by the fact that, unlike the Board of Appeal of ECHA, which is not subject to any obligation concerning the maximum length of proceedings, the Board of Appeal of ACER is required to examine appeals within a short period of time[42].

In its judgment in appeal, the Court of Justice confirmed the approach taken by the General Court and insisted once again on the composition of the Board of Appeal of ACER, which meets the requirements necessary to enable it to conduct a full review of decisions adopted by the Agency.

If the members of the Board of Appeal must have prior experience in the energy sector, this is because they have or should have the technical knowledge necessary to enable them to conduct a detailed examination of appeals. In this respect, the Court of Justice confirmed the appropriateness of the comparison made between the Board of Appeal of ACER and the Board of Appeal of ECHA. Their compositions and powers are of the same kind, and they both have the necessary expertise to enable them to carry out assessments of complex scientific, technical, and economic facts.

[42] It was two months from the filing of the appeal in the 2009 version of the Regulation. It is now four months (Art. 28(2) of Regulation (EU) n. 2019/942, *cit.*).

Even if the Court of Justice was not invited to rule on this subject in the *Aquind* case, full review, or detailed examination of an appeal, should not be confused with a complete re-examination of the file. The procedure before the Board of Appeal, both in ACER and in ECHA, remains of an adversarial nature, based on the pleas and arguments put forward by those who challenge the decisions of the Agency. Similarly, it must be made clear that, for the Board of Appeal of ECHA, a full review does not, and cannot, lead the Board of Appeal to substitute its own scientific opinion for the opinion on the basis of which the Agency took its decision. The Board of Appeal is asked to assess alleged errors of assessment and is not in search of a pure, abstract and absolute scientific truth, provided that such a truth would be anything other than a myth. In other terms, the Board of Appeal often underlines that the mere existence of a diverging scientific opinion is not, in itself, sufficient for the purposes of demonstrating the existence of an error vitiating a decision adopted by ECHA[43].

3.3. Remaining issues

The *Aquind* rulings were read, in Helsinki, with great satisfaction, and with relief. Everything that has been decided in the two judgments of September 2019 is now confirmed and set in stone. The very nature of the task conferred on EU Agencies' appeal bodies is to delve deep into the technical intricacies of the decisions brought before them.

This firm and definitive conclusion does not, however, prevent from wondering whether those appeal bodies have the actual means to carry out this heavy task effectively.

The EU Courts based their analysis on the instruments currently in force and on the intentions clearly expressed by the EU legislature, which provide EU Agencies with review bodies where they have been given decision-making powers on complex technical or scientific issues capable of directly affecting the legal situation of the parties concerned. Those internal review bodies have a certain independence, perform quasi-judicial functions through adversarial procedures, and are composed of lawyers and technical experts. This means that the Boards of Appeal are better able to dispose of appeals against decisions which often have a strong technical component. They are therefore enabled to conduct a full review of the decisions subject to appeal.

[43] This approach has been endorsed by the judgement of the General Court of September 20th 2019 in case T-125/17, *BASF Grenzach* v *ECHA*, *cit.*, para 458.

However, if they are legally and institutionally designed to conduct such an intensive review, are the EU Agencies' appeal bodies able, concretely, to fulfil this function?

Independence and efficiency are not only abstract principles; they are also parameters which must guide the daily action of any Board of Appeal. Several appeal bodies have already highlighted the existence of practical problems in the accomplishment of their missions. Their concerns must be addressed, not by new legislation, but by practical measures.

First, and foremost, appeal bodies need to get the necessary support from their respective Agencies. In Helsinki, the Board of Appeal of ECHA appears to be in a rather enviable situation in this respect. The three full-time members are part of the staff of the Agency, and they benefit from the required support of a registry which is exclusively working for them. This allows the Board of Appeal to fully commit its time to deciding on appeals. The legal, technical and scientific expertise is present not only in the Board of Appeal itself, but also in the registry. Conducting a full review of the decisions challenged before the Board of Appeal is part of the basic features of the daily work of those.

Members and registry staff also benefit from information and training activities provided within ECHA. They are constantly connected to the Agency activities, and can thus update their knowledge and experience, provided that they strictly remain outside all the decision-making processes put in place by the Agency. In practice, drawing such a line of demarcation does not raise any significant difficulty that could not be dealt with. Frictions cannot be always avoided, but experience shows that constant progress has been made, and that the permanent nature of the Board of Appeal of ECHA has considerably helped it to establish its legitimacy and reputation.

Non-permanent appeal bodies are in a less comfortable position. The high level of expertise required to become a member of such an appeal body is not mirrored by the existence, within the Agency concerned, of a permanent support structure with an equivalent level of expertise. If there is a registry, it is often under resourced. The non-permanent appeal bodies lack an autonomous relay, within the Agency, that would be entirely dedicated to their activities.

This explains the frustration felt by some members of non-permanent appeal bodies: while they fully acknowledge the importance of their tasks, as defined by the legislation and the EU Courts, and understand the need to intensify their review on the decisions brought before them, they can only regret, at the same time, that they lack some basic support, notably in terms of time and staff.

Independent appeal bodies, within the EU Agencies, vested with the crucial task of performing a full review of the decisions challenged before them, are today firmly attached to the EU system of legal remedies. But this legal and institutional reality must now become a tangible reality. The Court of Justice itself underlined that whatever the types of organisations chosen (permanent or not), or the procedural rules imposed (with or without deadlines to deliver), all appeal bodies must be able to carry out a full review. There is still a long way to go to make this difficult mission accessible to all appeal bodies within the EU Agencies.

SELECTED CONTEMPORARY QUESTIONS FROM THE ACTIVITIES OF THE ACER BOARD OF APPEAL

Alcune questioni attuali sulla commissione di ricorso di ACER

Questions d'actualité sélectionnées dans le cadre de l'activité de la chambre de recours de l'ACER

MIRO PREK*

TABLE OF CONTENTS: 1. Introduction: on importance of practitioners providing elements for discussion, informing the theoretical findings and judicial decision making. - 2. After *Aquind* as before *Aquind*: the nature and quality of administrative review remain the same? - 3. The unused potential of the *Aquind* judgement. - 4. Where is it all going to? - 5. New old questions to be examined. - 6. Conclusion: not all that glitters is gold.

1. Introduction: on importance of practitioners providing elements for discussion, informing the theoretical findings and judicial decision making

The proliferation of high-quality theoretical and scientific literature on the Boards of Appeal in the recent years has been astounding and has brought many important elucidations on the ever-evolving picturesque landscape of the EU Agencies and their BoAs. Those contributions were mainly based on analysing the legal framework and the case law, often comparatively. This is always very informative, but has little appeal and only modest immediate utility for the practice. The practitioners often look for existing, ready-to-use solutions they could apply to their case, and for inspiration (consolation as well, at least occasionally) from their peers. Unfortunately, at the practical level and from a practitioner's perspective, there was no such richness of horizontal analyses of practical aspects of the BoAs to be witnessed, which renders opportunities for exchanges

* Chairman of the ACER Board of Appeal and former Judge at the General Court. The views and opinions expressed in this article are those of the author. They do not purport to reflect the views or opinions of the Agency.

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between science and practice, as well as among the practitioners, of which our conference today is an excellent and important example, even more important.

The large amount of high-quality in-depth analyses of BoAs from the theoretical point of view and the vast majority of theoretical works accessible at the time of reading of the opinion in *Aquind* were already mentioned by the Advocate General. While it is a very valuable contribution of the Advocates General to conduct comprehensive research into the existing theoretical sources and include those in their opinions, it would be equally beneficial to the quality of the opinions and of the judgments to come if they also consider the facts as they exist in the everyday reality of the different BoAs. Truth be told, there are not many works published by the insiders, leaders or members of the BoAs: where they are, they tend to present and analyse their own BoA against some theoretical framework, falling into the trap of doing what everyone else is doing instead of providing insights into the (sometimes 'dirty') practicalities of work of the BoAs. One rare - and relatively recent – example from 2023 of an inside job is the very complete and detailed analysis by Ollier and Piebalgs of functioning of the ACER BoA[1]. It can only be welcomed that the two former leaders of the BoA have written about their experience and provided insights into the functioning of 'their' BoA.

The paper by Ollier and Piebalgs analyses the design and functioning of the EU Agency for the Cooperation of Energy Regulators' BoA and provides a record of the key issues of substance and procedure it faced over five years (November 2016 to October 2021), from the perspective of the authors as insiders, as former chairman and vice-chairman of this review body. In the middle of their 'term of office' in 2019, the ACER regulation was amended in some important aspects, also with regard to the powers of the BoA.

As also discussed in the literature, there are common features that unite the BoAs in their diversity; yet there are the specificities of each BoA that must be considered in every serious analysis of any given BoA. Some of the ACER BoA's specificities stem from those of "ACER's role in the construction of energy markets and of the place of the decisions it takes in the architecture of the EU energy policy: despite being labelled as 'individual decisions' many of ACER's decisions are of general application and have major impacts on energy markets". Some of these questions (for instance, an individual decision is individual by its name only and is a

[1] J.-Y. OLLIER, A. PIEBALGS, *The appeal procedure in the application of the EU energy law: experience from ACER's Board of Appeal 2016-2021, EUI, RSC, Policy Paper*, 2023/06, Florence School of Regulation. Retrieved from Cadmus, EUI Research Repository.

regulatory act by its substance?) are now being examined by the EU Courts. In addition to these questions, the paper also provides information on the workload of the Board: in the context of the implementation of network codes, the BoA was faced with an increasing number of cases (29 appeals, which were consolidated into 19 decisions). These cases are considered to be complex. As to the time imposed for the decision to be taken, it was extended from 2 to 4 months to enable the BoA "to progressively adjust the depth of its scrutiny to the appropriate level. Outstanding questions remain on the resources allocated to the board and on the clarification of its powers and procedures". While the most recent case law of the Court provided some more clarity on the first question (width and depth of scrutiny) and significant progress can be said to have been achieved, more work needs to be invested in the second question, especially in the part on resources made available to the Board.

The findings and insights of Ollier and Piebalgs are an excellent source of information as to what the situation was before 2021; since then, we've seen many changes implemented (powers of the BoA, deadline; case law), yet some elements remain the same. Or do they really?

2. After *Aquind* as before *Aquind*: the nature and quality of administrative review remain the same?

The first question of quite some importance to our (predecessor) BoA as the protagonist in the court procedures relating to the *Aquind* line of cases[2] - but inevitably also to the current BoA and more widely to all the BoAs -, is whether anything has changed with the delivery of the Court's *Aquind* judgment in spring 2023 compared to 'pre-*Aquind*' situation? Surprisingly or not, I am 'obliged' to say nothing has changed, as there was no need to change anything. Everything is still the same. Summing up the official position: nothing has changed in the substance of review because the previous BoA's and today's BoA standard of review have always been the same - full review then and now, to put it simply. We are still doing the complete, intense and deep scrutiny as our predecessors of the previous BoA did before *Aquind*. Such is the line of defence that ACER advanced before the General Court and the Court of Justice in the cases that are closed or still ongoing: in spite of mentions in the decisions of the BoA of application of limited review (review limited to manifest errors of appreciation, MEA), in practice the BoA has done the full, complete review; in any case, a review that went far beyond the mere review of

[2] *Aquind* case itself (currently an action for damages before the General Court), as well as cases in which the questions of (administrative) review are being discussed.

MEA. *Falsa nominatio non nocet*, and the substance is more important than the form.

This line of defence was somehow tenable until the first judgements of the General Court in spring 2023 that endorsed it, stating that what is done matters more than what is described to have been done, but received a serious blow by the same court less than half a year later, after delivery of the *Aquind* judgement, when the General Court annulled the BoA's decision by an order, declaring the appeal manifestly well-founded[3].

There were changes planned and done, however, in anticipation of *Aquind* and well before it (prepared in 2019, implemented in 2021). How can we otherwise explain the call for expression of interest for applications for the new members of the new BoA that finally 'took office' on October 2021 that expressly mentions the need for a more in-depth review?[4] It would seem that the Commission estimated that a 'more full' review will be needed and that the MEA standard would have to be abandoned and upgraded, so that this new board would need to be equipped with different profiles of experts, concretely its legal expertise reinforced. This is what happened in the end, in order to ensure conditions in which complete review of all the aspects of the decision can effectively be performed. The Court based it reasoning in *Aquind* on this element as well.

In practice, what happens today is that we not only have a relatively high number of cases (i.e. compared to ECHA BoA with whom the Court compares ACER BoA and establishes there is no need for discernment, at least not at the level of principles), but also commensurately lower resources, as I intend to illustrate later. For the current BoA, 18 cases per year is a high number of cases, given the fact that the experience of the current BoA shows that we are able to deal with six cases per year at the most; even here, the respect of the four-month deadline poses problems.

In addition to the regular work on review of decisions, the BoA would like to gain and retain the (relative) mastery of both the procedure and the substance of decisions from the adoption of our decision until the very end - sometimes the bitter end - of those procedures. Thus, in addition to the relatively high number of cases, we also are getting involved in participating in the defence of the cases before the General Court and the Court of Justice, which was not the situation before. We are trying to do that by being included in the workflow of the court cases and by participating in the oral hearings. We believe this part of our work to be

[3] General Court, September 6th 2023, case T-212/20, *Gaz-System S.A.* v *ACER*, ECLI:EU:T:2023:525.

[4] The fact that the composition of the BoA changed does not mean everything needed to be changed as it is difficult to predict in which directions the appeals will go, but it indicates a shift of focus on the side of the Commission.

an essential part of the quality control process. To date, none of actions against our decisions has reached the stage of the oral hearing. Without surprise, one can observe a certain meandering in argumentation of the cases at different periods and before different courts.

However, this attempts at mastering the quality of the decisions all along is opening new fronts for the BoA, demanding additional investment (work): we don't have the resources to do everything that we think we would need to do to do everything that needs to be done. Simplifying: our ambition flies much higher than our resources can follow.

3. The unused potential of the *Aquind* judgement

This brings me to the *Aquind* judgement. Turning first to the judgement of the General Court from 18 November 2020, it was a very positive surprise to see the GC exemplary pedagogic in its reasoning, defining the scope of review, defining the intensity of review, also saying - which was also the case in Austrian power grid and some other cases before - that if the BoA does not conduct the full review and as the General Court will only do the limited review, there will be no full review of the Agency decision at all[5]. Unfortunately, not all the points from the General Court judgment were taken on board by the Advocate General and by the Court, at least not *expressis verbis*.

Future problems were almost certain to emerge once the opinion of the Advocate General was read. Yes, there are similarities between the BoA of ECHA and the BoA of ACER, but there are also differences; some of the differences are so important that they should have prevented the Court from reaching the conclusions it reached.

What are the (most striking) differences between the two BoAs, compared by the Court and then leading to a set of generalised conclusions? We've have just heard from the Chair of the ECHA BoA that there are some important differences when ACER BoA is compared to ECHA BoA: the first not at all irrelevant difference is that compared to our peers at ECHA, we have a significant deficit of 100% of permanent members (our net result is -3 permanent members, compared to ECHA, because we have none - none of our members is a permanent member), and we have -1,5 person in the registry compared to ECHA as we only have 0,5 person in the registry: these two differences alone - they did not seem to matter much to the Advocate General and the Court - make a world of difference to us.

[5] What happens in cases where there is no BoA, e.g. with regard to decisions of EMA, EFSA or others – does the General Court perform the full review? Perhaps this is just a rhetorical question.

At the level of principles, however, we do agree with the statements of principle the Court made. In general, and in itself, the decision of the Court is well-balanced and well-rounded. We do agree that, for instance, the standard of review must be the same for all the bodies. But there are principles and there is reality and sometimes – as in the case at hand - reality does not willingly conform to principles.

From the point of view of the unexplored potential of the *Aquind* judgement, we are happy to use the arguments from this judgement in the future negotiations with our Agency: "you see, it's decided black on white that the standard of review (i.e. in the sense of quality of work) must be the same for all the BoAs. So maybe you should consider giving us the same resources or at least similar resources as to our peers, or at least the resources that make it possible for our Board to fulfil our functions approximately adequately?". This was attempted before *Aquind*. With *Aquind*, the new approach is irrevocably confirmed, but it seems that everyone has already recovered from the relative surprise it created and has gone back to business as usual. The response to the initial shock was that there need to be serious changes introduced in the functioning of the BoAs, but it then appeared that life can indeed go on as before. After and with *Aquind*, we have additional arguments to try again. Of course, we are not afraid of facing the practical limits of the applicability of the judgments of the Court on the terrain.

Even if one may not be completely satisfied with how the Court treats the factual situations, not discerning them sufficiently, it brings important messages to the legislators and the policy makers. It defines the essentials of the administrative review and it generalises them for all the boards of appeal. The feasibility of the review is beyond grasp of the Court, it is a kind of *de minimis non curat praetor* for it. This necessarily leads to the question of how to ensure the conditions in which the findings of the Court will not only be wishful thinking, but will become reality.

It seems that EUIPO and ECHA are in the category of their own. Yet, ECHA is used as a basis for comparison with ACER (and could probably be used for any other Board of Appeal). We do not maintain that every Board of Appeal should be structured, organised, equipped and functioning in the same way as ECHA Board of Appeal. However, we do maintain there should be - in order to be able to comply with the *Aquind* judgement of the Court - a minimum standard met for each and every BoA. The implementing elements of this minimum standard could be different for different BoAs, but it seems that at least one person (and not two times half a person or any other combination of the FTE) in the registry and at least one member, by no means necessarily Chair or Vice-chair, should be permanently available to the BoA. 'Permanently available'

here means that these two minimal personnel resources would dedicate their time and energy to not only day to day work on cases, together with other members of the Board of Appeal, but also to maybe even more important tasks of developmental nature, ensuring continuity and independence in real fact. These two full timers would be the minimal viable solution that could provide a sufficient basis for a work of a decent quality.

4. Where is it all going to?

Back to the beginning, to the question in the title of this conference "*Quo vadis, Boards of Appeal?"*. The Biblical response was ominous and tragic – *"I am going to Rome to be crucified again"*. The ACER Board of Appeal didn't go to Rome, it went to Luxembourg, and luckily enough it was not for crucifixion, it was for clarification. So, with *Aquind*, it now all stands clarified and decided. But even before *Aquind*, it was all clear at least to those colleagues who believed that the significant 'detour' that first appeared in the GC judgements in CPVO cases[6], where the BoAs were qualified as the 'quasi-judicial bodies' and their tasks in relation to the "complex botanical assessments" qualified as MEA[7], was a hick-up in the case law. In this regard, one can also note the change of language in the *Aquind* judgment: the Court doesn't use the expressions 'quasi-judicial body' anymore, it uses the terms 'bodies performing quasi-judicial functions'. What will it take to use the word 'administrative'? It may well be that that change of language is also the change of perspective or approach, meaning that we can now all go back to basics. In sum, we kept dealing with an illusionary problem we wouldn't have had had it not been opened by the judgment of the General Court: the CPVO was described as a 'quasi-judicial body', with *Aquind* 'developed back' in administrative bodies performing certain 'quasi-judicial functions' – from the wrong start to the wrong track and back on the starting position? All while hoping this time we will fail again, but better?

Now that the discussion can sadly (at least for some) only focus on what the 'quasi-judicial functions' are, the good news is that there are many

[6] The Schräder line of cases (General Court, September 18th 2012, joined cases T-133/08, T-134/08, T-177/08 and T-242/09, *Schräder* v *OCVV*, ECLI:EU:T:2012:430, paras 137 and 190), a Lemon symphony that turned really sour, but also provided for some refreshment of discussion both in theory as well as in practice, comparing or even wanting to assimilate the BoAs as the essentially administrative review bodies with or to the judicial bodies. Those attempts were a significant waste of energy. See also Court of Justice, May 21st 2015, case C-546/12 P, *Schräder* v *UCVV*, ECLI:EU:C:2015:332.

[7] General Court, 19th November 2008, case T-187/06, *Schräder* v *UCVV*, ECLI:EU:T:2008:511.

unexplored questions of administrative review of the BoAs as administrative review bodies that can usefully be analysed. Is it now time to more clearly separate the two reviews, judicial and administrative, and to concentrate on how to improve the administrative review?

5. New old questions to be examined

a. The right to good administration - and to a good administrative review

One of the questions that could be explored after the end of discussion on the 'quasi judicialness' of the BoAs is the need/obligation for the BoAs to follow blindly the case law of the courts that is essentially developed by the courts and for the courts as it relates to judicial review. Is there room for manoeuvre for the BoAs to detach themselves from the mental slavery and become slightly more creative, respecting the needs of the areas of law covered by their respective Agencies and, above all, the appellants and other stakeholders, and the need for administrative review to be properly conducted (before it can be submitted to judicial review)? Maybe to go as far as to explore the limits of the 'review of expediency'[8]? Or to set a very different approach for administrative review, departing from the one carved in stone for the judicial review, including the rules and practices on admissibility – in other words, to move from rigidities of the judicial review towards more flexible, substantive respect of rights and interests of participants? The right to good administration has many unexplored facets, especially when considering the 'unity in diversity', one of the essential characteristics of the landscape of Agencies and their appeal bodies today.

b. An inspiration post- Aquind: what changes are possible with the role of the Advocate General at the General Court?

As mentioned, on reading the opinion of the Advocate General in *Aquind*, we were tempted to do the same as the ECB did in the case *Banka Slovenije* of 2021[9], in which the ECB asked the Court for reopening of the oral part of the procedure to comment on the Advocate General's findings.

[8] Another concept that did not find much attention in the case law of the courts, at least not with regard to the judicial review. It may be different in the context of administrative review. Should it be different?

[9] Court of Justice, September 13th 2002, case C-45/21, *Banka Slovenije,* ECLI:EU:C:2022:670, p. 38 ff.

By document lodged at the Court registry on 10 May 2022, the ECB requested that the oral part of the procedure be reopened. The ECB disagreed with the Advocate General's opinion. It argued in particular that that opinion relies on a broad interpretation of the concept of "public sector obligations"' within the meaning of Art. 1(1)(b)(ii) of Regulation (EC) n. 3603/1993, which has significant consequences for the general organisation of economic and monetary policy, and that the parties did not have the opportunity to comment on that point at the hearing. While the substance giving rise to the request has nothing to do with ACER's area of competence, the request procedurally as an attempt to 'correct' certain developments in the opinion of the Advocate General may be worth examining – despite the negative outcome of the request for the ECB before the Court[10]. This unexplored avenue is worth exploring as the BoAs will mainly be involved in the procedures before the General Court, where the practice of appointing the Advocates General will be new (the possibility exists for quite some time now) and will also be shaped by practice – that practice will need to be developed. Traditionally, the General Court manages to make plausible connections of facts and law (that's what it was established for, to examine factually and legally complex cases); the use of possibility to appoint the Advocates General and hopefully to also be able to hope for an occasional reopening of the oral part of the procedure could contribute to the thorough examination of all the relevant facts and applying the law to them.

In any case, this is an interesting approach that may need to be revisited and modified in the sense that parties may submit observations to the General Court concerning the Advocate General's opinion, to submit additional observations and maybe offer a practitioner's view so that the judgment to come would be evidence-based, respectful of and true to the facts and not only literature-inspired[11].

The avenue that may be useful to explore in the future therefore is to develop further what was proposed by the ECB in C-45/21, however at the level of the General Court, with the specificities this entails.

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[10] In the given circumstances, the Court considered it was not necessary to order that the oral part of the procedure be reopened (p. 43), as it should be borne in mind that the and the Rules of Procedure make no provision for parties to submit observations in response to the Advocate General's Opinion (p. 41); the Court may at any time, after hearing the Advocate General, order the reopening of the oral part of the procedure, in particular if it considers that it lacks sufficient information (p. 42), and it had at its disposal, at the end of the written part of the procedure and the hearing before it, all the information necessary to give a ruling.

[11] This could be an option to use before the General Court and its newly clarified and developed system regarding the functions of the Advocates General at that Court.

The facts that there is the new filtering mechanism adopted and that the General Court deals with technically (factually) complex cases (*Aquind* probably was such a case), as well as the possibility for the General Court and its Advocates Generals to develop their own approach may provide some fertile ground for a more fact-friendly (fact-aware, factfulness-based) approach to cases in the future.

c. Filtering mechanism from the amended Article 58a of the Statute

We don't think that adding BoA on the list of the Article 58a will have an important impact on how we work and especially not on the number of cases. With regard to the latter, there will probably be less work for the ACER BoA as all the questions will be solved at the level of the General Court and there will be no need to participate in the proceedings before the Court. This is even more so if we consider going back to the original functions or the original intention of establishment of BoA, which is to engage in the administrative review.

d. What is admissible? A final point, currently under discussion

In line with the question on the possibility of developing specific rules for the administrative review instead of blindly applying the rules developed for and by judicial bodies, we should mention that there are two cases underway in which the question of admissibility of appeals against the decisions of the Agency are being discussed: what to do where the founding regulation of the Agency is different (more restrictive) than the TFEU is on admissibility to judicial review?

According to the Notices published in the OJ about the cases, the actions for annulment criticise the BoA for having declared their appeals inadmissible: the Applicant before the General Court claims the BoA failed to recognise that the contested decision is not only of direct but also of individual concern to the Applicant, and that the Applicant was entitled to appeal under Art. 28(1) of Regulation (EU) n. 2019/942 (first plea); the Applicant also claims that the BoA failed to recognise that a party may also bring an appeal under Art. 28(1) of Regulation (EU) n. 2019/942 where the contested measure is a regulatory act which – as in the present case – is of direct concern to the party bringing the appeal and does not entail implementing measures (even when labelled 'individual decision' by the ACER Regulation).

These are purely legal questions and those cases seem to be important not only to ACER's BoA. The more general question that started to

become quite important in *Unión de Pequeños Agricultores UPA*[12] and *Jégo-Quéré*[13] at the turn of millennium was revived after the entry into force of the Treaty of Lisbon (*Inuits* and the cases that followed and follow), and especially because of the importance of the energy transition: how broad an access to the administrative and to the judicial review do the BoAs and the courts want/need to give? Maybe this is a good opportunity to provide for more administrative (and later on, judicial) protection, especially with regard to the recent developments in some areas of law (climate and energy)[14].

6. Conclusion: not all that glitters is gold

The importance given to the BoA in the recent years because of their declared quasi-judicial nature was a very positive development, even if for wrong reasons: it has made both the theory and the practice aware of the existence and importance of the existence and nature of (quasi-judicial or administrative?) review at the level of Agencies.

Assuming almost everything is clear with regard to the nature, scope and intensity (in one word: quality) of judicial review, we should now recentre our attention to the administrative review. Based on discussions so far, even if not always in the right framework, there are now opportunities for the BoAs to be examined in their natural environment, the one of administrative review, and to observe - even better, assist and enable - them in their mission of developing (improving) the quality of their review. If in these discussions new opportunities are discovered and used to protect the interests of participants faster and better, the discussions will not be futile.

[12] Court of Justice, July 25th 2022, case C-50/00 P, *Unión de Pequeños Agricultores* v *Council*, ECLI:EU:C:2002:462.

[13] Court of Justice, April 1st 2004, case C-263/02 P, *Commission* v *Jégo-Quéré*, ECLI:EU:C:2004:210.

[14] The somewhat innovative approach taken in *Corneli* is not the best example, except of the point that there is room for improvement.

HARD QUESTIONS, SHORT TIME: WHO IS BRAVE ENOUGH TO SIT IN A BOARD OF APPEAL?

Questioni difficili, poco tempo: chi è abbastanza coraggioso da voler far parte di una commissione di ricorso?

Questions difficiles, petit temps : qui est assez courageux pour siéger dans une chambre de recours ?

MICHELE SIRI*

TABLE OF CONTENTS: 1. Introduction. – 2. The legal framework for the suspension of administrative decisions: does the CJEU case-law suffice? – 3. The role of fundamental rights in the quasi-judicial review. – 4. The role of fundamental rights in the administrative decision-making process: a burden or a boost to efficient administration? – 5. How Boards of Appeal can deliver some added value, compared to courts, when assessing these difficult questions?

1. Introduction

The present analysis will tackle the debates on the impact of *Aquind* on the role of Boards of Appeal, already discussed elsewhere in this Volume[1], focusing in particular on two matters which could help understand the role and the functioning of the ESAs Joint Board of Appeal. The first one is the role and the legal framework for the suspension of administrative decisions[2]. The second matter is the role and the interpretation of fundamental rights in the case-law of the Board. The role of fundamental rights will be addressed firstly from the point of view of the quasi-judicial review that the Board performs and, secondly, from

* Professor of Commercial Law at the University of Genoa and President of the ESAs Joint Board of Appeal. The views and opinions expressed in this paper are those of the Author. They do not purport to reflect the views or opinions of the Agencies.

[1] See in this *Volume* S. OOSTERHUIS, *More than the EU Courts, less than the Agencies: intensifying the boards of appeals' standard of review after the Aquind-judgment*, p. 105.

[2] For a deeper discussion of interim protection granted by Boards of Appeal see, in this *Volume*, M. F. ORZAN, *Interim protection before Boards of Appeal*, p. 83.

the perspective of the administrative bodies that are subject to such quasi-judicial review (or at least from what *probably should be* the perspective of administrative bodies).

2. The legal framework for the suspension of administrative decisions: does the CJEU case-law suffice?

Rules on suspension of administrative decisions are often dealt with in very synthetic provisions within the founding acts[3] and the Rules of Procedure of Boards of Appeal[4]. However, the Boards' experience so far suggests that these scant references underestimate the crucial role that time plays in the Boards' decision-making process.

Limiting the analysis to the ESAs Board, the timing the ESAs determine for the application date of their decisions might not always sit easily with the timing for the Board's procedure. Under Art. 60(2) of the ESAs Founding Regulations, applicants have three months to appeal against decisions that are addressed to them or are of direct and individual concern to them. Thereafter, the Board of Appeal has three months to take a decision.

This means that, in the first-best scenario where the appeal is complete from the outset and can therefore be considered as 'lodged', a timespan of six months will elapse between the moment the relevant ESA releases its decision and the moment the Board will finalize the appeal procedure.

Shorter timings might be possible, but they cannot be taken for granted as they may not be compatible with due consideration to the rights of the parties and a thorough assessment of the case by the Board members – especially when these involve matters pertaining to fundamental rights, as the analysis will further explore below[5].

Whenever the date of application for the ESAs' decision falls before the foreseeable date of the decision by the Board of Appeal there is a clear

[3] According to the Art. 278 TFEU, 'actions brought before the Court of Justice of the European Union shall not have suspensory effect. The Court may, however, if it considers that circumstances so require, order that application of the contested act be suspended'.

[4] According to the Art. 60(3) of the Regulation (EU) n. 1093/2010, Regulation (EU) n. 1094/2010, Regulation (EU) n. 1095/2010 – the so called 'ESAs Founding Regulations' – "an appeal lodged pursuant to paragraph 1 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". See also Art. 10 of Board of Appeal of the European Supervisory Authorities' rule of procedure.

[5] See in this *Volume* P. STANCANELLI, A. M. FERNANDEZ, *Role and Perspectives of the Boards of Appeals of EU Agencies in Light of the Reform of the Statute of the Court of Justice*, p. 305.

risk for the protection of the appellant. Such a risk is heightened when application of the ESAs' decision (or compliance with it by the appellant) leads to results that cannot be easily reverted.

A case in point is the withdrawal of an authorization. Once a firm is ousted from the market, it must dismantle its organization and will lose all its clients, who will have most likely moved to another provider – in short, that firm will not be going concern any longer. Here is where suspensions become crucial.

Under the case-law of the Court of Justice, suspensions are traditionally allowed only when the two conditions are met: (*i*) they must not appear *prima facie* unfounded (*fumus boni iuris*); and (*ii*) they must be aimed at avoiding an irreversible damage before a decision is taken on the merits (*periculum in mora*)[6].

The two conditions are interpreted narrowly, because the very idea of a suspension runs against the presumption, which the Court of Justice reiterates, that the acts of EU administrative bodies comply with the law[7]. Moreover, redress is always on the background as a general remedy that can restore the applicant's rights in case the appeal is upheld on the merit. For this reason, the risk that the appellant may suffer from purely economic losses is rarely regarded as a sufficient ground to suspend the challenged decision[8].

The ESAs Board of Appeal follows the approach of the Court of Justice on this matter[9]. This is far from being an obvious point[10]. As

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[6] See for example Court of Justice, March 2nd 2016, case C-162/15 P-R, *Evonik Degussa* v *Commission*, ECLI:EU:C:2016:142, paras 21 and 71 and the case-law cited. The Court has introduced also a third requirement which is the "balancing of interest", according to which the risk associated with each of the possible disposals of the case must be weighed in the proceedings for *interim* measures.

[7] General Court, October 10th 2020, case T-451/20 R, *Facebook Ireland* v *Commission*, ECLI:EU:T:2020:515, para 23.

[8] See for example, General Court, October 10th 2020, case T-451/20 R, *Facebook Ireland* v *Commission*, *cit.*, para 70. However, there are some exceptions according to which economic losses could sometimes be considered sufficient for satisfying the *periculum in mora* requirement: see for example Court of Justice, November 22nd 2018, case C-315/18, *Valencia Club de Futbol SAD* v *European Commission*, ECLI:EU:C:2018:951.

[9] The last BoA decision on a suspension request is decision of ESAs Board of Appeal of 23 October 2023 in case BoA-D-2023-03, *Dubai Commodities Clearing Corporation (DCCC)* v *ESMA*. The judgment's matter is the ESMA decision to withdraw the recognition of DCCC as a Tier 1 third-country CCP based on the fact that DCCC no longer complies with the requirements set out in Art. 25(2), point (d) EMIR. For the final Board's decision, after the disposal of an *interim* measure, see decision of ESAs Board of Appeal of 29 January 2024 in case BoA-D-2024-01, *Dubai Commodities Clearing Corporation (DCCC)* v *ESMA*, in which the BoA confirms the ESMA's decision.

[10] In some decisions the Board does not seem to consider it necessary to follow the Court case-law on *interim* measures: see decision of ESAs Board of Appeal of 30

Aquind has demonstrated, Boards may have their own specificities that run against an automatic reproduction of the Court's case-law[11].

However, there is sufficiently broad autonomous case-law by the Boards on this matter[12], which in turn aligns with the Court's line of reasoning. Hence, it is sensible that the Board refers to a well-established interpretation of similar rules on suspension. After all, one can assume that EU law works as a system where, unless the law provides otherwise, identical provisions should be interpreted in the same way[13].

There is of course no reason to question the presumption that the ESAs acts comply with EU law. However, the traditional case-law of the Court may be sometimes too narrow in other respects, when it comes to granting suspension. In particular, redress may not always be a panacea to mend possible flaws in the challenged decisions. First, in the abovementioned scenario where suspension is denied and the appeal is upheld, compliance with the challenged act may require efforts that add upon those needed to re-establish the *status quo ante* later on. In this case, redress does not avoid wasting resources and may in any case prove hard to quantify.

This risk of squandering resources is not the same for all the ESAs decisions, of course. For instance, compliance with administrative sanctions does not lead to specific issues later on, in case the Board adjudicates in favor of the applicant. Payments of sanctions are easy to undo if the sanctioned entity can afford them, even if they must be paid

November 2018 in case D_2018_03, *Skandinavia Enskilda Banken AB* v *ESMA*.

[11] Court of Justice, March 9th 2023, case C-46/21 P, *ACER* v *Aquind Ltd*, ECLI:EU:C:2023:182, paras 53 ff. For an analysis of the judgment see, in this *Volume*, M. LAMANDINI, D.R. MUNOZ, Aquind *and the Standard of Review of the Esas Joint Board of Appeal and of the SRB Appeal Panel*, p. 261. The Court's position has been also anticipated – but not necessarily hoped for – by some Scholars: see M. GARGANTINI, *La registrazione delle agenzie di* rating *e il ruolo della Commissione di ricorso delle Autorità europee di vigilanza finanziaria*, in *Rivista di diritto societario*, 2014, p. 403.

[12] See for example decision of ESAs Board of Appeal of 8 June 2023 in case BoA-D-2023-01, *Euroins Insurance Group AD* v *EIOPA*; see also decision of ESAs Board of Appeal of 30 November 2018 in case D_2018_03, *cit.*, in which the BoA focuses particularly on a third requirement – the balancing of interest – because 'the Board is not a court'.

[13] A similar reasoning is set by some Scholars, according to whom CJEU and Board of Appeals should be considered as different elements but in a unique and coherent European rights protection system. See for example M. LAMANDINI. D.R. MUNOZ, *A promise kept? The first years of experience of the Appeal Panel of the SRB*, in *Journal of Banking Law and Banking,* 2023, p. 168 and, more recently, J. ALBERTI, M. LAMANDINI, *The Parts and the Whole*, in *Revue of European Litigation*, 2023, p. 115. For its part, also the Board seems to have sometimes recognized the judicial and quasi-judicial protection as an integrated system see decision of ESAs Board of Appeal of 8 June 2023 in case BoA-D-2023-01, *cit*.

immediately upfront: a mere restitution will suffice, here. This is all the more so when the ESAs deny a request for an authorization, as these decisions do not even require any actions from the side of the applicant.

However, risks are higher when two conditions occur simultaneously: (*i*) complying and undoing compliance with the ESAs decision is expensive; (*ii*) the application date of the ESAs decision is likely to fall before the Board's decision on the merits of the case.

In this case, the Board may be particularly rigorous when scrutinizing the ESAs' decisions after a request for suspension. This scrutiny will address, in particular, whether the appeal provides arguments that appear, *prima facie*, not unreasonable. As the *fumus boni iuris* will be subject to close scrutiny, it becomes crucial that the ESAs pay the utmost attention to some fundamental issues concerning the proper conduct of the administrative proceedings.

Chiefs among these issues are those concerning fundamental rights. Here is where a paradox emerges in these cases – Boards often deal with incredibly important issues such as fundamental rights, but they must do so within the short timeframe not just of the whole appeal procedure, but also of the suspension phase alone.

3. The role of fundamental rights in the quasi-judicial review

The increasing attention towards fundamental rights is one of the most remarkable developments of the recent case-law, both before the Court of Justice and Boards of Appeal[14]. Some particularly important disputes in this regard originated in Italy. In those disputes, the Court of Justice has rendered some crucial decisions on the ban against double punishment and prosecution (*ne bis in idem* – cases *Garlsson*[15] and *Zecca & Di Puma*[16]) and on the right to remain silent before the national supervisor when the risk exists that a substantially criminal punishment will apply (case *DB* v *Consob*[17]).

[14] A. ROSAS, *The Court of Justice of the European Union: A Human Rights Institution?*, in *Journal of Human Rights Practice*, 2022, p. 204.

[15] Court of Justice, March 20th 2018, case C-537/16, *Garlsson Real Estate SA* v *Consob*, ECLI:EU:C:2018:193. The *ne bis in idem* principle is enshrined in Art. 50 of the Charter of Fundamental Rights.

[16] Court of Justice, March 20th 2018, joined cases C-596/16 and C-597/16, *Enzo di Puma* v *Consob* and *Consob* v *Antonio Zecca*, ECLI:EU:C:2018:192.

[17] Court of Justice, February 2nd 2021, case C-481/19, *DB* v *Consob*, ECLI:EU:C:2021:84. The rights considered by the Court in the decision are those enshrined in Art. 47 ('Right to an effective remedy and to a fair trial') and in Art. 48 ('Presumption of innocence and right of defense') of the Charter of Fundamental Rights.

More recently, the ESAs Board had to deal with matters pertaining to the right of those involved in an administrative proceeding to be heard by the administrative authority, and to the obligation of that authority to give reasons for its decisions[18]. Both these fundamental rights are enshrined in Art. 41 of the Charter of Fundamental Rights, which is directly binding on all the European bodies[19].

The essential premise is that approaching this kind of matters is far from easy. Fundamental rights are at the core of the EU legal architecture, and they should not be subject to any compression. At the same time, there is no doubt that a Board should be able to tell cases where a substantive violation occurred from others where there is no material harm for the applicant, so that the appeal does not deserve to be upheld on this matter.

For instance, the ESAs Board has stated that the duty to provide reasons in an administrative decision cannot be satisfied by a mere repetition of the wording of the law that defines the purpose of the ESAs' powers. In the Board's view, reproducing provisions that are in any case applicable does not, in principle, suffice to satisfy the standard of the Charter of Fundamental Rights[20].

By the same token, the Board reached the conclusion that the right to be heard is violated even when secondary legislation does not provide for it[21]. When an administrative decision is addressed to a person and will determine legal consequences for that person, no matter that the law does not include such person among those who must be consulted. The direct

[18] The decision, as above mentioned, is decision of ESAs Board of Appeal of 23 October 2023 in case BoA-D-2023-03, *cit.*

[19] Art. 41 of the Charter of Fundamental Rights is often cited by the Board of Appeal in its decisions. Even if this is not the main topic of the analysis, it seems useful to remember that the Art. 41 is also used to argue for the administrative nature of the Board(s) in European Union. Recently, some Scholars started to claim the Board is getting away from the Art. 41 moving close at the same time to the Art. 47 of the Charter. However, this route will not necessarily change the Boards' nature: see in this *Volume* G. AGRATI, *Procedural Guarantees in the Litigation before the Boards of Appeal*, p. 65; M. CHAMON, A. VOLPATO, M. ELIANTONIO, *Conclusion,* in M. CHAMON, A. VOLPATO, M. ELIANTONIO (eds.), *Boards of Appeal of EU Agencies: Towards Judicialization of Administrative Review*, Oxford, 2022, p. 321.

[20] See decision of ESAs Board of Appeal of 23 October 2023 in case BoA-D-2023-03, *cit.*, para 37, considering therefore satisfied the *fumus boni iuris* requirement for suspending ESMA decision to withdraw the recognition of DCCC as a Tier 1 third-country CCP.

[21] See *ibidem* paras 42-46, concluding for the existence of *fumus boni iuris* requirement. In particular, the Board admits the Art. 25(3) EMIR does not expressly mention the CCP among the entities ESMA should consult before the withdrawal decision. However – according to the Board – this 'does not preclude the CPP form enjoying the right to be heard on a different legal basis, such as Art. 41(2) of the Charter' (para 44).

applicability of the Charter of Fundamental Rights ensures that the ESAs must always comply with it.

In both instances, however, the problem that arises is how far the Board should go after these initial statements, particularly as regards the ability of the appeal procedure to compensate for such violations. In other words: (*i*) what about the reasons that are stated during the appeal procedure (for instance in the ESAs' response)? Are they able to compensate for the lack of sufficient reasoning in the administrative decision? (*ii*) as to the right to be heard, what happens if, once again during the appeal, the applicant does not provide any information that would have been material enough to play a role in the administrative decision-making process?

These two questions can both be assessed from two perspectives, one practical and one theoretical, which can lead to different outcomes in terms of incentives to the parties involved.

The duty to provide reasons is once again a good starting point. From a practical perspective, one can observe that Boards are normally established in the interests of procedural economy[22] and that, therefore, the explanations provided by the ESAs during the course of the appeal should be capable of compensating the lack of sufficient reasons in the contested decision. After all, remitting the decision to the ESAs for the sole purpose of having its wording modified to integrate information that was already provided to the appellant in the context of the Appeal proceedings would not improve the protection of the appellant. Indeed, this would just determine a postponement of the final decision, with no benefit for anyone.

However, one can argue that such a lenient approach towards administrative decisions lacking a complete reasoning may expose the Board decision to the risk of being challenged, in turn, if one believes there is no way to compensate for the original lack of grounds with information the ESAs provided during the appeal. For sure, that lenient approach also provides an incentive not to clearly state reasons in the first place, because in the worst case the ESAs can fulfil the duty before the Board.

The same kind of questions arise with respect to the right to be heard. Allowing the ESAs to fulfil that duty during the appeal might incentivize them to be less attentive during the administrative proceeding, although

[22] Indeed, flexibility is generally considered an essential feature for proceedings before the Board of Appeal. See for example J. ALBERTI, *The Threshold Guardians. The Future of EU Agencies' Boards of Appeal in light of the recent reforms of CJEU Statute*, in *Revue of Administrative Law*, 2023, p. 71. See also, in this *Volume*, C. ZADRA, *Possible Future Developments of the Legal Framework of the Boards of Appeal: A Short Analysis from the Perspective of the Council of the European Union*, p. 293.

they would do so at their own risk in case the applicant can bring material information at a later stage.

At the same time, remitting the case back to the ESAs when there is no rational ground to believe the decision can be revised does not seem to improve the protection of the party. After all, according to the CJEU case-law, in order for an infringement of the right to be heard to result in annulment, it is necessary to establish that, had it not been for such an irregularity, the outcome of the procedure might have been different[23]. Again, this second point of view would lead to conclude that there is a functional continuity between the ESAs and the Board, something that is however debatable in the first place[24].

4. The role of fundamental rights in the administrative decision-making process: a burden or a boost to efficient administration?

More in general, it seems important to spend a few words on the role of fundamental rights in the administrative decision-making process. This is not something that has to do with the ESAs Joint Board as such, but rather with the administrative proceedings in general – partially from the perspective of the Board and partially from the reading of the case-law of the Court of Justice in the decisions mentioned above.

In this regard, there seems to be quite some misunderstanding on the role and the function of human rights protection. Fundamental rights are, of course, primarily a way to protect individuals (and sometimes the organizations individuals create) from the abuse of power by the public authority. In this regard, they are often seen as a limitation to what administrative bodies can do – something that hinders their ability to maximize their efficiency, particularly from the perspective of the smooth functioning of the administrative action. Wouldn't the administrative proceeding be more effective if the addressees were forced to talk and share useful information? Wouldn't it be smoother if there is no need to listen to their point of view, which takes time to gather and to assess? Why spend time to state the obvious in a reasoned decision when it seems there is only one obvious decision to take?

However, this kind of attitude does not seem particularly productive. The protection of fundamental rights should be considered as something

[23] Court of Justice, November 30th 2023, case C-173/22 P, *MG* v *European Investment Bank*, ECLI:EU:C:2023:932, para 36, quoting Court of Justice, June 18th 2020, case C-831/18 P, *Commission* v *RQ*, ECLI:EU:C:2020:481, para 105 and the case-law cited.

[24] For the (different) meanings of 'functional continuity' see J. ALBERTI, *The Position of Boards of Appeal: Between Functional Continuity and Indipendence*, in M. CHAMON, A. VOLPATO, M. ELIANTONIO (eds.), *cit.*, p. 245 ff.

that supports (as opposed to hindering) administrative efficiency and effectiveness. For every fundamental right, one can find a good reason why it is indeed in the interest of the administration to enforce that right in a substantive way[25]. The hearing of the involved party is an excellent way to factor into the decision-making process information that is most likely relevant to the decision to take[26]. Without that information, the risk is higher that the decision will be blind on some crucial matters[27].

Forcing the person involved to talk is, instead, and excellent way to receive false information. That person will in fact have strong incentives to avoid punishment for remaining silent, but also for the violation they are accused of. Hence, lying is the best option sometimes, but factoring unreliable information into the decision-making process does no good to the efficiency of the administration. By the same token, isn't the mandatory reasoning a good way to force the administration to stick to a logical reasoning where facts are the basis of well-grounded decisions?

One can play this game for every fundamental right, as anticipated. Another example could be the *ne bis in idem* and the need to avoid squandering resources to enforce something that was already enforced. Therefore, this perception of fundamental rights as a supporting element for good administration can certainly improve the effectiveness of administrative bodies and, why not, reduce litigation afterwards.

5. How Boards of Appeal can deliver some added value, compared to courts, when assessing these difficult questions?

The answer to this question lies with the analysis of the role the Board may play depending on whether there is a functional continuity with the

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[25] See e.g. M. GARGANTINI, *Public enforcement of market abuse bans. The ECtHR Grande Stevens decision*, in *Journal of Financial Regulation*, 2015, p. 149.

[26] The dual-purpose of the right to be heard is highlighted also in Court's decisions. See Court of Justice, November 30th 2023, case C-173/22 P, *MG* v *European Investment Bank*, *cit.*, para 23, according to which 'the right to be heard pursues a dual objective. First, to enable the case to be examined and the facts to be established in as precise and correct a manner as possible, and, second, to ensure that the person concerned is in fact protected'. Indeed, 'the right to be heard is intended in particular to guarantee that any decision adversely affecting a person is adopted in full knowledge of the fact' – also citing Court of Justice, June 4th 2020, case C-187/19 P, *EEAS* v *De Loecker*, ECLI:EU:C:2020:444, para 69 and the case-law cited.

[27] See Court of Justice, December 18th 2008, case C-349/07, *Sopropé* v *Fazenda Publica*, ECLI:EU:C:2008:746, para 49: "the purpose of the rule that addressee of an adverse decision must be placed in a position to submit his observation before that decision is adopted is to enable the competent authority effectively to take into account all relevant information".

ESAs or not[28]. Functional continuity might facilitate a review where substance prevails over form[29]. Even when it appears that a violation occurred on a formal basis, there is some room to reconsider the point before the Board and to mend the loopholes of the administrative proceeding in that regard. Vice-versa, one can expect that the Board may not be satisfied of formal compliance when the substance is not met.

At the same time, even if one believes that the role of the Board is more detached, so to say, from the ESAs, there is still a lot of added value to find in the ability of the Board members to rely on their expertise in financial law, something a traditional judge may find more difficult to do[30].

[28] M. LAMANDINI, D.R. MUNOZ, *Some Reflections on the Standard of Review in the Experience of the ESAs Joint Board of Appeal and of the SRB Appeal Panel*, in *European Company and Financial Law Review*, 2022, 6, p. 950.

[29] M. CHAMON, D. FROMAGE, *Between Added Value and Untapped Potential: The Boards of Appeal in the Field of EU Financial Regulation*, in M. CHAMON, A. VOLPATO, M. ELIANTONIO, *cit.*, p. 8.

[30] M. LAMANDINI, D.R. MUNOZ, *Finance, Law, and the Courts,* Oxford, 2023, p. 471 ff. The presence of expert members is traditionally considered as the main feature of the different Boards of Appeal in the European Union: see M. CHAMON, A. VOLPATO,*Sketching Out the Role and Function of the ECHA Board of Appeal: Germany v ECHA and BASF v ECHA***,** in *European Law Revue*, 2020, p. 840.

AQUIND AND THE STANDARD OF REVIEW OF THE ESAs JOINT BOARD OF APPEAL AND OF THE SRB APPEAL PANEL

Aquind *e lo* standard *di controllo della commissione di ricorso congiunta delle ESAs e della commissione di ricorso di SRB*

Aquind *et le niveau de contrôle de la commission de recours des AES et de la commission de recours du CRU*

MARCO LAMANDINI[*]
DAVID RAMOS MUÑOZ[**]

TABLE OF CONTENTS: 1. Is *Aquind* a game-changer in the theory and practice of the standard of review for the JBoA and the AP? – 2. Parallels with the intensity of the review of the European courts.

1. Is *Aquind* a game-changer in the theory and practice of the standard of review for the JBoA and the AP?

Pursuant to Art. 60 of the ESAs Regulations any person, including competent authorities, may appeal against a decision of ESMA, EBA or EIOPA referred to in Article 17, 18 and 19 and any other decision taken by any of these authorities in accordance with the Union acts referred to in Article 1(2)[1]. The Joint Board of Appeal shall decide upon the appeal.

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[*] Full Professor of Commercial Law, *Alma Mater Studiorum* University of Bologna; Member of the Appeal Panel of the SRB. The views and opinions expressed in this article are those of the author. They do not purport to reflect the views or opinions of the Agency. This contribution develops and updates issues already published in *Some Reflections on the Standard of Review in the Experience of the ESAs Joint Board of Appeal and of the SRB Appeal Panel*, in *European Company and Financial Law Review*, 2023, pp. 950-970.

[**] Associate Professor of Commercial Law, Universidad Carlos III de Madrid; Alternate Member of the Joint Board of Appeal of the ESAs and of the Appeal Panel of the SRB. The views and opinions expressed in this article are those of the author. They do not purport to reflect the views or opinions of the Agencies.

[1] Regulation (EU) n. 1093/2010 of the European Parliament and of the Council, Regulation (EU) n. 1094/2010 of the European Parliament and of the Council, Regulation (EU) n. 1095/2010 of the European Parliament and of the Council, of 24

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The JBoA may confirm the decision taken by the authority or remit the case. In case of remittal, the authority shall be bound by the decision of the JBoA and shall adopt an amended decision. The decision of the JBoA can be challenged for annulment before the General Court pursuant to Article 61. Almost identical provisions apply to the Appeal Panel of the SRB, pursuant to Article 85 and 86 SRMR[2].

There is no express guidance in the regulations on how the JBoA or AP should decide upon the appeal and examine whether it is well-founded. Article 263 TFEU provides that European courts shall limit their scrutiny to the review [of] the legality of the appealed decisions or expressly specifies that the review shall be based (only) "on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers". There is no comparable provision for the JBoA or the AP in the founding regulations for the ESAs or the SRB, nor elsewhere. Thus, the question arises whether context and finality may support the conclusion that the standard of review is the same of the European courts. The answer is still not conclusive.

In the academic literature there seems to be no clear consensus.

One may be tempted to look for a conclusive answer at the case-law, still in the making, concerning the standard of review of other Boards of Appeal in place at European Agencies outside finance. In particular, the conclusions reached in 2019 and 2020 by the General Court for the BoAs of ECHA and ACER seems to offer some guidance, at least for those Bodies[3]. The General Court held that the BoA of ECHA is not called "to conduct a *de novo* evaluation (…), that is to say an evaluation of the question whether, at the time when it rules on the action, in the light of all the relevant elements of fact and law, in particular scientific issues, a new decision with the same operative part as the decision contested before it may be lawfully adopted"[4].

November 2010, in *OJ* L 331, 15.12.2010, p. 1 ff. (ESAs Regulations).

[2] Regulation (EU) n. 806/2014 of the European Parliament and of the Council, of 15 July 2014, in *OJ* L 225, 30.06.2014 (SRMR).

[3] General Court, September 20th Case T-125/17, *BASF Grenzach* v *ECHA*, ECLI:EU:T:2019:638, paras 60 and 65, and paras 87-89; General Court, November 18th 2020, case T-735/18, *Aquind* v *ACER*, ECLI:EU:T:2020:542, paras 50-70. Within the appeal introduced against the *Aquind* decision, the application for interim suspension was rejected with order of the Vice-President of the Court of 16 July 2021. The *BASF* case is closed, because the related appeal was dismissed; see Court of Justice, order of the Vice-President of May 28th 2018, case C-565/17 P, *BASF* v *ECHA*, ECLI:EU:C:2018:340.

[4] General Court, September 20th Case T-125/17, *BASF Grenzach* v *ECHA*, *cit.*, para 59.

However, "the review, by the Board of Appeal, of scientific assessments in an ECHA decision is not limited to verifying the existence of manifest errors. On the contrary, in that regard, by relying on the legal and scientific competences of its members, that BoA must examine whether the arguments put forward by the applicant are capable of demonstrating that the considerations on which that decision of the ECHA is based are vitiated by error"[5].

For the BoA of ACER the General Court, in *Aquind*, judging of a decision of ACER adopted pursuant to the original wording of the ACER Regulation, noted that the Board of Appeal, under that version of the Regulation, could exercise the powers which lie within the competence of the Agency or remit the case[6]. Thus, it reaffirmed in this context that the administrative review should undertake a full review that is not limited to 'manifest errors' in decisions entailing complex technical and economic assessments. *Aquind* was appealed, and in his Opinion on such appeal, Advocate General Campos Sanchez-Bordona suggested to the Court to follow this course of action[7]. Something that the Court ultimately did with its judgment of 9 March 2023[8]. Thus, it would be tempting to conclude that there is a clear 'doctrine' for the standard of review of administrative appeal bodies, which all of them are expected to follow.

Yet, such conclusion would be premature and, in our view, may prove in due course misguided. To reach such conclusion, it would be necessary to argue that the findings reached by the Court for Boards of Appeal of other Agencies may be applied by analogy to the JBoA or the AP, because their defining features do not present relevant differences.

Yet, there are quite visible, and quite relevant, differences between other bodies and the JBoA and AP. Such differences are not a mere accident, but the result of institutional design (and have clear implications on the governance itself of the relevant Agencies), and they may have an impact on the intensity of the review. Whereas the Boards of Appeal of EUIPO, CPVO and ECHA and, at the time of the decision challenged in *Aquind*, also ACER exercise on appeal *any power which lies within the competence of the Agency* or remit the case, other Boards of appeal such as the JBoA and AP can only confirm or remit. Such difference may work as a first warning against any automatic inference by analogy.

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[5] *Ivi* para 89.

[6] General Court, November 18th 2020, case T-735/18, *Aquind* v *ACER*, *cit.*, para 27.

[7] Opinion of Advocate General Capos Sanchez-Bordona, September 15th 2022, case C-46/21 P, *ACER* v *Aquind*, ECLI:EU:2022:C:695.

[8] Court of Justice, March 3rd 2023, case C-46/21 P, *ACER* v *Aquind*, ECLI:EU:C:2023:182.

To better exemplify the difference, consider that the CJEU disregards EUIPO BoA as a "court or tribunal" to the effect of preliminary references because they enjoy "the same powers as the examiner" and there is thus "continuity of their functions with the Agency" (something that we may term 'functional continuity'), in the sense that "an action before the EUIPO Board of Appeal forms part of the administrative registration procedure, following an interlocutory revision by the first department to carry out an examination, pursuant to Article 60 of Regulation (EC) n. 40/1994"[9]. The same functional continuity was found by the General Court for the ECHA's and ACER's Boards of Appeal in the cases referred to above, because the BoAs of those Agencies have the same powers as the original Agency's decision-maker whose decision is appealed in front of them. This is not the case for all Boards of Appeal.

More specifically, this reasoning is not applicable to the JBoA and AP[10]. These two bodies are not in 'functional continuity' with the decision makers of their respective Agencies (who, by the way, are the governing bodies of the respective Agencies), and cannot exercise the powers which lie with the authority. They can only either confirm the appealed decision as it stands or remit the case to the authority. If they cannot substitute their decision for that of the authority, it should logically follow that these bodies not only cannot make any de novo assessment of the Agency's determination, but are also vested with the task of ensuring the legality of its actions, as courts typically do.

In turn, the 2019 Court reform[11] and its most recent 2024 further revision send mixed signals. The 2019 reform stipulates that "an appeal brought against a decision of the General Court, which, in turn, follows the decision of an independent Board of Appeal of EUIPO, CPVA, ECHA and EASA shall not proceed unless the Court of Justice first decides that it should be allowed to do so". At first glance, this would suggest that the lower administrative review of the named Board of Appeal

[9] General Court, December 12th 2002, case T-63/01, *Procter & Gamble* v *OHIM*, ECLI:EU:T:2002:317, paras 21-22; General Court, March 8th 2012, case T-298/10, *Gross* v *OHIM,* ECLI:EU:T:2012:113, para 105; as to the CPVO, see case General Court, September 18th 2012, case T-133/08, *Schräder* v *CPVO,* ECLI:EU:T:2008:511, para 137 and, on appeal, Court of Justice, May 21st 2015, case C-546/12 P, *Schräder* v *CPVO*, ECLI:EU:C:2015:332, para 73.

[10] See Y. HERINCKX, *Judicial Protection in the SRM*, in R. HOUBEN, W. VANDENBRUWAENE (eds.), *The Single Resolution Mechanism*, Bruxelles, 2017, p. 20.

[11] Regulation (EU) n. 2019/629 of the Council and the European Parliament of 17 April 2019, amending Protocol No 3 of the Statute of the Court of Justice, in *OJ* L 111, 25.04.2019, p. 1 ff. For a discussion of the proposal, J. ALBERTI, *The draft amendments to CJEU's Statute and the future challenges of administrative adjudication in the EU*, in *Federalismi.it*, 6 February 2019, pp. 1-32.

is deemed sufficiently reliable, and part of the European administration of justice (*lato sensu*), to justify a limitation on appeal.

And yet, the reform leaves plenty of doubts. First, it did not allow those administrative review bodies with the possibility to make preliminary references. Thus, it remains unclear how administrative review bodies, subject to the review of the General Court, can be trusted with the decision, but not with the possibility of a dialogue with the Court to ensure their proper interpretation and application of EU law. Second, the JBoA and AP were not included among the appeal bodies subject to the reformed rules, despite they are *not* in functional continuity with their Agencies and are therefore less embedded into the Agency and more court-like. The possible reason is that, since these bodies were more recent, the Courts preferred to wait and see if these bodies proved their worth with a longer track record. And indeed, with its more recent 2024 reform, Article 58a of Protocol 3 of the Statute has been finally amended to extend the same mechanism to all Boards of Appeal established as of 1 May 2019 (including the JBoA and the AP).

For these reasons one needs to be prudent before assuming that the evolving case-law on other Boards of Appeal, namely those of ECHA and ACER[12], may be applied by analogy to the JBoA and the AP without any qualifications.

Nor, to our mind, does the argument put forward by the General Court looks entirely convincing. In the General Court's view, these BoAs must carry out a full review that is not limited to manifest errors in decisions entailing complex technical and economic assessments, because otherwise *this would mean that the General Court would be carrying out its limited review of the decision of the Board of Appeal which would be in itself the result of a limited review, in violation of the principle of effective judicial protection*. This view of the ever-narrowing review is visually very powerful, suggesting that an error could slither forward, overlooked, from one stage of review to another. Yet, is it accurate? Other examples show that there are failsafe mechanisms to prevent this from happening. In composite proceedings the pleas for annulment may also refer to preparatory acts which are part of the proceedings leading to the adoption of the final decision[13]. Thus, to the extent that errors of the Agency's decision are not remedied and thus incorporated by reference into the decision of the BoA which confirms such decision, they would be assessed by the General Court in its review

[12] General Court, September 20th, case T-125/17, *BASF Grenzach* v *ECHA*, *cit.*, paras 60 and 65, and paras 87-89; General Court, November 18th 2020, case T-735/18, *Aquind* v *ACER*, *cit.*, paras 50-70.

[13] See F. BRITO BASTOS, *Derivative illegality in European composite administrative procedures*, in *Common Market Law Review*, 2018, pp. 101-134.

of the Board of Appeal decision. Furthermore, the General Court scrutiny is not marginal on factual and legal errors, and is only confined to the 'manifest error' in those part of the challenged decision which entail complex technical and economic assessments. In other words, the General Court would be able to subject to its review, as part of its review of the BoA decision, also the Agency decision, and the risk "of a limited review of a limited review" as described by the court seems to us to morph into the more familiar review that the European courts do in annulment proceedings of any other Agencies' decision resulting from composite proceedings. If the legality review offered by the General Court and the Court of Justice is, by itself, not sufficient to ensure judicial protection, then the whole system is in breach, regardless of the standard of review applied by the appeal bodies, for all the decisions that fall outside the remit of the AP (which does not encompass all SRB's decision) and which are scrutinized directly by the General Court.

Contrary to this (over)simplification, we believe that the review by the Courts is thorough and demanding, regardless of the label one attaches to it. The same happens with the review by the Appeal Panel and the Joint Board of Appeal.

An example is illustrative. In the SRB context, ex ante contributions to the single resolution fund and resolution decisions are not subject to an appeal before the AP. They are directly challenged before the General Court. Judging from experience, the intensity of the scrutiny of the General Court on such decisions can be characterized as a quite exacting. It comprises the scrutiny that the evidence relied on by the SRB is factually accurate, reliable and consistent, and also whether it constitutes *all* the relevant information which must be taken into account in order to asses a complex situation *and* whether that information is capable of supporting the conclusions drawn from it[14]. This is exactly the same type of scrutiny that would take place in the case of an MREL decision (under Articles 12 *et seq* SRMR) or an administrative contributions' decision is appealed before, and confirmed by the AP, and is subsequently challenged (as AP decision) before the General Court.

Looking at the practice of the JBoA and AP, we observe that, although in a decision[15] the JBoA – quite incidentally – seemed to

[14] General Court, June 1st 2022, case T-481/17, *Fundación Tatiana Pérez* v *SRB*, ECLI:EU:T:2022:311; General Court, June 1st 2022, case T-510/17, *Del Valle Ruiz* v *SRB*, ECLI:EU:T:2022:312; General Court, June 1st 2022, case T-523/17, *Eleveté Invest Group* v *SRB*, ECLI:EU:T:2022:313; General Court, June 1st 2022, case T-570/17, *Algebris* v *Commission*, ECLI:EU:T:2022:314; General Court, June 1st 2022, case T-628/17, *Aeris Invest* v *Commission and SRB*, ECLI:EU:T:2022:315.

[15] Decision of ESAs JBoA of 10 November 2014 in case 2014-D-05, *Investor*

acknowledge that an appeal could allow, at least in some circumstances, a somehow wider consideration on the merit, beyond the legality review applied by the CJEU, so far, both the JBoA and the AP have considered that their review (*i*) cannot lead to a de novo evaluation and (*ii*) needs to respect the margin of appreciation which the applicable rules confer upon the Agency and its decision-making bodies. To that aim, in *Scope Rating* v *ESMA*[16] the JBoA clarified that it is not "in functional continuity with the ESMA's Board of Supervisors" noting that: "(unlike other Boards of Appeal of European Agencies, e.g., EUIPO), the JBoA does not enjoy the same powers as the ESMA Board of Supervisors and there is not, thus, in the merit, full continuity of its functions with the Agency decision-maker"[17].

The JBoA consistently concluded that: "the Board of Appeal is not empowered to second guess decisions of the Board of Supervisors which entail a margin of appreciation and the Board of Appeal's review is limited to verifying whether ESMA, in adopting its determination, complied with all applicable procedural rules, duly stated the reasons, accurately stated the facts or committed a manifest error of assessment of a misuse of powers".

The AP, in turn, has constantly held[18], most notably in the access to document saga concerning the resolution of Banco Popular Español, that: "in its assessment - to ensure the functionality of the Board and to respect the role and division of tasks provided for by the SRMR and Regulation (EC) n. 1049/2001 - the Appeal Panel must certainly verify if the Board complied with all relevant substantive and procedural rules, properly stated its reasons and did not incur in any manifest error, but cannot substitute its opinion for that of the Board where the applicable legal provisions grant a margin of appreciation to the Board, which means that, on issues where the assessment of the facts may render to different interpretations, e.g. the impact of certain disclosures on decision-making or legal proceedings to the effect of the exceptions to access to documents under Regulation (EC) n. 1049/2001, the Board's margin of appreciation must be also respected by the Appeal Panel, unless there is a specific reason not to do so".

Protection Europe v *ESMA* (JBoA decision *Investor Protection Europe* v *ESMA*).

[16] Decision of ESAs JBoA of 28 December 2020 in case 2020-D-03, *Scope Ratings* v *ESMA*.

[17] The Board of Appeal referred to General Court, December 12th 2002, case T-63/01, *Procter & Gamble* v *OHIM*, *cit.*, paras 21-22.

[18] Decision of SRB AP of 19 June 2019 in case 21/2019, para 39; see also decision of SRB AP of 28 June 2021 in case 1/21.

In other words, both the JBoA and the AP have held that they are tasked to perform a full review of law *and* of facts, and these can be better appraised thanks to a composition of both Boards which ensure technical expertise also beyond legal knowledge. Their sole limitation is that, to the extent that the authorities' governing bodies are, under the applicable legal framework, granted 'discretion' e.g., where a provision expressly states that the Agency 'may' (or may not) grant a certain derogation from a requirement, or a margin of 'technical' appreciation, the suitability of the discretionary choices cannot be subject to a de novo assessment and their review is confined to manifest errors in assessment.

There are, however, two further qualifications which may act as notes for caution.

First, the JBoA and AP review implies a close scrutiny of all errors of facts and of law, extended to the verification not only that the evidence relied on by the Agency is factually accurate, reliable and consistent, but also whether if constitutes all the relevant information which must be taken into account in order to asses a complex situation and whether that information is capable of supporting the conclusions drawn from it. This means that the appeal body must be able to examine other evidence that it considers relevant for the assessment of the complex situation.

Second, any time an appealed decision rests on a discretionary choice, the statement of reasons is considered key, and the requisite standard to be met by the decision is exacting[19]. An example taken from the AP practice in case 2/2021 may help clarifying this point. In the context of so called iMREL waivers, Article 12h SRMR as amended by regulation (EU) n. 877/2019 provides that: "the Board *may* waive the application of Article 12g in respect of a subsidiary of a resolution entity established in a participating Member State where: […] *(c) there is no current or foreseen material practical or legal impediment to the prompt transfer of own funds or repayment of liabilities by the resolution entity to the subsidiary in respect of which a determination has been made* in accordance with Article 21(3), in particular where resolution action is taken in respect of the resolution entity".

It is apparent that Article 12h(1) SRMR requires a two-pronged test: (1) *after* ascertaining certain preconditions, the Board (2) *may* waive the

[19] General Court, September 23rd 2020, case T-411/17, *Landesbank Baden Württenberg* v *SRB*, ECLI:EU:T:2020:435 and, on appeal Court of Justice, July 15th 2021, joint cases C-584/20 P and C-621/20 P, *European Commission* v *Landesbank Baden Württenberg*, ECLI:EU:C:2021:601; General Court, October 6th 2021, joint cases T-351/18 and T-584/18, *Ukrselhosprom Versobank* v *European Central Bank,* ECLI:EU:T:2021:669, paras 385-387. This is also consistent with the ABoR practice, which recently published a statement that disclosed that a recurring element in ABoR opinions has been the need for the ECB to provide adequate reasoning of its decisions, and with the AP practice, as recently recalled by the decision of SRB AP of 13 February 2023 in case 3/22.

application of Article 12g SRMR. According to the case-law of the General Court, when a prudential rule confers to the competent authority the power to grant derogations from the applicable prudential regime when certain conditions are met, the authority is granted technical *discretion* to refuse such derogations "even when the conditions set out in that provision are me"[20]. This is valid also for the first period of Article 12h SRMR.

Yet, the condition of Article 12h SRMR that "there is no current or foreseen material practical or legal impediment to the prompt transfer of own funds or repayment of liabilities", is formulated in an open-textured way, and thus lends a margin of appreciation to the Agency in assessing whether such condition is met. The assessment whether the conditions of Article 12h SRMR are met is not an exercise of discretion in the proper sense, but rather a verification that the factual and legal requirements of Article 12h(1)(c) SRMR are satisfied. Nonetheless, due to the relative open-ended nature of the requirement, the assessment is not clear-cut and it implies a complex, factual and legal assessment which entails a margin of appreciation, yet more constrained and limited than the one granted in the second stage of the assessment, where the Board is literally given the discretionary power not to grant the waiver, even if all conditions are met. In the current practice of the AP, the review of both assessments needs to ensure at the same time appropriate deference to the technical evaluation of the Agency and a fine-tuned, yet close scrutiny of its legality, in order to ensure that also the exercise of fully fledged discretion granted by the first period of Article 12h SRMR does not go unchecked and is weighted against general principles like proportionality, reasonableness and equal treatment. Confronted with this issue, the AP, in case 2/21 considered insufficient the statement of reasons of an appealed decision concerning the refusal of a waiver from iMREL pursuant to Article 12h SRMR[21] and remitted the case to the SRB, noting that: "in accordance with settled case-law, the duty to state reasons pursuant to Article 296 TFEU is of very fundamental importance (consider to this effect, case C-269/90, *Hauptzollamt München* v *Technische Universität München*, para 14). Only in this way can the court (and in the present appeal, the Appeal Panel) verify

[20] See General Court, July 13th 2017, case T-733/16, *La Banque Postale* v *European Central Bank*, ECLI:EU:T:2018:477, para 58; General Court, July 13th 2018, case T-745/16, *BPCE* v *European Central Bank,* ECLI:EU:T:2018:476; General Court, July 13th 2018, case T-758/16, *Crédit Agricole* v *European Central Bank*, ECLI:EU:T:2018: 472; compare also General Court, April 14th 2021, case T-504/19, *Crédit Lyonnais* v *European Central Bank*, ECLI:EU:T:2021:185.

[21] The Appeal Panel made reference, by analogy, to the Opinion of Advocate General Kokott, January 27th 2011, case C-263/09 P, *Edwin Co. Ltd*, ECLI:EU:2011:C:30, paras 55, 57 and 64.

whether the factual and legal elements upon which case 2/21 the exercise of the power of appraisal depends were present. The Appeal Panel further notes that the duty to state reasons is particularly important in the prudential and resolution context, as also significantly acknowledged by the General Court, in its judgement in case T-122/15, *Landeskreditbank Baden-Württemberg* v *ECB*, paras 122-124 (and the case-law cited) and in its very recent judgment in joint cases T-351/18 and T-584/18, *Ukrselhosprom Versobank* v *ECB*, paras 385-387. The obligation to state reasons laid down in Article 296 TFEU is an essential procedural requirement, as distinct from the question whether the reasons given are correct, which goes to the substantive legality of the contested measure. In that vein, first of all, the statement of reasons required under Article 296 TFEU must be appropriate to the measure in question and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted that measure, in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to carry out its review. As regards, in particular, the reasons given for individual decisions, the purpose of the obligation to state the reasons on which an individual decision is based is, therefore, in addition to permitting review by the courts, to provide the person concerned with sufficient information to ascertain whether the decision may be vitiated by an error enabling its validity to be challenged. Furthermore, the requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the statement of reasons to specify all the relevant matters of fact and law, since the question whether the statement of reasons meets the requirements of Article 296 TFEU must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question".

Case 2/2021 is also illustrative of another interesting aspect. If the reasons of a decision are grounded on national law, such national law can alternatively matter in the context of the review as fact or, to the extent that national law is the law that the Agency is called to apply by reference of EU law, as law. In its decision of 27 January 2022 in case 2/2021 the AP was adamant in noting, in an *obiter dictum*, that, upon request of an appellant, the AP could indeed check also the substantive legality of a decision vis-à-vis aspects of national law relevant for the adoption of such decision. The AP wrote (at para 115 of its decision): "the Appeal Panel acknowledges that reference to national law in the context of the

assessment of a guarantee (issued under national law) provided to meet the condition of Article 12h(c) SRMR does not transform nor incorporate that national law into EU law and such national law, in this context, may therefore be approximated to the factual sphere. However, national case 2/21 36 law is also part of the EU rule of law, a fundamental principle of EU law. In the instant case, however, the Appellant has not raised a ground of appeal on the substantive illegality of the Contested Decision due to a false or mistaken application of French law in the assessment of the revocability and enforceability of the guarantee, which could also translate into an incorrect assessment of the SRB that the condition of letter c) of Article 12h was not met (see, by way of analogy, Opinion of Advocate General Kokott of 27 January 2011, case C-263/09 P, *Edwin Co. Ltd*, paras 55, 57 and 64). Yet, the Appellant has challenged the Contested Decision as contrary to the principle of good administration and, therefore, it is up to the Appeal Panel to ascertain if the Board duly fulfilled its obligation to state reasons laid down in Article 296 TFEU as an essential procedural requirement, as distinct from the question whether the reasons given are correct, which goes to the substantive legality of the contested measure (for which, as noted, no ground of appeal was raised)".

2. Parallels with the intensity of the review of the European courts

Is all this really different from the standard of review of the CJEU in its review of Agencies' decisions in the EU law of finance? Is it, in other terms, still necessary that the discussion on the standard of review for the JBoA and AP enters the quagmire of the often-elusive distinction between marginal and full review?

We surmise it is not, because, at least in the law of finance, the standard of review of the European courts has significantly evolved from the most traditional 'hands off' understanding of the manifest error limitation to a much more exacting 'hands on' approach, but one that still respects the necessary margin of technical appreciation granted by the legislators to the authorities.

Indeed, it is true that the precise intensity of administrative and judicial review of the decisions of financial supervisors needs to be calibrated on a case-by-case mode in the most complex cases, between the Scylla's and Charybdis of full and marginal review[22]. Yet, it is increasingly apparent that European courts, whilst rightly refraining from any de novo evaluation of a supervisor's complex technical and economic assessment,

[22] See A. KALINTIRI, *What's in a name?*, in *Common Market Law Review*, 2016, pp. 1283-1316; A. FRITZSCHE, *Discretion, scope of judicial review and institutional balance*, in *Common Market Law Review*, 2010, pp. 361-403.

are keen in checking whether errors of fact or errors of law are present. To that end they (*i*) closely check the substantive legality of the decision, (*ii*) extend their verification of facts not only that the evidence relied on by the Agency is factually accurate, reliable and consistent, but also whether if constitutes all the relevant information which must be taken into account in order to asses a complex situation and whether that information is capable of supporting the conclusions drawn from it and (*iii*) are demanding on the requisite standard of the statement of reasons. Indeed, although at the early days of the inception of the Banking Union the literature was still focusing on the binary distinction between marginal and full review[23], the standard of review in the cases in the law of finance of the Court has developed over time to ensure full effectiveness of the fundamental right of judicial protection, drawing lessons from the parallel evolution (also on requirement of sufficiency of motivation[24])[25] e.g. in the antitrust context[26].

In particular settled case-law of the General Court *vis-à-vis* the ECB and the SRB[27], clearly showed that European courts have become bolder and more willing to elaborate the criteria of manifest error, duty to state reasons and excess of power, and control of the substantive legality of the decision to grant themselves a sufficient leeway for effective and robust judicial control. This, in our view, blurs the lines between error and manifest error, and morphs the controversy over the two yardsticks into a semantic one.

As an author nicely put it[28], the judicial review of discretion in the

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[23] Compare e.g. E. WYMEERSCH, *The European Financial Supervisory Authorities or ESAs*, in E. WYMEERSCH, K. HOPT, G. FERRARINI (eds.), *Financial Regulation and Supervision. A Post-Crisis Analysis*, 2012, p. 294; P. CHIRULLI, L. DE LUCIA, *Specialised Adjudication in EU Administrative Law: the Boards of Appeal of EU Agencies*, in *European Law Review*, 2015, pp. 832-857. For a review limited to questions of law see A. WITTE, *Standing and judicial review in the new EU financial markets architecture*, in *JFR*, 2015, p. 245; J. MENDES, *Discretion, care and public interests in the EU Administration: Probing the limits of law*, in *Common Market Law Review*, 2016, pp. 419-452; M. LAMANDINI, *Il diritto bancario dell'Unione*, in *Banca, borsa e tit. cred.*, I, p. 423; M. LAMANDINI, *Il diritto bancario dell'Unione*, in R. D'AMBROSIO (ed.), *Quaderni di Ricerca Giuridica della Consulenza Legale*, 2016, p. 441.

[24] Court of Justice, December 2nd 2009, case C-89/08 P, *Commission* v *Ireland,* ECLI:EU:C:2009:742.

[25] Court of Justice, June 29th 2010, case C-550/09 P, *E and F.*, ECLI:EU:C:2010:382.

[26] Court of Justice, May 16th 2000, case C-83/98 P, *France* v *Ladbroke Racing and Commission*, ECLI:EU:C:1999:577; Court of Justice, November 6th 2012, case C-199/11, *Otis and Others*, ECLI:EU:C:2012:684.

[27] Compare R. SMITS, F. DELLA NEGRA, *The Banking Union and Union Courts: Overview of cases*, available at this link: https://ebi-europa.eu/publications/eu-cases-or-jurisprudence/.

[28] See M. IOANNIDIS, *The judicial review of discretion in the Banking Union: from 'soft' to*

Banking Union has moved from soft to harder look. European courts attach much importance to process-based review, and in some decisions, they do not evaluate the choices made by EU legislators or Member States, but focus on the factors considered in the decision and its justification[29]. Some provisions, such as Article 41 of the EU Charter of Fundamental Rights provide for the "duty to give reasons" as a source of scrutiny, and procedural safeguards are very relevant. Also, European courts acknowledge the importance of 'discretion', and are deferential to administrative authorities. Yet, they reject ideas such as that Agencies may not be bound by a court's interpretation of a legal term, or that an issue may be 'committed to Agency discretion'. EU Courts have the ultimate responsibility to interpret EU law, and, in the presence of open-textured concepts and provisions they will discuss whether an Agency's interpretation is 'the' reasonable interpretation, rather than 'a reasonable enough' interpretation. In doing so, Courts provide an authoritative interpretation of key concepts of the law of finance, and incidentally bolster the legitimacy of supranational authorities which could otherwise be contested at a national level.

It seems to us that the intensity of the review under the settled case-law of the European Courts in the law of finance perfectly suits also to the JBoA and the AP. Both for courts and the JBoA and AP the question is not about changing the standards of review as they stand; it is about ensuring that the standard of legality review is meaningfully applied, because the reviewing court or quasi court is capable of engaging in a dialogue with the supervisory institution in its own terms and challenge its reasoning, having due regard to all factual elements of the case. What kind of error of assessment counts as 'manifest' cannot be determined independently of the Court's understanding of what falls within the acceptable range, which, in turn, cannot be established without reference to the court's willingness to take a hard, or better said, closer look at all factual and legal elements of the reasoning. Thus, albeit with nuances often determined by the specific features of each case, in the supervisory and resolution context it seems to us that the marginal v full review debate is, in the Banking Union, more academic than practical and that a full assessment of facts, to the extent that procedural rules allow a proactive evidentiary role, Q&A and expert witness, and a stringent review of the interpretation and application of law (and thus of the substantive legality) is possible, and thus full legal accountability and full effective judicial protection is warranted.

It remains to be seen, when confronted with complex technical

'hard(er)' look, in C. ZILIOLI, KARL-PHILIPP WOJCIK (eds.), *Judicial Review in the European Banking Union*, 2021, p. 130.

[29] See K. LENAERTS, *The European Court of Justice and Process-Based Review*, in *YEL*, 2012, pp. 3-16.

assessments based on alternative options on future, hypothetical scenarios which are all technically and factually conceivable, the authority has necessarily chosen one, whether or not the review can extend to verify:

a) not only that the preferred option is not implausible but that it is also the 'most likely' (or 'more likely than not') according to the so called 'balance of probability' test as described by Advocate General Kokott in the antitrust context first in *Bertelsmann*[30] and more recently in *CK Telecoms*[31]; and

b) that the choice made is not only factually supported by the evidence in the file but also is proportionate, reasonable and not discriminatory.

Different problems arise in the review of sanctions. European courts and quasi courts should be given also in the law of finance unlimited jurisdiction under Article 261 TFEU, in a way that their control may embrace also 'the appropriateness and fairness of the penalties imposed, meaning that the Court's own discretion replaces the Commission's discretion'[32]. This is desirable. A different (and incidental) question is, however, if quasi-court should not move, in this context, from backseat to front seat if some fines are criminal in nature (*coloration penale* according to the ECtHR case law). This is however a matter of institutional design which is clearly beyond the scope of this paper.

[30] Court of Justice, July 10th 2008, case C-413/06 P, *Bertelsmann and Sony Corporation of America* v *Impala*, ECLI:EU:C:2008:392, paras 207-208.

[31] Opinion of Advocate General Kokott, October 20th 2022, case C-376/20 P, *European Commission* v *CK Telecoms UK Investments Ltd.*, ECLI:EU:C:2022:817, paras 56-58. Consider in the literature, A. KALINTIRI, *Evidence Standards in EU Competition Enforcement – The EU Approach*, 2019, p. 78, and J. MENDES (ed.), *EU Executive Discretion and the Limits of Law*, Oxford, 2019.

[32] R. GEIGER, D.-E. KHAN, M. KOTZUR, *European Union Treaties*, 2015, p. 872.

THE SCRUTINY PERFORMED BY THE ERA BOARD OF APPEAL: SOME GENERAL AND OPERATIONAL REMARKS, WAITING FOR A SETTLED PRACTICE

Lo scrutinio effettuato dalla commissione di ricorso di ERA: alcune considerazioni generali e operative, in attesa di una prassi consolidata

Le contrôle effectué par la chambre de recours d'ERA: quelques considérations générales et opérationnelles, en attendant une pratique consolidée

MARCEL VERSLYPE*

TABLE OF CONTENTS: 1. Introduction. – 2. Competences and functioning. – 3. Composition and current setup. – 4. Working methods and cases.

1. Introduction

ERA's Board of Appeal (BoA) has entered into function in June 2019, in the framework of the application of the 4th Railway Package[1], entrusting the Agency with the delivery of Vehicle Authorisations, Single

* Chairman of the ERA Board of Appeal. The views and opinions expressed in this article are those of the author. They do not purport to reflect the views or opinions of the Agency.

[1] The so-called 4th Railway Package is a comprehensive legal strategy, built up by six different acts with the goal of empowering and completing the European railways system. It comprises two 'pillars': a technical one, which mainly aims at boosting the competitiveness of European railways and vehicles and their administration, and a market one, which pursues the gradual opening of this sector's market shares and activities. The technical pillar includes, among others, Regulation (EU) n. 2016/796 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Railways, in *OJ* L 138, 26.05.2016, p. 1 ff., which is ERA's establishing Regulation. Further information about the 4th Railway Package can be found within the European Commission's overview on its adoption, available at this link: https://transport.ec.europa.eu/transport-modes/rail/railway-packages/fourth-railway-package-2016_en.

Safety Certificates and European Rail Traffic Management System (ERTMS) approval files. The Rules of Procedure of the ERA's Board of Appeal have been adopted shortly after by the Commission, in its implementing activity over the aforementioned legislation[2]. Given the scant number of cases brought so far before the ERA's BoA, this intervention will be limited to general and institutional remarks over this BoA and on its potential future evolution: still, such an inquiry seems necessary in the view of both the complete overview on all Boards of Appeal and the tracing of some peculiar evolutionary scenarios that might include (but not be limited to) the railways system.

2. Competences and functioning

As a general assumption, it must be kept in mind that, while the Board of Appeal is part of the administrative structure of the Agency, it still issues its findings independently.

After a decision has been taken by the Agency, the applicant may request for a review of the decision at the level of the Executive Director. If not satisfied, the applicant may bring an appeal before the Board of Appeal[3]. Any natural or legal person may also appeal against a decision that is of direct and individual concern to them, even though the decision is addressed to another person[4]. Appeals have to be lodged within two months of the notification of the decision to the person concerned or failure to act[5]. If the appellant is not the addressee of the decision, the appeal has to be lodged within two months of the day on which the decision became known to the appellant. The time-limit for the issuing of the BoA findings is three months in case of an appeal and one month for decisions following an arbitration request.

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[2] See Commission implementing Regulation (EU) n. 2018/867 of 13 June 2018 laying down the Rules of Procedure of the Board(s) of Appeal of the European Union Agency for Railways, in *OJ* L 149, 14.06.2018, p. 3 ff.

[3] As anticipated in the text, decisions that can be appealed are mainly relating to authorisations, certificates releases and approval procedures, as stated in Art. 58 of ERA's establishing Regulation, (Regulation (EU) 2016/796 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Railways and repealing Regulation (EC) No 881/2004, in *OJ* L 138, 26.5.2016, p. 1-43.) The scope of application the BoA has been entrusted with is then confined (coherently with every other similar body) to decisions producing binding legal effects.

[4] See Art. 60 of ERA's establishing Regulation.

[5] The BoAs ability to state over 'failures to act' can, indeed, be considered as a *unicum* within the Agencies' panorama, which are usually limited to annulment-style appeals. See Article 58(1) of ERA's establishing Regulation for the related provision.

The Board of Appeal looks both procedural and operational aspects of the Agency's decisions[6]. It issues findings and if the appeal is founded it remits the case to the Agency (specifically, to its Executive Director) which takes a final decision with a statement of reasons. Decisions taken on the basis of the findings of the Board of Appeal may be appealed before the General Court of the European Union.

A peculiarity, compared with other Agencies' Boards of Appeal, is that the ERA's one deals both with appeal and arbitration cases. Arbitration requests are submitted to the Board of Appeal by the National Safety Authorities before a decision on authorisations, certificates or approvals is taken. In cases of disagreement of the Agency with National Safety Authorities on negative assessment of authorisation and certification as well as ERTMS track-side and vehicles approval. The Agency and the partners (National Safety Authorities, Industry) cooperate with a view to reaching a mutually acceptable assessment. If there is no agreement, then they may bring the matter to the Board of Appeal for arbitration. Where the BoA agrees with the Agency, the Agency takes a decision without delay. Where the BoA agrees with the negative assessment of the National Safety Authorities, the Agency issues an authorisation with an area of use excluding the parts of the network which received a negative assessment.

3. Composition and current setup

The Board of Appeal consists of a chairperson and two to five members. Each member has a vote and, in case of tie, the chair holds the casting vote.

The members of the Board of Appeal are appointed by the Management Board of the Agency, from a list of qualified experts drawn up by the Commission following an open and transparent selection procedure. They are appointed for four years renewable once. The BoA members do not belong to the Agency personnel and thus they are reimbursed on the basis of the time they spend working on cases. A system

[6] Indeed, the BoAs scrutiny over the Agency's decisions is closely linked to the CJEU's case law on this matter, which has been so far developed in three milestone cases, notably case General Court, December 11th 2014, caseT-102/13, *Heli-Flight* v *EASA*, ECLI:EU:T:2014:1064; General Court, September 20th 2019, case T-125/17, *BASF Grenzach* v *ECHA*, ECLI:EU:T:2019:638 and General Court, November 18th 2020, case T-735/18, *Aquind* v *ACER*, ECLI:EU:T:2020:542. This case law entrusts the Boards of Appeal with an intense control, devoted to review the whole legality of their Agencies' decisions so that the General Court is then able to restrict its own scrutiny to the search for manifest errors. The legal consequences of this case law, notably referring to the *Aquind* case, are more deeply analysed in the devoted part of this *Volume*.

has been introduced to monitor the attribution of days of work of its members, the planning and number of meetings, hearings and deliberations related to cases, as well as other meetings and reports to the Management Board regularly.

The chairperson's role is to preside over the appeal and arbitration proceedings and ensure the quality and consistency of decisions by a Board of Appeal. The chairperson also designates a rapporteur among the members of the Board for each proceeding. The rapporteur carries out a preliminary examination of the appeal and present the results of that examination to the other members. As a consequence of this presentation and of the relating discussions, the rapporteur prepares a draft of the findings of the Board of Appeal.

Currently the composition is of one chairperson, two members and three alternates. It is important to highlight that a full gender balance has been achieved and that a combination of appropriate legal, procedural and technical competences is ensured, which allows for a fair and independent conduct of the proceedings. Members of the Board of Appeal may not take part in any appeal or arbitration proceedings if they have any personal interest in the proceedings, if they have previously been involved as representatives of one of the parties to the proceedings, or if they participated in the taking of the decision appealed against. Specific rules on the management of conflict of interests adopted by the Management Board of the Agency apply for members of the Board of Appeal. The BoA set up guidelines on the assessment of interests in relation to each appeal proceedings to ensure proper evaluation before they are entrusted with a case.

Finally, the BoA is supported by a registrar to whom the appeals and arbitration requests are submitted. The registrar is a member of the Agency staff and is directly appointed by the Board of Appeal.

4. Working methods and cases

The BoA may request opinions from national experts, seeking for clarifications on national legislation or other aspects of a case, during the initial examination of the procedure under appeal. For that purpose, a list of possible experts to be invoked during appeal or arbitration proceedings has been constituted by the BoA[7].

[7] However, it is worth recalling that another source of qualified national experts for this purpose could be found withing the list of individuals, set out by the European Commission, in order to provide potential candidates to the role of BoAs members. Moreover, contact points in each Member State have been made available, to which the BoA can address requests for expertise assistance, if deemed necessary.

The Board has set up internal processes to ensure fairness and efficiency in the proceedings. These include guidelines and forms directed to appellants, both for arbitration requests and for submitting appeals. The robustness and accuracy of these processes and guidelines have been tested regularly with fictious cases which served also as training to the BoA members.

The current lack of a high number of cases in front of the Board needs to also be evaluated in light of some internal practices of the Agency. As a matter of fact, the latter has identified, as a key goal in its Single Programming Document[8], to generate no appeals against its decisions. This results in potential disagreements between the Agency and individuals being sorted through negotiations, without launching an appeal. Several times a year, the BoA is then informed about the number of negative decisions files that might lead to appeal, as well as the number of reviews against decisions. Some other aspects have also been recently analysed. First, the number of rejected applications, already in front of the administrative organs of the Agency, is very low and varies from 1 to 3 % depending on the type of application submitted by individuals. This high level of 'satisfaction' granted to applicant is probably facilitated by the circumstance that, for each application, ERA organizes a close exchange of information and opinions with applicants during the assessment process, enhancing cooperation and thus reducing the chance of rejection. Second, the Agency has put in place an internal process of legal review of the soundness of 'negative' decisions, as well as a strong internal Quality Assessment review. Finally, there is a strong resistance, innate to the sector of railways operators, to initiate procedures that could delay the commissioning of capital-intensive equipment for several months.

All of this being said, as of April 2024 the BoA received two appeal cases on vehicle authorisations and conformity-to-type applications, both of which originated from applications that were rejected by the Agency[9]. In both cases, the BoA concluded that the grounds of the two appeals (submitted in 2021) were founded and, consequently, the Executive Director modified the contested decisions. These two cases already contributed to highlight some delicate points within the operations of the Agency and the BoA. On the one side, from a substantial point of view, they revealed contradictions in the Technical Specifications for Interoperability (TSI). The TSI define the technical and operational

[8] See ERA Single Programming Document for 2023-2025, available at this link: https://www.era.europa.eu/system/files/2022-12/SPD%202023-2025_ERA.pdf.

[9] See decision of ERA Board of Appeal of 5 October 2021 in case EACLI EU-ERABA-2021-001, *Siemens Mobility GmbH* v *ERA* and decision of 5 October 2021 in case EACLI EU-ERABA-2021-002, *Siemens Mobility GmbH* v *ERA*.

standards which must be met by each subsystem in order to meet the essential requirements and ensure the interoperability of the railway system in the European Union[10]. On the other side, from a procedural point of view, despite the fact that the findings for both cases were issued within the time-limits, it was made obvious that these constraints are currently quite short, as well as the time limits for arbitration decisions. This has been identified as a major risk due to the limited capacity of the BoA, which does not possess expertise on every topic that may be at issue in an appeal or an arbitration procedure. Even appointing external experts is not a conclusive solution to this matter, as it is a time-consuming measure, given that it requires time to identify the most suitable experts, check their availability within specific time frames, contracting them, and granting them sufficient time to prepare an opinion. In such a situation, it may not be possible to meet the deadlines[11]. Furthermore, the need to ensure translations in all the procedural languages involved in the case inevitably has an impact on the time-limits, as appeals may be submitted in any of the 24 EU official languages. In a comparative perspective, it is to be highlighted that ERA is the only one of the EU Agencies to have such short time limits for appeals and arbitration, a situation which may suggest some modifications by the EU legislator to ensure coherence among the BoAs and to allow ERA's Board to effectively carry out its mandate.

[10] These requirements are set out, together with the conditions to ensure compliance to them, within Directive (EU) n. 2016/797 of the European Parliament and of the Council of 11 May 2016 on the interoperability of the rail system within the European Union, in *OJ* L 138, 26.05.2016, p. 44 ff.

[11] In the two aforementioned cases, the fact that one of the members of the Board was an expert on the subject made it possible to identify the contradictions and to suggest modifications that were introduced during the revision of the Technical Specifications for Interoperability.

PART III

EU AGENCIES' BOARDS OF APPEAL AND THE FUTURE OF THE EU SYSTEM OF JUDICIAL PROTECTION

ROUNDTABLE DEBATE

EU AGENCIES' BOARDS OF APPEAL AND THE FUTURE OF THE EU SYSTEM OF JUDICIAL PROTECTION. A PERSPECTIVE FROM THE EUROPEAN PARLIAMENT

Le commissioni di ricorso delle agenzie europee e il futuro del sistema di tutela giurisdizionale dell'Unione europea. Uno sguardo dal Parlamento europeo

Le chambres de recours des agences européennes et l'avenir du système de protection judiciaire de l'Union européenne. Une perspective du Parlement européen

TAMAS LUKACSI*

TABLE OF CONTENTS: 1. The institutional and constitutional context surrounding the Boards of Appeal and the European Parliament. – 2. Some specific input of the European Parliament into the legislative process concerning the issue of transparency of judicial (and quasi-judicial) proceedings.

1. The institutional and constitutional context surrounding the Boards of Appeal and the European Parliament

First, let me say a few words about the institutional context, as seen from the perspective of the European Parliament.

If one would need to settle on a single word, I would propose to consider the keyword 'control'. Control in the political sense, control over policy making and, finally but most importantly, control in the judicial sense.

Let us imagine the context in a graphic way: let us picture a U-shaped chart or graph, that is a shape which has two horns. In this picture the two horns represent political control, on one side, and judicial control on the

* Member of the Legal Service of the European Parliament. The views and opinions expressed in this article are those of the author. They do not purport to reflect the views or opinions of the Institution.

other side. On the top of the first horn, we find the European Parliament and on the other horn we find the Court of Justice of the European Union. In between, on various degrees of this U-shaped graph, we find a colourful variety of political, policy and judicial control mechanisms, and I think that is where the Boards of Appeal are situated somewhere, having a hybrid nature, that combines both policy-control and quasi-judicial control. Namely that Boards have an extremely complex review task, which consists in re-assessing decisions by the Agencies, on the one hand, in a quasi-judicial manner, but also, on the other hand, in a manner which consists of reviewing of complex technical issues that is more reminiscent of policy-making or at least substantive control of policy-making. Indeed, as it has been recalled on several occasions, according to the *Aquind* doctrine[1], Boards of Appeal are not necessarily established only to confine themselves to a limited review of complex technical and economic assessments. Unlike the EU judicature, Boards of Appeal may also have jurisdiction, by way of a review of expediency, to annul or replace the decisions of an Agency solely on the basis of technical and economic considerations.

Thus, from the institutional perspective of the European Parliament, it is easy to understand where does the common denominator lie between the European Parliament and Boards of Appeal: it consists, in substance, in both entities exercising control over the executive branch.

The control functions of the European Parliament are important, albeit sometimes forgotten, since we are mainly perceived as the co-legislator. However, the Treaties are quite rich in references to parliamentary control at the European level.

Article 14(1) of the Treaty on European Union (TEU) stipulates that European Parliament shall "jointly with Council, exercise legislative and budgetary functions". This is the part which is most quoted and well know. However, the text goes on to say that the European Parliament shall also "exercise functions of *political control* […] as laid down in the Treaties (emphasis added)". Thus, in the very first provision in the TEU concerning Parliament, the legislative and control functions are mentioned on the same footing. This general control function is then manifest in various specific provisions scattered throughout the Treaties. For example, Article 17(8) TEU: "the Commission, as a body, shall be responsible to the European Parliament [which] may vote on a motion of censure of the Commission".

Or take Article 290(2) of the Treaty on the Functioning of the

[1] See General Court, November 18th 2020, case T-735/18, *Aquind Ltd.* v *ACER*, ECLI:EU:T:2020:542, para 52 and 56.

European Union (TFEU) on delegated acts. In that context, it is foreseen that legislative acts shall explicitly lay down the conditions to which delegation is subject; and these conditions may allow the European Parliament (or the Council), to decide to revoke the delegation to the Commission. The conditions of the delegation may also foresee that the delegated act may enter into force only if no objection has been expressed by the European Parliament (or the Council) within a period set by the legislative act. This is also an example of political control or control over policy-making.

Last but not least, Article 226 TFEU foresees that in the course of its duties, the European Parliament may, at the request of a quarter of its component members, set up a temporary Committee of Inquiry to investigate, without prejudice to the powers conferred by the Treaties on other institutions or bodies, alleged contraventions or maladministration in the implementation of Union law, except where the alleged facts are being examined before a court and while the case is still subject to legal proceedings. This latter exclusion, *expressis verbis*, by the Treaty of parallel investigation with legal proceedings puts the committees of inquiry rather on the political control side of our U-shaped graph. The inter-institutional decision laying down detailed provisions on the exercise of the European Parliament's right of inquiry, that is the decision of the European Parliament, the Council and the Commission of 19 April 1995 on the detailed provisions governing the exercise of the European Parliament's right of inquiry[2], specifies in its Article 2(3) that a temporary committee of inquiry may not investigate matters at issue before a national or Union court of law until such time as the legal proceedings have been completed. Within a period of two months either of publication in accordance with paragraph 1 or of the Commission being informed of an allegation made before a temporary committee of inquiry of a contravention of Union law by a Member State, the Commission may notify the European Parliament that a matter to be examined by a temporary committee of inquiry is the subject of a pre-litigation procedure; in such cases the temporary committee of inquiry shall take all necessary steps to enable the Commission fully to exercise the powers conferred on it by the Treaties. Again, the exclusion of overlaps with (quasi-)judicial proceedings assimilates the parliamentary committees of inquiry rather to instruments of political control.

Thus, the common catchword is 'control': the similarity of vocation between the European Parliament and Boards of Appeal can be found

[2] Decision n. 95/167/EC, Euratom, ECSC of the European Parliament, the Council and the Commission of 19 April 1995 in the detailed provisions governing the exercise of the European Parliament's right of inquiry, in *OJ* L 113, 19.05.1995, p. 2 ff.

within the parameters of this very complex and colourful system of various control mechanisms, at the Union level, over the exercise of executive functions, which represent a great variety of political, policy quasi-judicial and judicial control mechanisms over the executive.

Let me bring up some recent examples of European Parliament legislative amendments put forward in recent years.

The joint report of the Committee on Legal Affairs (JURI) and the Committee on Economic and Monetary Affairs (ECON) of 5 April 2023 concerning the Anti-Money Laundering Authority (AMLA)[3]: apart from the anecdotic observation that it proposes to change the name from Administrative Board of Review to Board of Appeal, it leaves practically untouched the competences and the scope of review of the BoA. Where it proposes to introduce new substantive rules is a new Article 62a which relates to actions before the Court of Justice[4].

The report of the Committee on Industry, Research and Energy (ITRE) on the proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) n. 1227/2011 and Regulation (EU) n. 2019/942 to improve the Union's protection against market manipulation in the wholesale energy market does not touch in any meaningful way competences of the ACER BoA either[5].

The JURI Committee report on the proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) n. 6/2002 on Community designs and repealing Commission Regulation (EC) n. 2246/2002 introduces an inoffensive amendment (AM 26) which concerns a purely procedural issue[6].

These recent examples demonstrate a lack of controversy as far as the European Parliament is concerned when it comes to the reform of the

[3] Report on the Proposal for a Regulation of the European Parliament and of the Council establishing the Authority for Anti-Money Laundering and Countering the Financing of Terrorism and amending Regulations (EU) 1093/2010, (EU) 1094/2010, (EU) 1095/2010 (COM(2021)0421 – C9-0340/2021 – 2021/0240(COD)).

[4] Since the grounds of review are enumerated in primary law, it is somewhat difficult to situate the proposal's introduction of new grounds, such as 'incorrect decision'.

[5] Apart from an innocent reference in Article 4a(5) that in case of a withdrawal decision, the Agency shall indicate the right to appeal the decision before the Agency's Board of Appeal and to have the decision reviewed by the Court of Justice in accordance with Articles 28 and 29 of Regulation (EU) 2019/942.

[6] According to AM 26 of the Report on the Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) 6/2002 on Community designs and repealing Commission Regulation (EC) 2246/2002 (COM(2022)0666 - C9-0394/2022 - 2022/0391(COD)), "the Commission is empowered to adopt delegated acts in accordance with Article 109a to supplement this Regulation by specifying the formal content of the notice of appeal and the proceedings for lodging and examining an appeal".

judicial architecture related to the Boards of Appeal.

2. Some specific input of the European Parliament into the legislative process concerning the issue of transparency of judicial (and quasi-judicial) proceedings

Coming to the second point, it will be the specific input of the European Parliament into the legislative procedure on the recent amendment of the Statute of the Court of Justice[7], that has been approved this year, on 19 March.

Now, if we have a look at the report drawn up by the European Parliament during the legislative procedure, what we can see is that actually the European Parliament did not touch the issue of Boards of Appeal and the judicial architecture related to Boards of Appeal. So, I would say 80% or perhaps 90% of the amendments in Committee was related to the preliminary reference issue. The rest deals with various topics that relate for example to transparency (see in more detail below), public consultation (Article 63a new)[8], or reporting obligations by the Court (see for example Article 4a(2))[9]. This shows that members of Parliament and more specifically members of the JURI Committee seem to have been more interested in the issue of preliminary references than transparency, let alone Boards of Appeal, and maybe it is a verification of my theory that I have just tried to present. If there was not much to add to the initiative of the Court from the point of view of the Parliament that is because the same Parliament acknowledges the control functions of the Boards of Appeal, it sees, as it were, the synergy with Parliament's own functions of political control. So perhaps instead of a lack of interest, I would say this shows rather a lack of controversy, a lack of any perceived institutional 'competition' or 'rivalry' with Boards of Appeal as far as the European Parliament is concerned when it comes to the reform of the judicial architecture related to the Boards of Appeal and a tacit endorsement of the synergy with those entities in the field of political control of the executive.

Allow me to present shortly the report adopted in the JURI

[7] Statute of the Court of Justice: amendment of Protocol No 3 (2022/0906 (COD)), rapporteur: Ilana Cicurel. Committee report tabled for plenary (A9-0278/2023); decision by Parliament on 27 February 2024 (T9-0086/2024).

[8] According to Article 63a "Any amendment of this Statute at the request of the Court of Justice shall be subject to a public consultation of two months being carried out prior to the adoption of the legislative request by the Court of Justice".

[9] According to Article 4a(2) "No later than [three years after the entry into force of this amending Regulation], the Court shall present a report to the European Parliament, the Council and the Commission on the implementation of this reform".

Committee on 27 September 2023, on the draft Regulation of Parliament and Council amending Protocol (N° 3) on the Statute of the Court of Justice of the European Union[10]. In the JURI Committee, there were 51 amendments presented and the draft report was adopted in September and this text, as I said, mainly dealt with the issue of preliminary rulings and issues linked to that, for example provisions on the obligation of the Court to present a report to the European Parliament, the Council and the Commission on the implementation of this reform, and concentrating on the number of preliminary rulings examined by the General Court, the number and nature of the requests for preliminary ruling that were not transmitted to the General Court, the average length of time spent on dealing with requests for preliminary rulings, or — more close to our subject matter today — the number and nature of the cases that were subject to the initial admission mechanism for appeals[11].

But there was an issue which I would specifically like to highlight. I will put it forward for further debate, because now we are talking about future and about the greater context. Maybe that's an issue worth reflecting upon and perhaps a new angle to the discussion could be the question of transparency of the Court procedures. Indeed, there was an amendment presented by a member of the European Parliament which dealt with the access to documents in court proceedings and this amendment was actually adopted in the JURI Committee.

So, in the report of the JURI Committee there is this amendment and it's quite far reaching — I have to say. I will first quote recital (2b), which by its very nature is prone to contain some 'poetry':

> "*In this context, and as the Court of Justice is increasingly required to rule on matters of a constitutional nature and related to human rights and the Charter of fundamental rights of the European Union (CFREU),* the transparency and openness of the judicial process *should be strengthened. To that end, the Statute should be modified to ensure that* all *documents deposited with the* R*egistrar by the parties or by any third party in connection with an application* are accessible to the public *upon request. This would be in line with the principle of open decision-making. Transparency increases accountability and builds trust in the Union and in Union law. In preliminary ruling proceedings in particular, giving access to case-files will enable other national judges to better assess the necessity of referring additional references and thus reduce the overall workload on the Court of Justice. Such access should be granted in accordance with the arrangements and*

[10] References: A9-0278/2023, 2022_0906(COD)), rapporteur: Ilana Cicurel.
[11] See Article 4a and notably point f).

> *exceptions set out in the Statute, in order to preserve the calm and dignity of judicial deliberations and ensure that the public interest and fundamental rights, such as those laid down in Article 16 TFEU and Article 8 of the CFREU which provide for the protection of personal data, Article 7 of the CFREU which protects the right to private and family life and communications and Article 339 TFEU which requires the institutions to respect professional secrecy, are protected*" (emphasis added).

Solemn language apart, it is to be observed, that the objective of the proposal was to strengthen transparency of the judicial process. To reach that aim, it is proposed that all documents deposited with the Court's registry be accessible to not only persons who can demonstrate a legitimate interest, but to the public in general. The only condition is that a request should be made in that regard.

Interestingly, the recital refers to the principle of open decision making. This clearly ties in with Article 15(1) TFEU, according to which the Union institutions, bodies, offices and Agencies shall conduct their work as *openly* as possible, in order to promote good governance and ensure the participation of civil society. While the Treaties contain several provisions on the openness of institutions, traditionally the Court has been seen as an institution which carries out its functions more remotely from the public eye, in order to — as the recital continues by pointing out — preserve the calm and dignity of judicial deliberations and ensure the exercise of rights ensured in the CFREU. Finally, it is interesting to observe that the justification for this proposed paradigm shift when it comes to transparency of EU court proceedings is the fact that the Court is increasingly required to rule on matters of a constitutional nature and related to human rights and the CFREU. Transparency builds trust — this is how one could summarise the overall logic.

Enacting terms mirror this logic and read as follows:

> "*Article -1*
>
> *The following Article is inserted in the Statute:*
>
> *'Article 20a*
>
> *Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right to access, upon request, documents of the Court in accordance with arrangements set out in the Rules of Procedure.*
>
> *The President shall refuse access to a document, either of his or her own motion or at the request of a party or any other person concerned, where disclosure would undermine protection of the public interest, or the privacy or the integrity of an individual.*
>
> *The President shall also refuse access to a document where disclosure*

would undermine the protection of commercial interests or the Court's decision-making process, unless there is an overriding public interest in disclosure'.".

So that was the position of the Legal Affairs Committee.

It is well worth having a discussion to assess the merits of the proposal and the pros and cons. And this discussion, I think, leads easily to a discussion on the overall philosophy of the EU judicial system and the future of the EU's judicial system, for example the issue of the respective roles of the General Court and the Court of Justice, which seem to be progressively polarizing towards a supreme (administrative) court, as for the former, and a constitutional court, as for the latter. When thinking about future and perspectives, one has the privilege to think a little bit outside of the box. At this is a legitimate question when it comes to the perspectives of our judicial system in the EU: at what level should be define transparency? To be noted: the JURI report does not specifically speak about preliminary ruling procedures, but it would cover all procedures, including, I guess, procedures related to previous procedures with the Boards of Appeal and legal challenges against decisions by Boards of Appeal, with all the delicate and sensitive details such complex assessments entail.

Now, whether to give full access and full transparency to such procedures, it is a very weighty question. I think this is also a question of legal culture, in the end. For example, when one watches court room drama from the United States, one can immediately grasp that that is a completely different legal culture, because there everything is transparent and everything is on the table – for better or worse. On a less anecdotic note, for example, in the context of Brexit a few years ago, I really enjoyed following the broadcasting from the Supreme Court in the case *R (Miller)* v *Secretary of State for Exiting the European Union*[12]. Tediously long, but very exciting questioning, incredibly sophisticated legal argumentation ... one could really watch live a whole legal culture in action. So that is certainly an undeniable positive effect of full transparency to allow the interested public to get in touch on a daily basis with the legal culture and traditions of a country and thus the legal culture to penetrate into society, which is a

[12] The judgment stated that the question for the Court's decision involved the constitutional law of the United Kingdom: it was whether the Crown's executive government is entitled to use the Crown's prerogative powers to give notice under Article 50 for the United Kingdom to cease to be a member of the European Union. The Court held that the Government had no power to trigger notification under Article 50 of the TEU, because it would remove a series of rights created by Acts of Parliament. The principle of parliamentary sovereignty required that only Parliament could take away those rights.

key to its legitimacy and longevity.

Nevertheless, on the other hand one can be faced with very technical issues, which do not represent any tangible interest to the public. And we all know that in reality transparency *does not automatically* lead to better quality of debates or deliberation, nor does it automatically lead to greater interest or engagement by the public.

During the inter-institutional negotiations of the legislative file, the latter argument found supporters in the Council. In the end, the negotiated compromise text kept the original idea[13], but focused more on a specific type of legal actions in Union law.

Recital (4) contains now the reference to the principle of transparency and the justification to the corresponding enacting term, Article 23, new subparagraph five[14].

In Article 23 on preliminary ruling procedure, new paragraph after fourth paragraph is inserted:

> "*Statements of case or written observations submitted by an interested person pursuant to this Article shall be published on the Court's website within reasonable time after the closing of the case, unless that person raises objections to the publication of its own written submissions*".

We can observe thus, the provision went through important changes during the legislative process and its scope became substantially narrower. Notably, in the final text, transparency requirements cover only the preliminary ruling procedure and no other forms of procedure, which are more adversarial in their nature.

Indeed, preliminary rulings can be more assimilated to constitutional adjudication, where the game is more of a positive sum game and where the parties don't argue a case from an adversarial logic, but rather all assist

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[13] European Parliament legislative resolution of 27 February 2024 on the draft Regulation of the European Parliament and of the Council amending Protocol No 3 on the Statute of the Court of Justice of the European Union (07307/2022 – C9-0405/2022 – 2022/0906(COD) — T9-0086/2024).

[14] According to Recital (4) "In this context, and as the Court of Justice is increasingly required, in preliminary ruling cases, to rule on matters of a constitutional nature or related to human rights and the Charter of Fundamental Rights of the European Union (CFREU), the transparency and openness of the judicial process should be strengthened. To that end, and without prejudice to Regulation (EC) No 1049/2001 of the European Parliament and of the Council, the Statute should be amended in order to provide that the statements of case or written observations submitted by an interested person referred to in Article 23 of the Statute should be published on the website of the Court of Justice of the European Union within a reasonable time after the closing of the case, unless that person raises objections to the publication of that person's own written submissions, in which case it will be mentioned on the same website that such an objection has been raised. Such a publication will increase accountability and build trust in the Union as well as in Union law".

the Court of Justice with input allowing it to have a full picture before handing down a ruling that would assist the national judge in ruling on the underlying case. Indeed, in this context, there is usually less confrontation than in an adversarial procedure which reveals a "cooperative relationship wherein the critical sense of identity results not from one body being national and the other transnational, but from their sense of both belonging to the judicial branch […] reinforcing their ability to uphold the law"[15]. Moreover, there's a possibility to block publication if the author of the pleading in question simply objects. Thus, the final version contains a strong safeguard to the parties' interests, while covering a narrower scope.

In essence, in the final text negotiated with the Council, the transparency requirement is more restrictive and it only relates to preliminary rulings.

[15] See J. WEILER, *The Constitution of Europe – Do the New Clothes Have an Emperor?*, Cambridge, 1999, p. 124.

POSSIBLE FUTURE DEVELOPMENTS OF THE LEGAL FRAMEWORK OF THE BOARDS OF APPEAL: A SHORT ANALYSIS FROM THE PERSPECTIVE OF THE COUNCIL OF THE EUROPEAN UNION

Gli sviluppi dell'inquadramento giuridico delle commissioni di ricorso: una breve analisi dal punto di vista del Consiglio dell'Unione europea

L'évolution possible du cadre juridique des chambres de recours : une brève analyse du point de vue du conseil de l'union européenne

CARLO ZADRA*

TABLE OF CONTENTS: 1. Introduction. – 2. Differences seem to mostly outweigh similarities. – 3. Common denominators. – 4. Harmonisation versus heterogeneity. – 5. The impact of new Article 58a of the statue of the ECJ (the 'filtering mechanism'). – 6. Presumption of independence. – 7. Does the 'filtering mechanism' have a 'judicializing' effect? – 8. Who must ensure the independence of the BoAs? – 9. Conclusive remarks.

1. Introduction

Highly experienced and skilled speakers have already provided extremely interesting, detailed and exhaustive contributions on the topic. The purpose of my short intervention is certainly not to elaborate a more detailed analysis, but rather to provide, as much as possible, some insight on the state of play as regards the internal discussions on the legislative works concerning the BoAs within the Council, as well as some personal thoughts on the impact that the recent legislative changes to the Statute of the Court of Justice might produce on the future legislative works.

* Director of the Justice and Home Affairs team of the Council Legal Service. The views and opinions expressed in this paper are those of the author. They do not purport to reflect the views or opinions of the Institution. The author would like to thank Ms Panagiota Sarakenidou (Lawyer, Master in EU law) for the contribution that she provided to this intervention.

The characteristics of the BoAs have already been described in detail by other speakers. I will not elaborate on them further. But, with the risk of oversimplifying, let me try, first of all, to summarise the situation.

2. Differences seem to mostly outweigh similarities

In short, only 10 of the total 38 existing Agencies have a Board of Appeal as an independent, albeit internal, body with the power to review their decisions. These 10 BoAs cover a wide spectrum of typologies from 'quasi-judicial' to more 'administrative' powers of revision. Even though all of them are responsible for appeals against decisions of their respective Agencies, the intensity of their power of revision is different. They are characterised by different degrees of organic and functional independence as well as different inquisitorial powers. Differences can also be observed, from an organic point of view, in the practical arrangements affecting the appointment, term of office and removal of the Boards' members, as well as their contractual regime and the organisation of their secretariats.

To give a few examples, the Founding Regulation of the ERA establishes an additional arbitration procedure[1]. In this same Agency, the BoA is not necessarily a permanent body; it may also be an ad-hoc configuration, established on a case-by-case basis[2]. Regarding the governing rules of the BoAs, in several cases they rely on the Rules of Procedure adopted by their Agency's Management Board, while ACER Board adopts and publishes its own Rules of Procedure[3]. The ESAs BoAis a joint body composed of six members, with every participating Agency appointing two of them[4]. In most cases, though, members are appointed by the Management Board of each Agency, based on a list of experts proposed by the Commission, while their Chairs are designated by the BoAs itself. However, the President and chairperson of EUIPO[5] are an

[1] Art. 56 of the Regulation (EU) n. 2016/796 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Railways and repealing Regulation (EC) n. 881/2004, in *OJ*, L 138, 26.05.2016, p. 32.

[2] Art. 55 of the Regulation (EU) n. 2016/796 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Railways and repealing Regulation (EC) n. 881/2004, in *OJ* L 138, 26.05.2016, p. 1.

[3] Art. 25 of the Regulation (EU) n. 2019/942 of the European Parliament and of the Council of 5 June 2019 establishing a European Union Agency for the Cooperation of Energy Regulators, in *OJ* L 158, 14.06.2019, p. 42.

[4] Artt. 58-59 of the Regulation (EU) n. 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 n. 716/2009/EC and repealing Commission Decision 2009/77/EC, in *OJ* L 331, 15.12.2010, p. 113.

[5] Artt. 165-166 of the Regulation (EU) n. 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (codification)

exception to this rule, since they are appointed by the Council, from a list of candidates that is proposed by its Management Board.

In the majority of the Agencies, the members are appointed for a term of 4 to 5 years, renewable once. In the Board of EUIPO, the terms of both the Chair and the members can be renewed multiple times and up to the completion of their retirement age. The most significant divergence, however, is in the conditions for the removal of a particular member. Whereas all the other Regulations provide for removal in the presence of serious grounds, the ESA and ACER Regulations mandate that the member in question must be found guilty of serious misconduct[6].

The heterogeneity of the BoAs is, to a large extent, the result of the divergent approach followed by the Co-legislators in the existing Founding Regulations or the complete absence of provisions thereof. For instance, most of the Founding Regulations do not provide any indication as to the identity or the professional status of their Boards' members. However, the ERA Regulation[7] explicitly excludes the Agency's staff from being appointed as members of its BoA; in the same vein, the joint BoA of the ESAs[8] cannot be composed of current staff of competent authorities, national or European institutions involved in relevant activities. On the contrary, the ACER Regulation[9] specifically stipulates that the members of its BoA shall be selected among current or former staff of national or European authorities in relevant sectors. This divergence reinforces the ambiguity surrounding the lack of organic independence, even though some Regulations already emphasise certain procedural guarantees to that regard.

(Text with EEA relevance.), in *OJ* L 154, 16.06.2017, p. 70.

[6] For other differences see J. ALBERTI, *The Position of Boards of Appeal: Between Functional Continuity and Independence*, in M. CHAMON, A. VOLPATO, M. ELIANTONIO (eds), *Boards of Appeal of EU Agencies: Towards Judicialization of Administrative Review?*, Oxford, 2022, p. 248 ff.

[7] Art. 56 of the Regulation (EU) n. 2016/796 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Railways and repealing Regulation (EC) n. 881/2004, in *OJ* L 138, 26.05.2016, p. 33.

[8] Art. 58 of the Regulation (EU) n. 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 n. 716/2009/EC and repealing Commission Decision 2009/77/EC, in *OJ* L 331, 15.12.2010, p. 113.

[9] Art. 26 of the Regulation (EU) 2019/942 of the European Parliament and of the Council of 5 June 2019 establishing a European Union Agency for the Cooperation of Energy regulators (recast), in *OJ* L 158, 14.06.2019, p. 42.

3. Common denominators

But there are also some good news: notwithstanding their numerous differences, a quick comparison of the existing BoAs shows us that they are also characterised by important common denominators. Their shared guarantees of impartiality and independence are ensured through standard clauses in all the Founding Regulations. In particular, all Regulations contain provisions that require members to act independently, explicitly stating that "they shall not be bound by any instructions". Certain Agencies, such as the ESAs and ACER, even require their Boards' members to submit an annual public declaration of any interests that could interfere with their position. Certainly, the connections between the members' procedural arrangements and the competent Management Boards underline the absence of organic independence. However, the prohibition of any external influence or the undertaking of parallel duties within the Agency demonstrates the legislative commitment to functional independence and avoids conflict of interests. The Boards of Appeal are truly indispensable to the EU legal order precisely due to this delicate balance.

4. Harmonisation versus heterogeneity

That being said, the main question at this point is whether the EU Co-legislators should seek to harmonise the BoAs or simply acknowledge their heterogeneity. Currently, there is no initiative within the Council towards the need to conceive a horizontal approach to be agreed also with the European Parliament, in order to ensure minimum harmonisation or standardisation of the provisions concerning the BoAs, that the EU legislator could take into account in view of the negotiation of new proposals concerning the setting up of new Agencies or the amendment of the existing ones. Nor the Commission seems to work on such idea to be submitted to and discussed with the EU Co-legislators. The Council, up to now, followed a very empirical and pragmatic approach, discussing the features of the BoAs on a case-by-case basis.

Despite the potential legal implications of the current state of play in terms of possible lack of consistency and alignment, the absence of such an initiative does not necessarily have a positive or negative connotation. The harmonisation of the BoAs may well be a matter of academic debate, but there is no indication that this persisting diversity is a problem that should be resolved in the short term.

5. The impact of new Article 58a of the Statute of the ECJ (the 'filtering mechanism')

At the same time, the legislative works concerning the reform of the Statute of the Court of Justice, and notably its Art. 58a[10] concerning the new 'filtering mechanism', seem to have, directly or indirectly, an important impact in framing the role of the BoAs and, as a consequence, the margin of manoeuvre of the Co-legislators in their capacity of conceiving and modelling the BoAs.

Article 58a as a procedural provision to filter the cases brought before the Court now forms part of the Union's primary law and, while not being, as such, a legal basis, is certainly legally binding on the co-legislators. By introducing this provision, the Court has established a procedural framework which should be taken into account by the Co-legislators when they are drafting new legislative acts with respect to EU Agencies.

6. Presumption of independence

The new filtering mechanism introduced by Art. 58a explicitly refers to "independent" Boards of Appeal. The attempt to demarcate this independence had been a central point of discussion during the legislative process preceding the adoption of this Article. During the legislative work that started in 2018, several suggestions were made either for a general, explicit definition of this term, or the inclusion of specific examples.

The Court initially proposed that the procedure apply to all disputes which have already been the subject of an examination by an Agency's BoA. The reference to specific Boards of Appeal in the explanatory memorandum was included merely for information purposes[11].

In its opinion on the Court's request, the European Commission noticed that the concept could be clarified in two ways. One option would entail the incorporation of an exhaustive list of BoAs into Art. 58a of the statute. A second would involve defining the concept of "independent administrative body"[12].

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[10] Art. 58a of the Regulation (EU, Euratom) n. 2019/629 of the European Parliament and of the Council of 17 April 2019, amending protocol n. 3 on the statue of the Court of Justice of the European Union, in *OJ* L 111, 25.04.2019, p. 1

[11] Council of the European Union, amendments to protocol n. 3 on the statute of the Court of Justice of the European Union, n. 7586/18, 28.03.2018.

[12] European Commission opinion on the draft amendments to protocol n. 3 on the statute of the Court of Justice of the European Union, presented by the Court of Justice on 26 March 2018, COM(2018)534 final, 11.07.2018, p. 8.

Despite these suggestions, the Co-legislators opted for a list of 4 (at that time) and (now with the last reform) 10 Agencies[13], whose Boards of Appeal are now part of the new procedural provision. The choice of the Co-legislators was, therefore, to simply take stock of the existing Agencies and the 'independence' of their respective BoAs, as it already results from their Founding Regulations.

However, this direct mention of specific bodies neither address the question of their degree of independence or their nature in substantive terms. Nor, in my opinion, it entails that their independence could not be put into question. Despite the impact of the new provision on the procedural role of the BoAs, their legal basis remains the Founding Regulation of their respective Agency, accompanied by the internal Rules of Procedure. The recent provision should be read in the light of these legal instruments and their interpretation by the relevant case law.

The concept of independence is not defined in the provision itself. As previous speakers have mentioned, the Boards of Appeal enjoy functional independence, but not organic independence. Indeed, as we have seen, the Regulations establishing the Board of Appeal of each Agency include safeguards to prevent any form of external influence on the decision-making process. At the same time, there are clear rules regarding the exclusion of members who have been involved in the prior administrative procedure of the same case. Furthermore, even though this is not always clearly reflected in the Founding Regulation and a careful assessment of the current practice is certainly needed[14], the Boards enjoy, *de facto*, a certain budgetary and organisational independence, while their members are appointed through transparent and clearly prescribed procedures. Nonetheless, the BoAs remain an integral part of their respective Agency, falling under the mandate of the same Management Board and the same staff Regulations. Therefore, although their functional independence is confirmed both from an internal and an external perspective, their organic independence is far from guaranteed.

One thing seems certain to me: without speculating on the reasons why the Co-legislators wanted, so to say, to take a picture, with that provision, of the current state of play, the inclusion of all the existing

[13] Amendments to protocol n. 3 on the statute of the Court of Justice of the European Union: European Parliament legislative resolution of 27 February 2024 on the draft Regulation of the European Parliament and of the Council amending protocol n. 3 on the statute of the Court of Justice of the European Union (07307/2022 – C9-0405/2022 – 2022/0906(COD)).

[14] See, in particular, in this *Volume* M. NAVIN-JONES, *Ramification of the Aquind Judgements for 'Non Permanent' Boards of Appeal*, p. 197 and A. BUCHET, *The Boards of Appeal of the European Chemicals Agency. Structure and Power of Review*, p. 221.

Boards of Appeal in the aforementioned list does not imply any presumption of independence. It is merely a reminder that their decisions are part of the newly introduced procedural step before the Court of Justice and that, in that specific context, given the procedural role conferred on the BoAs through primary law, their independence is of essence. Nevertheless, as to the need to substantiate the concept of independence, this derives rather from their own legal basis and the accompanying case law. While it is possible to introduce further amendments through the Founding Regulations of their Agencies, the margins of this possibility are now framed by the binding requirements imposed on the BoAs by the new filtering mechanism, given their role in and impact on Court proceedings.

The new provision frames, therefore, the discretionary power of the Co-legislators when establishing new Agencies with a Board of Appeal. All existing and new BoAs must adhere to the criterion of independence as set out by this provision.

7. Does the 'filtering mechanism' have a 'judicializing' effect?

Certain scholars have described the new Article as having a 'judicializing' effect on the nature of the Boards of Appeal[15]. This term refers to the departure from a purely administrative character towards a more judicial one. In this context, does the new Art. 58a suggest a shift towards a more judicial nature of the BoAs? Such an approach could lead to the assumption that the BoAs need to comply with the conditions provided by Article 47 of the Charter. However, the conditions of Article 47 would require a stricter scrutiny of the BoAs' degree of independence. Despite the functional independence of the BoAs, their lack of organic independence implies that they may not meet the independence criteria that a purely judicial body should fulfil. The Court has also acknowledged this distinct degree of independence in the *Aquind* judgment[16]. There, the Court explicitly referred to a 'certain independence' of ACER[17], which deviates from the one usually attributed to purely judicial bodies. An entity with only 'certain' independence, albeit impartial, is not obliged to fully comply with the rigid conditions of Article 47.

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[15] See, *inter alia*, M. CHAMON, D. FROMAGE, *Between Added Value and Untapped Potential: The Boards of Appeal in the Field of EU Financial Regulation*, in M. CHAMON, A. VOLPATO, M. ELIANTONIO (eds), *cit.*, Oxford, 2022.

[16] Court of Justice, March 9th 2023, case C-46/21 P, *ACER* v *Aquind Ltd*, ECLI:EU:C:2023:182.

[17] *Ibidem.*

In this respect, Article 41 of the Charter seems to be better suited to circumscribe the quasi-judicial activity of the BoAs, without risking an unduly scrutinised framework. This perspective would allow for the preservation of the added value of the BoAs, while acknowledging their administrative dimension. Otherwise, accepting a purely judicial nature would limit the BoAs' revisional powers, contrary to the Co-legislators' intention. Adhering to strict judicial conditions would inevitably restrict the power of review only within the limits provided for purely judicial bodies. In order for the BoAs to bring their added value within the Union legal order, they should retain their flexible relation to the requirement of independence and the prevalence of their administrative elements.

As I already mentioned, the Boards of Appeal have already been described as performing a 'quasi-judicial function' in the *Aquind* judgment, a term that highlights the delicate balance between a judicial and an administrative review body. The Court adopted a flexible approach, recognising that the role of the BoAs includes judicial, as well as administrative elements, both of which are equally important in achieving their purpose. In that regard, the appeals' procedure is a significant component of the Court's judicial structure. Together with the guarantees of the BoAs' independence, the status of these appeals reflects their quasi-judicial nature. At the same time, the examination of the acts produced by the Agencies involves complex technical assessments, resulting in a concentrated and thorough review, similar to that exercised by administrative authorities. Article 58a does not seem to pursue the aim of affecting this delicate balance.

The notion of independence referred to therein needs to be interpreted in the light of the relevant case law. In my opinion the Court did not mean to confer on the BoAs any powers additional to the ones provided by their Founding Regulations. Such an initiative would not only lay outside of the Court's jurisdiction, but it would also imply that the Court would willingly undermine its own powers. Conversely, there is no indication that the new provision would limit the role of the BoAs to the one of a judicial authority. On the contrary, the Court opted for a more flexible approach, throughout its case law, fully taking into account the administrative perspective.

A more prominent comparison to judicial bodies would require the BoAs to limit their revision to instances of manifest error of appraisal, misuse of powers or manifest excess of discretion. On account of the Court's flexible approach, the BoAs do not seem to be required to remain within these strict margins of judicial revision, including in the light of Article 58a.

Notwithstanding any possible interpretation of this provision of primary law, the position already expressed by the Court seems to exclude any obligation for the Co-legislators to further 'judicializing' the BoAs' activity. A different approach would confine the BoAs to the constraints typically placed on judicial bodies, namely the independence criterion of Article 47 of the Charter.

The nature of the BoAs as an indispensable part of their Agency is crucial to achieving their purpose by drawing on their specialised knowledge and applying it to their decisions. An attempt to fit the BoAs into the strict framework of Article 47 would significantly limit their potential of assessing intricate legal and technical issues. On the contrary, a flexible approach would ensure the added value of the BoAs to the extent that the quality of their specialised review would be reserved, without the strict limits of judicial revision.

From the perspective of the legislative works, it is also worth reminding, in this context, the Parliament's suggestion, made in the context of the legislative works concerning the revision of ESA Regulation in 2019, to provide the BoAs with the competence to examine soft law produced by the Agencies, such as their recommendations or opinions[18]. This proposal failed because of the Council's opposition. Such a change now seems even less attainable, since the increased (quasi-) judicial aspect of the BoAs would probably not allow for an assessment of non-binding acts. Even though the inclusion of soft law within the scope of review is not completely excluded, such an addition would seem now more difficult to explore.

8. Who must ensure the independence of the BoAs?

The filtering mechanism is, therefore, an important factor, but does not change the parameters to be taken into account when assessing the legality of the BoAs and their functioning. It confirms that 'independence' is the essence but does not provide any further specification in this respect. The responsibility to preserve the legality of the BoAs and their independence in substantive terms is shared between the Co-legislators and the Management Board of each Agency concerned, under the control of the Court of Justice. Since the BoAs are still part of and organically linked to their respective Agency, the Management Board of each Agency could oversee the details concerning its daily functions and technicalities, through its internal Rules of Procedure. However, the legal basis of the

[18] Regulation (EU) n. 2019/2175 of the European Parliament and the Council amending the ESA Regulation referred to in fn 5.

BoAs is each Agency's Founding Regulations and, as such, it falls under the responsibility of the Co-legislators.

The recent amendment of Article 58a frames the outer margins of this work. Therefore, any future evolution of the legal framework of the BoAs should fully take into account this 'silent-effect' of the new Art. 58a in framing the work of the Co-legislators. The 'quasi-judicial' role of the BoAs as well as their independence as now established in Article 58a in the context of Court proceedings must be complied with and further preserved in this context.

9. Conclusive remarks

At this stage, there is no horizontal debate among the institutions concerning the determination of the BoAs' nature and independence, but the current available legal framework, while fragmented, does not seem to raise particular concerns. It is rather the opposite. Notwithstanding the (in some case important) differences, the common denominators in the relevant secondary legislation, as already interpreted by the case law, ensure some consistency and effectiveness, in particular as regards functional independence.

Article 58a is mainly mirroring the current state of play. The BoAs are indeed *quasi-judicial* in nature and enjoy a *certain independence*. At the same time, the unavoidable 'framing silent effect' of the filtering mechanism on the future work of the Co-legislators needs to be taken into account: any BoA should not comply only with the legal basis in the treaties and its Founding Regulation (secondary law), but also with Article 58a and the role conferred on BoAs in the context of Court proceedings.

In terms of future work, some reflection seems nevertheless necessary to further improve the legal framework from the point of view of organic independence. Prevention is always better than cure. The Commission, in the light of its right of initiative, could take the lead in this respect and launch such reflection (even at informal/services level) with the co-legislators.

But considering the need for further harmonisation at the legislative level should be balanced with the risk of jeopardising the added value of these bodies. An attempt to further regulate the BoAs could inevitably lead to their increased delimitation, thus hindering the free exercise of their potential. The powers of new Agencies will vary depending on concrete regulatory and economic objectives that need to be achieved at EU level. Such powers will have to be conferred and exercised within the limits of

the *Meroni* doctrine[19], as well as fully take into account the obligation to ensure a broad protection of the rights of economic operators and individuals.

In this context, the purpose of the BoAs should be fully preserved by allowing their flexible function, while fully taking into account the peculiar role of the Agencies to which they pertain organically, and without the limits that would be imposed on bodies of strictly judicial nature. This is, in my opinion, the message already conveyed by the Court in its *Aquind* judgment.

[19] Court of Justice, June 13th 1958, case C-9/56, *Meroni & Co., Industrie Metallurgiche SpA* v *High Authority of the European Coal and Steel Community*, ECLI:EU:C:1958:7.

ROLE AND PERSPECTIVES OF THE BOARDS OF APPEALS OF EU AGENCIES IN LIGHT OF THE REFORM OF THE STATUTE OF THE COURT OF JUSTICE

Ruolo e prospettive delle commissioni di ricorso delle agenzie europee alla luce della riforma dello statuto della Corte di giustizia

Rôle et perspectives des chambres de recours des agences européennes à la lumière de la réforme du statut de la Cour de justice

PAOLO STANCANELLI[*]
ALEJANDRO MENÉNDEZ FERNÁNDEZ[**]

TABLE OF CONTENTS: 1. Introduction. – 2. The tension between heterogeneity and common features among the EU Agencies and among the BoAs. – 2.1 Heterogeneity ad a consequence of the different functional necessities of the EU Agencies and of their BoAs. – 2.2 The commonalities among BoAs and the effect of Article 58a of the statute of the Court of Justice. – 3. Is the recognition of the role and effectiveness of the BoAs stemming from Article 58a of the statute of the Court of Justice fully deserved? – 3.1 What the Charter expects from BoAs. – 3.2 Room for improvement: enhancing the organic independence of the BoAs. – 4. Conclusion.

1. Introduction

EU Agencies are interesting creatures. They have developed following different paths, at different times and with different purposes and missions. Yet, sometimes, the institutions treat them as a relatively uniform category, an approach that lies at the verge of oversimplification. That has been the case, for instance, with the system of judicial remedies

[*] Principal Legal Adviser in the Legal Service of the European Commission. The views and opinions expressed in this article are those of the author. They do not purport to reflect the views or opinions of the Institution.

[**] EU Legal Advisor at RECLAIM. The views and opinions expressed in this article are those of the author. They do not purport to reflect the views or opinions of the Agencies.

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concerning the decisions issued by the boards of appeal (BoAs) of the Agencies having decisional powers, for which a mechanism of filter of appeals at the level of the Court of Justice has been introduced following the reform of the Statute of the Court of Justice of the European Union (Statute).

This mechanism runs on the presumption that the review of those Agencies' decisions made by the BoAs concurs to the compliance with the fundamental right to an effective judicial protection, which is in fact a recognition of the reliability of the work done by the BoAs themselves. Nevertheless, one cannot deny that some criticisms have been directed towards the introduction and then the generalisation of this mechanism in the Statute.

Through the present contribution we will explore the relative heterogeneous nature of the EU decentralised Agencies and of the BoAs created within some of them, and the tensions which may derive from the combination of this diversity with the homogeneous treatment stemming from the mechanism of filter of appeals. Then, we will analyse how this mechanism raises the stakes for the protection that BoAs are required to offer to the appellants, and we will explore the possible avenues they have to be up to the task.

2. The tension between heterogeneity and common features among the EU Agencies and among the BoAs

2.1 Heterogeneity as a consequence of the different functional necessities of the EU Agencies and of their BoAs

Agencies in the European Union have appeared gradually.

Initially, they were conceived as poles of technical expertise in support of the work of the Commission. The first two Agencies, CEDEFOP (for vocational training) and EUROFUND (for the improvement of living and working conditions)[1], created in the Seventies in the domain of social policy, had as their main aim gathering and disseminating knowledge in their respective fields of competence through the organisation of courses and seminars, carrying and publishing studies, setting up working groups and facilitating contacts between researchers and stakeholders.

[1] Council Regulation (EEC) n. 337/75 of 10 February 1975 establishing a European Centre for the Development of Vocational Training, in *OJ* L 39, 13.02.1975, p. 1 ff.; Council Regulation (EEC) n. 1365/75 of 26 May 1975 on the creation of a European Foundation for the improvement of living and working conditions, in *OJ* L 139, 30.05.1975, p. 1 ff.

As EU law extended to new policy areas and increased in technical complexity, a number of new Agencies were established in the Nineties. Some of them were conferred tasks similar to the previous Agencies. That is the case, for instance, of the European Environment Agency or the European Agency for Safety and Health at Work[2], whose mission consisted in providing, connecting and sharing technical expertise in their respective areas of competence, and thus assisting the Commission in the elaboration and implementation of its policies. However, were also created a couple of Agencies entrusted with genuine regulatory powers: the Office for Harmonization in the Internal Market (today's EU Intellectual Property Office, EUIPO) and the Community Plant Variety Office (CPVO). Since these Agencies were tasked to implement centralised authorisation procedures and were given decisional powers, it appeared expedient to provide in their founding Regulations with appeal systems to allow the affected parties obtain administrative redress[3]. This is how the first BoAs sprung in the EU context.

The process of 'agentification' continued and intensified in the following years. Some of the newly created bodies were called to assist the Commission in the adoption of decisions authorising the use in manufacturing processes or the marketing of certain products in sectors requiring particular high-level scientific expertise – e.g. the European Medicines Agency (EMA) and the European Food and Safety Authority (EFSA)[4] – or even to adopt themselves such kind of decisions – e.g. the European Chemicals Agency (ECHA)[5]. Other Agencies were tasked with directly exercising supervision at European level upon the operators active

[2] Council Regulation (EEC) n. 1210/90 of 7 May 1990 on the establishment of the European Environment Agency and the European Environment Information and Observation Network, in *OJ* L 120, 11.05.1990, p. 1 ff.; Council Regulation (EC) n. 2062/94 of 18 July 1994 establishing a European Agency for Safety and Health at Work, in *OJ* L 216, 20.08.1994, p.1 ff.

[3] Council Regulation (EC) n. 40/94 of 20 December 1993 on the Community trade mark, in *OJ* L 11, 14.01.1994, p. 1 ff., Title IV, Section 1 and Title VII; Council Regulation (EC) n. 2100/94 of 27 July 1994 on Community plant variety rights, in *OJ* L 227, 1.09.1994, p. 1 ff., Part Three, Chapter IV.

[4] Council Regulation (EEC) n. 2309/93 of 22 July 1993 laying down Community procedures for the authorization and supervision of medicinal products for human and veterinary use and establishing a European Agency for the Evaluation of Medicinal Products, in *OJ* L 214, 24.08.1993, p. 1 ff.; Regulation (EC) n. 178/2002 of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety, in *OJ* L31, 1.02.2002, p. 1 ff.

[5] Regulation (EC) n. 1907/2006 of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, in *OJ* L396, 30.12.2006, p. 1 ff., Title II.

in specific economic sectors, like the three supervisory authorities in the financial sectors – i.e. the European Banking authority (EBA), the European Securities and Markets Authority (ESMA) and the European Insurance and Occupational Pension Authority (EIOPA)[6] – and the Agencies active in the transport sector – the European Aviation Safety Agency (EASA) and the EU Agency for Railways (ERA)[7].

In the last decade, the EU legislator continued to establish Agencies in a punctual way, when it considered necessary or appropriate to have a dedicated EU entity able to provide assistance to the Commission in the form of technical or scientific advice; to create a network of national competent authorities and to organise the cooperation between them in the interests of the Union – e.g. the Agency for the Cooperation of Energy Regulators (ACER)[8] – or to monitor and regulate the activities of economic operators, including through binding decisions and enforcement actions – e.g. the Single Resolution Board (SRB)[9].

Currently, we count 35 so-called decentralised Agencies, a notion which regroups all the entities with legal personality created by the EU legislator in order to accomplish a specific policy mission and which are fully independent from the EU institutions (as opposed to the executive Agencies, which are controlled by the European Commission). The proliferation of this kind of Agencies has been explained on different reasons: the Member States' aim to counterbalance the centralisation of powers in the Commission; the need to shed some transparency over the highly technical decision-making at EU level; the need to have well contained poles of expertise able to react to future crises; and even the change in trends in public management[10]. Irrespective of the reason

[6] Regulation (EU) n. 1093/2010 of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), in *OJ* L331, 15.12.2010, p. 12 ff.; Regulation (EU) n. 1094/2010 of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), in *OJ* L331, 15.12.2010, p. 48 ff; Regulation (EU) n. 1095/2010 of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), in *OJ* L331, 15.12.2010, p. 84 ff.

[7] Regulation (EC) n. 1592/2002 of 15 July 2002 on common rules in the field of civil aviation and establishing a European Union Aviation Safety Agency, in *OJ* L240, 7.09.2002, p 1 ff.; Regulation (EC) n. 881/2004 of 29 April 2004 establishing a European Railway Agency, in *OJ* L164, 30.04.2004, p. 1 ff.

[8] Regulation (EC) n. 713/2009 of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators, in *OJ* L211, 14.08.2009, p. 1 ff.

[9] Regulation (EU) n. 806/2014 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, in *OJ* L 225, 30.07.2014, p. 1 ff.

[10] See M. EGENBERG, J. TRONDAL, *Agentification of the European Union administration:*

behind their blossoming, the truth is that each Agency has been considered, at the moment of its institution, the right answer to a specific functional necessity in a specific policy area.

Due to their 'spontaneous' establishment, on a case-by-case basis and to address punctual and specific issues, every Agency has been moulded to meet the needs underlying its own creation, without following a general plan and a single institutional structure. This initially generated a conspicuous heterogeneity in the design of the governing bodies of these Agencies and in their relations with the Commission, as well as concerning the nature and scope of their powers. Realising that such fragmentation could be problematic, the Commission published, in 2008, a communication highlighting the need for a more consistent approach towards EU Agencies[11]. This led to the launching of an inter-institutional dialogue that produced the 2012 Joint Statement on decentralised Agencies, carrying the so-called Common Approach[12]: a template for the creation of future Agencies that touches aspects like their seat, their governance structures, their operation and budget and their transparency and accountability. The decentralised Agencies established since then actually present more common features than in the past, without losing the particular characteristics that make them suitable to achieve their respective missions.

Ten of the existing decentralised Agencies have a BoA among their internal organs[13]. In essence, they are all Agencies which are entrusted with the power of adopting decisions or other normative acts affecting the legal situation of interested parties (referred to as regulatory Agencies). The EU legislator considered necessary to provide for internal means of redress against their acts and, like for the Agencies, the creation of the BoAs was dictated on a case-by-case basis by a purely functional need, i.e. enhancing the right to an effective remedy of the concerned economic operators. In relation to the BoAs, the so-called Common Approach of 2012 only stresses the need to ensure their impartiality and independence, "on the basis of transparent and objectively verifiable criteria to be defined by the Agencies"[14].

Connecting the dots, in *TARN Working Paper 1/2016*, pp. 4-5; E. PANDER MAAT, M. SCHOLTEN, *Historical Development of Boards of Appeal of EU Agencies*, 2021, p. 3, available at SSRN: https://ssrn.com/abstract=4139150.

[11] Communication from the Commission to the European Parliament and the Council – European Agencies – The way forward, COM (2008) 135 final.

[12] European Parliament, Council of the European Union and European Commission, Joint Statement on decentralised Agencies.

[13] EUIPO, CPVO, EASA, ECHA, EBA, ESMA, EIOPA, SRB, ERA, ACER.

[14] European Parliament, Council of the European Union and European Commission, Joint Statement on decentralised Agencies, Annex, Common Approach,

The heterogeneity of the regulatory Agencies is also reflected in their BoAs, which present different structural characteristics: some BoAs sit and act in a permanent manner, while others are more *ad hoc*, depending on the rather unequal workloads before them. They have also different powers: some BoAs can gather evidence on their own initiative while others are limited to the evidence provided by the parties; some BoAs not only can annul, but also can replace the decisions taken by the Agencies' authorities which are challenged before them, while others can only refer them back to those authorities in case, they consider that the challenged decisions are vitiated.

2.2 The commonalities among BoAs and the effect of Article 58a of the Statute of the Court of Justice

Despite coming in different shapes and forms, BoAs of the regulatory Agencies also share some important commonalities. First, they are statutorily independent from the Agencies for which they operate. Moreover, they are composed of lawyers and specialists on the areas of expertise of their respective Agencies. Furthermore, they have jurisdiction over an exhaustive list of Agencies' decisions and constitute a prior mandatory step before bringing a case before the EU Courts[15]. Finally, they are typically requested to adjudicate rapidly, sometimes within strict and rather short deadlines imposed by their founding acts.

These shared characteristics have been considered sufficient to recognise that BoAs provide such a homogeneous and satisfactory degree of protection for the concerned economic operators that, when the Statute was modified in 2019, a new provision was inserted – Article 58a – which introduces a filtering mechanism , whereby an appeal against a judgement delivered by the General Court may not be admitted by the Court of Justice if it concerns the decision of the BoAs of EUIPO, CPVO, ECHA or EASA, unless it "raises an issue that is significant with respect to the unity, consistency or development of Union law".

There had been discussions as to the reasons why only the cases concerning decisions issued by the BoAs of the four expressly mentioned Agencies were subject to this mechanism. The wording of Article 58a of the Statute may be misleading, to the extent that it may be interpreted as if the filter of appeals was applicable only to the BoAs that reached a certain level of independence. In reality, there are no indications from the founding acts or from the practical experience that the BoAs of these four

para 21.

[15] See P. CHIRULLI, L. DE LUCIA, *Specialised Adjudication in EU Administrative Law: The Boards of Appeal of EU Agencies*, in *European Law Review*, 2015, p. 835.

Agencies are more independent[16] or more powerful and effective[17] than the other ones.

In practice, as the literature reflects[18], the 2019 reform of the Statute had as its ultimate aim to lighten the Court's workload. In particular, the introduction of the mechanism of the filter of appeals was dictated by the wish to dispense the Court from a subset of very technical litigation which is already subject to two instances of scrutiny, rather than by a detailed analysis of the status and performance of the BoAs. Recital 4 of Regulation (EU) n. 2019/629, which is the legal act having materially amended the Statute, also points in this direction: "many appeals are brought in cases which have already been considered twice, initially by an independent Board of Appeal, then by the General Court, and … many of those appeals are dismissed by the Court of Justice because they are patently unfounded or on the ground that they are manifestly inadmissible"[19]. The fact that Article 58a of the Statute ultimately listed only four Agencies was somewhat contingent on the circumstance that in the original proposal of the Court the BoAs of these Agencies were mentioned as examples of effective legal remedy[20].

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[16] One might argue that the BoA of EUIPO is more independent because it is not established as an organ of the Agency, but this is also the case of the BoA of SRB, which was not included in the list. In addition, the appointment of the members of the BoAs of CPVO and EUIPO is done by the Council, while the members of the BoAs of ECHA and EASA are selected by the Management Boards of these Agencies from a list elaborated by the Commission.

[17] The scope of powers of the BoA of EASA was amended in 2018 by Regulation (EU) n. 2018/1139, removing its power to replace decisions taken by the Agency and providing instead for a system of remit of the vitiated decisions (Regulation (EU) 2018/1139 of the European Parliament and of the Council of 4 July 2018 on common rules in the field of civil aviation and establishing a European Union Aviation Safety Agency, and amending Regulations (EC) No 2111/2005, (EC) No 1008/2008, (EU) No 996/2010, (EU) No 376/2014 and Directives 2014/30/EU and 2014/53/EU of the European Parliament and of the Council, and repealing Regulations (EC) No 552/2004 and (EC) No 216/2008 of the European Parliament and of the Council and Council Regulation (EEC) No 3922/91, in *OJ* L 212, 22.08.2018, p. 1-122). The BoAs of most of the Agencies not listed in the 2019 reform of the Statute, instead, have the power to substitute their decisions to those taken by the Agencies' authorities.

[18] See L. DE LUCIA, *The Boards of Appeal as Hybrid Adjudicators: On Some Shortcomings of Article 58a of the Statute of the Court of Justice of the European Union*, in M. CHAMON, A. VOLPATO AND M. ELIANTONIO (eds.) *Boards of Appeal of EU Agencies: Towards Judicialization of Administrative Review?*, Oxford, 2022, p. 193.

[19] Regulation (EU, Euratom) n. 2019/629 of the European Parliament and of the Council of 17 April 2019 amending Protocol No 3 on the Statute of the Court of Justice of the European Union, in *OJ* L111, 25.04.2019, p. 1 ff.

[20] See Commission Opinion on the draft amendments to Protocol No 3 on the Statute of the Court of Justice of the European Union, presented by the Court of Justice on 26 March 2018, para 40.

Be it as it may, the problem with the apparently accidental character of the list of Art. 58a will soon be solved. The already agreed, further reform of the Statute will extend the mechanism of filter of appeals to the cases concerning the decisions of all the ten existing Agencies having a BoA, plus – as already provided in the original version of the norm in point – to the cases concerning decisions of independent BoAs set up after May 2019 (the date when the mechanism was first introduced)[21]. The reason falls in line with that given in 2019: "[s]uch appeals concern cases which have already been considered twice, initially by an independent Board of Appeal, then by the General Court, with the result that the right to effective judicial protection is fully guaranteed"[22].

Thus, the European Parliament and the Council, in their capacity of constitutional co-legislators (the Statute is contained in a Protocol to the EU Treaties and is therefore part of the primary law of the EU), explicitly acknowledge that the remedy offered by the BoAs contributes decisively to the full realisation of the fundamental right to effective judicial protection, relying essentially on the independence of these bodies. In fact, the co-legislators largely echo the recognition by the Court of Justice itself that the BoAs constitute an appropriate and effective remedy in the specific domains of activities of the Agencies entrusted with genuine regulatory powers, while referring to their *certain independence* and stressing the *quasi-judicial* nature of the functions they perform[23].

Yet, there is no consensus in the literature nor among practitioners about the effectiveness and the fairness of the protection offered by the system of BoAs[24]. Interestingly, those criticisms have gone unnoticed during the legislative process that led to the recent reform of the Statute. Neither the Commission nor the co-legislators have made any remarks on the generalisation of the mechanism of filter of appeals concerning BoAs decisions originally proposed by the Court. Nevertheless, one may be left wondering to what extent the rosy picture that lies at the basis of the

[21] Document 16848/1/23 of 16 January 2024, Council of Ministers of the EU, available at: https://data.consilium.europa.eu/doc/document/ST-16848-2023-REV-1/en/pdf.

[22] Position of the European Parliament adopted at first reading on 27 February 2024 with a view to the adoption of Regulation 2024/… amending Protocol No 3 on the Statute of the Court of Justice of the European Union, recital 23.

[23] See Court of Justice, March 9th 2023, case C-46/21 P, *ACER* v *Aquind*, ECLI:EU:C:2023:182, para 59.

[24] See E. PANDER MAAT, M. SCHOLTEN, *Historical Development of Boards of Appeal of EU Agencies*, *cit.*, pp. 18-19; M. KRAJEWSKI, *Relative Authority of Judicial and Extra-Judicial Review. EU Courts, Boards of Appeal, Ombudsman*, Oxford, 2021, p. 137; P. CHIRULLI, L. DE LUCIA, *Non-Judicial Remedies and EU Administration: Protection of Rights versus Preservation of Autonomy*, London, 2021, pp. 255-256.

generalisation of that mechanism, i.e. the assumption that BoAs provide effective remedies, fully reflects the reality or whether there is some room for improvement in the system of BoAs.

To answer this question, we first need to check what type of independence and protection can be expected from BoAs to ensure that they comply with the Charter of Fundamental Rights of the EU (CFREU). It is only against the benchmarks of the CFREU that we can check BoAs' performance and identify fields for improvement – if needed.

3. Is the recognition of the role and effectiveness of the BoAs stemming from Article 58a of the Statute of the Court of Justice fully deserved?

3.1 What the Charter expects from BoAs

The operation of the mechanism of filter of appeals has clear consequences on the overall protection offered to the concerned economic operators, who are (almost) deprived of a second layer of judicial review. Hence, what is removed 'from the top' ought to be compensated 'at the bottom' of the proceedings. In this regard, it is worth noting that the rationale of Article 58a in the 2024 reform of the Statute goes one step further than that of 2019. It is justified not only on that the listed Agencies are 'independent', but also on that they play a role in guaranteeing 'effective judicial protection'. We should therefore examine what those two requirements mean for BoAs and to what extent the current paradigm lives up to them.

There is discussion as to the applicability of the right of Article 47 of the CFREU to remedial proceedings of administrative nature[25]. It should be stressed that the added value of BoAs' review lies, precisely, on factors that courts normally lack: specialised technical knowledge provided by the non-lawyer members of the panels, procedural flexibility and swiftness. Actually, BoAs complement the judicial review, rather than substitute it[26]. Hence, a rigid translation of the standards set forth by Article 47 of the CFREU to the activity of BoAs may risk hampering the benefits they provide. They are not courts and the reform of Article 58a of the Statute cannot artificially transform them into such.

In addition, Article 47 of the CFREU does not require, as a rule, the existence of a systematic double degree of judicial review[27]. Similarly, the

[25] See D. RITLENG, *Boards of Appeal of EU Agencies and Article 47 of the Charter: Uneasy Bedfellows?*, in M. CHAMON, A. VOLPATO AND M. ELIANTONIO (eds.), *cit.*, p. 299 ff.

[26] See P. CHIRULLI, L. DE LUCIA, *cit.*, 2021, p. 243.

[27] Court of Justice, July 28th 2011, case C-69/10, *Samba Diouf*, ECLI:EU:C:2011:524,

non-regression principle does not prohibit any reform of the judiciary that modifies the degree of judicial oversight; it rather precludes those reforms that amount to an overall and systemic reduction in the protection of the value of the Rule of Law or of the judicial independence[28]. In any case, the General Court has recognised that the administrative review offered by BoAs does contribute to upholding the right to an effective remedy[29].

Furthermore, many of the principles enshrined in Article 47 of the CFREU find parallelisms in those of Article 41 of the CFREU, which is certainly applicable to the BoAs. The right to a good administration already encompasses the obligation for BoAs to handle their cases fairly and impartially, to take careful consideration of the points of fact and law raised by the applicants, to ensure the right to be heard and to state reasons for their decisions[30].

In the case of BoAs, two aspects deserve particular attention in view of ensuring compliance with the requirements of Article 41 of the CFREU: the intensity of their review over the decisions of their respective Agencies and their independence from these Agencies.

The problem with the intensity of BoAs' review lies in the absence of a well-established standard of review in their founding Regulations. The lighter the review, the cheaper, faster and easier it is to carry it out, but lower the protection it offers to individuals. Yet in the absence of standards, some BoAs initially opted for a review similar to that of EU Courts[31]. The latter, when examining complex and technical decisions – like the ones adopted by EU Agencies – limit themselves to checking whether the decision is "vitiated by a manifest error, a misuse of powers or whether the author of the decision clearly exceeded the limits of its discretion"[32].

However, the EU Courts have rejected the applicability of that standard to BoAs. In *BASF* v *ECHA* the General Court underlined the technical expertise of ECHA's BoA to argue that the latter should not only

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para 69; Court of Justice, May 30th 2013, case C-168/13 PPU, *F.*, ECLI:EU:C:2013:358, para 44.

[28] Court of Justice, April 20th 2021, case C-869/19, *Repubblika,* ECLI:EU:C:2021:311, paras 64-65.

[29] General Court, September 20th 2019, case T-755/17, *Germany* v *ECHA,* ECLI:EU:T:2019:647, paras 56-57.

[30] D. RITLENG, *Boards of Appeal of EU Agencies and Article 47 of the Charter: Uneasy Bedfellows?*, in M. CHAMON, A. VOLPATO AND M. ELIANTONIO (eds.), *cit.*, pp. 312-314.

[31] S. OOSTERHUIS, *More than the EU Courts, less than the Agencies: intensifying the Boards of Appeals' standard of review after the* Aquind-*Judgement,* in this *Volume*, p. 105; M. KRAJEWSKI, *cit.*, p. 116-119.

[32] General Court, September 20th 2019, case T-125/16, *BASF* v *ECHA,* ECLI:EU:T:2019:638, para 87.

examine whether the decision is vitiated by 'manifest errors', but rather by (plain) 'errors'[33]. The Court of Justice confirmed this line of interpretation in *Aquind*. It relied on the composition, accessibility of procedures and competence of ACER's BoA to argue that the limited review of technical assessments proper of EU Courts does not apply to BoAs[34]. Otherwise, the Court argued, when EU Courts are seized of BoA decisions, they would be carrying out a limited review of an already limited review, something which is incompatible with ensuring effective judicial protection[35]. The Court then flagged that its review could be vitiated by the lack of safeguards at the administrative level and thus defined a uniform standard of BoAs' review.

The other sensitive aspect of the system of administrative review of the BoAs relates to their independence. Undoubtedly, there exists a tension between BoAs' statutory independence and the fact that they still operate within their Agencies, as the General Court recognised in *Procter and Gamble*[36]. On the one hand, independence underpins the impartial and fair handling of cases by BoAs – as required by Article 41 CFREU – while ensuring that the overall system of administrative and judicial review guarantees the right to an effective remedy – as mandated by Article 47 CFREU and emphasized in *Germany* v *ECHA* and *Aquind*. On the other hand, BoAs still keep organisational and budgetary ties with their Agencies[37], with some authors underscoring the need for improvement in this regard[38].

It is settled case law of the Court of Justice that independence has two mirroring dimensions, one objective and one subjective: it requires absence from external control as well as impartiality on the handling of proceedings[39]. On its objective dimension, then, independence "require[s] rules, particularly as regards the composition of the body and the appointment, length of service and grounds for abstention, rejection and

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[33] *Ivi* para 89.

[34] Court of Justice, March 9th 2023, C-46/21 P, *ACER* v *Aquind*, ECLI:EU:C:2023:182, para 66.

[35] *Ivi* para 67.

[36] General Court, December 12th 2002, case T-63/01, *Procter and Gamble* v *OHIM,* ECLI:EU:T:2002:317, paras 19-22.

[37] See M. KRAJEWSKI, *cit.*, pp. 104-108; J. ALBERTI, *The Position of Boards of Appeal: Between Functional Continuity and Independence*, in M. CHAMON, A. VOLPATO AND M. ELIANTONIO (eds.), *cit.*, pp. 254-257.

[38] See E. PANDER MAAT, M. SCHOLTEN, *Historical Development of Boards of Appeal of EU Agencies*, *cit.*, pp. 18-19; J. ALBERTI, *The Position of Boards of Appeal: Between Functional Continuity and Independence*, in M. CHAMON, A. VOLPATO AND M. ELIANTONIO (eds.), *cit.*, p. 272.

[39] Court of Justice, June 24th 2019, case C-619/18, *Commission* v *Poland (Independence of the Supreme Court)*, ECLI:EU:C:2019:531, paras 72-74.

dismissal of its members, that are such as to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it"[40]. Even if this is the standard developed by the Court to assess judicial independence under Article 19 TEU, it can also offer some guidance as to what to expect from BoAs[41].

As mentioned above, all the founding Regulations of EU Agencies establish that BoAs are independent from the governing bodies of their respective Agencies and cannot receive instructions from them[42]. Some Regulations complement this provision with rules on revolving doors for BoA members[43]. In practice, however, the members of the BoAs are not completely immune from possible influence by their Agencies.

First, for most BoAs, the Management Boards of the respective Agencies play a role in the appointment of their members, even if a third party (like the Commission) intervenes by coming up with a list of names[44]. Similarly, the same boards mostly decide on the removal of the members of the BoAs, in some cases subject to a prior notification to the Commission[45]. Nonetheless, the Court of Justice has consistently stated that the appointment of judges by the executive or by the legislative does not affect their independence insofar as they are free from the appointers' influence when exercising their role[46].

Moreover, BoAs do not have control over their budget and staff; as a rule, the budget of the BoAs is integrated into that of their respective Agencies[47] and, in addition, the members of the BoAs should rely for their daily work on the support of the staff paid or seconded by those Agencies. This can have an impact on the capacity of the BoAs to adjudicate: the higher the resources available, the more thorough the examination of a case will be[48].

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[40] *Ibid*, para 74.

[41] See E. PANDER MAAT, M. SCHOLTEN, *Historical Development of Boards of Appeal of EU Agencies*, *cit.*, p. 10.

[42] See J. ALBERTI, *The Position of Boards of Appeal: Between Functional Continuity and Independence*, in M. CHAMON, A. VOLPATO AND M. ELIANTONIO (eds.), *cit.*, p 258.

[43] *Ibid.*

[44] See E. PANDER MAAT, M. SCHOLTEN, *Historical Development of Boards of Appeal of EU Agencies*, *cit.*, p. 8.

[45] *Ivi* p. 10.

[46] Court of Justice, April 20th 2021, case C-896/19, *Repubblika* v *Il-Prim Ministru,* ECLI:EU:C:2021:311, para 56.

[47] See J. ALBERTI, *The Position of Boards of Appeal: Between Functional Continuity and Independence*, in M. CHAMON, A. VOLPATO AND M. ELIANTONIO (eds.), *cit.*, p. 260.

[48] See M. KRAJEWSKI, *cit.*, p. 137.

Last, the founding Regulations of the regulatory Agencies are typically silent on questions like employment conditions of the members of the BoAs, ethics rules applicable to them and their enforcement, staffing and financial autonomy or the capacity of the BoAs to defend autonomously their decisions.

All these elements, taken together, may give rise to questions on the expediency to improve the level of independence of the BoAs in order to provide the necessary guarantees of impartiality to the parties subject to their jurisdiction.

3.2 Room for improvement: enhancing the organic independence of the BoAs

The most effective solution to address these questions would consist in introducing legislative harmonisation on aspects like the rules on selection and removal of the members of the BoAs and in providing for genuine budgetary autonomy of those bodies. However, one must acknowledge that, at the moment, there is no political momentum for proposing those changes.

Thus, the governing bodies of the concerned Agencies may need to explore alternative avenues to guarantee that the independence of BoAs is CFREU-proof, looking into the margins for manoeuvre at their disposal. In this respect, it is worth recalling – as mentioned above – that the 2012 Common Approach highlights the Agencies' own responsibility in terms of ensuring the independence of the members of their BoAs[49].

For instance, the governing bodies of the concerned Agencies could agree with their respective BoAs, through administrative arrangements, on appropriate measures to provide the latter with control on their supporting staff and a certain autonomy in the determination and management of their operational budget. Appropriate measures may also be envisaged in relation to the ethics rules applicable to BoA members, like declarations of interest to avoid conflicts of interest[50] or allowing the parties to submit a request of recusal of a member of a BoA to dispel any doubts about the impartiality of proceedings[51]. Similarly, an explicit list of BoA members' incompatibilities may also be helpful to guarantee internal independence[52].

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[49] See n. 14.

[50] See M. KRAJEWSKI, *cit.*, p. 107.

[51] *Ibid.*

[52] See J. ALBERTI, *The Position of Boards of Appeal: Between Functional Continuity and Independence*, in M. CHAMON, A. VOLPATO AND M. ELIANTONIO (eds.), *cit.*, p. 258.

In addition, the degree of protection offered by the administrative review may be made more uniform if BoAs learn from one another and share best practices. In this respect, a precious role can be played by the Inter Agency Appeal Panel Network, which is the informal network of the Chairs of the BoAs and a privileged space for exchanges and mutual learning about developments concerning the organizational and functional features of all the BoAs.

Finally, what could bring further protection for appellants – without requiring any legislative modifications – would be a less strict application of the filter of appeals by the Court of Justice. In the course of the legislative proceedings which led to the 2024 reform of the Statute, the Council of Bars and Law Societies of Europe flagged this as a concern, arguing that the filter "cannot result in the total elimination of the appeals in all the areas concerned"[53]. Nevertheless, as desirable as this may be, such a change would be neutral in respect of the question of strengthening the BoAs' organic independence.

4. Conclusion

The EU regulatory Agencies have decision-making powers which may affect, sometimes very substantially, the sphere of rights of natural and legal persons. The BoAs created by the founding Regulations of these Agencies provide reinforced protection to those persons, who can make recourse to reliable, professional and fast proceedings to make their cases and defend their rights.

The effectiveness of the remedy offered by the BoAs has been *de facto* recognised by Article 58a of the Statute, which introduces a mechanism of filter of appeals concerning the decisions issued by the BoAs, thus acknowledging the reliability of their scrutiny over their respective Agencies' decisions.

Yet, with the upcoming extension of this mechanism to the cases concerning the decision of all the existing and future BoAs, the need to ensure the full compliance with the fundamental rights to an effective remedy and to a good administration calls for a closer examination of the administrative review made by the BoAs. Certain guarantees in terms of independence of the members of the BoAs and effectiveness of their review must be ensured across the concerned Agencies, which does not mean that they necessarily have to be cut from the same cloth; diverse systems can still provide similar protection. Nonetheless, the

[53] See P. PERAKIS, CCBE comments on the draft amendment to Protocol No 3 on the Statute of the Court of Justice of the European Union, presented by the Court of Justice on 30 November 2022, Brussels, May 5th 2023.

responsibilities implicitly imposed by Article 58a of the Statute on the BoAs are substantial, as they are positioned as the gatekeepers at the entrance hall of the EU Courts. In particular, they will need to fully embrace the challenge of combining their special features of administrative independent bodies – which have nonetheless significant links with the governing bodies of the Agencies whose decisions they scrutinise – with the guarantees of the quasi-judicial review they are expected to provide.

CONCLUDING REMARKS

EU AGENCIES' BOARDS OF APPEAL: *VICTIMES DE LEUR SUCCÈS?*

Le commissioni di ricorso delle agenzie dell'Unione europea: victimes de leur succès*?*

Les chambres de recours des agences de l'Union européenne: victimes de leur succès ?

JACOPO ALBERTI*

TABLE OF CONTENTS: 1. The Boards' adherence to the 'Kirchberg orthodoxy'… – 2. … and the reasons why it should not be overestimated. – 3. The interpretation and application of Aquind by the Boards of Appeal. – 4. The lack of innovation in the Board of Appeal model. – 5. Some proposals for updating the Board of Appeal model. – 6. The untapped potential of EU Agencies' Boards of Appeal. – 7. An agenda for future research.

1. The Boards' adherence to the 'Kirchberg orthodoxy'…

First and foremost, the studies included in this Volume have clearly demonstrated that the Boards of Appeal are very keen to follow not only the case-law of both EU Courts, but also to use the more than seventy-years-old 'Kirchberg experience' for the purpose of interpreting and applying the principles of EU litigation arising in the cases pending before them. Some exceptions occur, such as in the case of third-party participation in proceedings, as discussed by Anrò. However, the broad picture reveals a strong affinity between the Boards of Appeal and the EU Courts in managing litigation. This approach cannot but be welcomed, since it lessens – at least with regard to the time framework covered by this research – the risks of fragmentation of the EU legal order that have often been reported when judicial power is shared among different entities and, in particular, when it is also exercised through specialised bodies[1].

* Associate Professor of EU Law at the University of Ferrara and Coordinator of the Jean Monnet Module *EU Specialized Judicial Protection*.

[1] P. CHIRULLI, L. DE LUCIA, *Tutela dei diritti e specializzazione nel diritto amministrativo europeo. Le commissioni di ricorso delle agenzie europee*, in *Rivista Italiana di Diritto Pubblico Comunitario*, 2015, in particular p. 1343-1344.

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In a similar vein, the risk of the creation of sectoral jargons, which often leads to the creation of conflicting case-law and the misinterpretation of common principles of law[2], also seems to be very well managed both by the Boards of Appeal and by the EU Courts. Leaving aside some discrepancies – almost unavoidable with so many different and highly technical policy fields – the main principles of EU litigation and EU law are evoked by all Boards of Appeal using the same legal terminology and, most importantly, according to a notion which is consistent with the settled case-law of the Court of Justice. The main exception to this trend lies in the standard of review applied by each Board. As highlighted by Oosterhuis, quite different terminologies are adopted in relation to this matter, and they reflect quite different approaches towards the issue. As will be further discussed below[3], the progressive application (and further clarification)[4] of *Aquind* is already bringing and will further bring more harmonisation on this issue.

The sound relationship between the Boards of Appeal and the Kirchberg judges also emerges when one considers the number of appeals lodged against decisions taken by the former, as well as the first five years of application of the new Article 58a of the CJEU Statute. As discussed by Silvestri, the rate of appeals against Boards' decisions is very low and the cases where the former are annulled by the General Court or by the Court of Justice are even fewer. Thus, the Boards of Appeal confirm their traditional role[5] as a valuable filter serving to reduce the caseload of the EU Courts while enhancing the protection of individuals' rights. Moreover, as highlighted by Torresan, the filter mechanism set forth by Article 58a of CJEU Statute has so far led only in a few cases to a re-examination of a decision originally taken by the Boards. Although the General Court certainly deserves the most credit for this achievement, having demonstrated its ability to effectively review the activity of the Boards of Appeal, it also shows how the latter have been able to support the former in delivering justice.

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[2] R. E. LEVY, R. L. GLICKSMANN, *Agency Specific Precedents*, in *Texas Law Review*, 2011, p. 500.

[3] See below, § 3.

[4] See, for a recent development of *Aquind* (which has been decided during the publication of this Volume and, thus, it has not been discussed in depth therein) General Court, 25th September 2024, case T-482/21, *TenneT TSO*, ECLI:EU:T:2024:650, paras 174-224. Further clarification may also come in the next future by the pending cases C-281/23 P and C-282/23 P, *Polskie sieci elektroenergetyczne and others* v *ACER*.

[5] For a quantitative analysis of the Boards' workload until 2018, see J. ALBERTI, *The draft amendments to CJEU's Statute and the future challenges of administrative adjudication in the EU*, in *Federalismi.it*, 2019, in particular p. 16-20.

2. … and the reasons why it should not be overestimated

The sound relationship between the Boards of Appeal and the EU Courts emerging from this study is a major achievement that should not be taken for granted. However, one might question, somewhat provocatively, whether such an affinity does not also entail some disadvantages or, at least, some missed opportunities.

As a result of the doubts about their 'quasi-judicial' nature, the Boards of Appeal always come out the losers. On the one hand, they feel bound by CJEU case law, as if they were fully-fledged first-instance judges, since they rarely innovate the settled principles of EU litigation, even when it means confirming the well-known interpretations[6] that hinder the access to justice for individuals (the ACER Board of Appeal's very polite attempt to expand its competence with respect to regulatory acts, discussed by Burelli, being a good exception though). On the other hand, the Boards of Appeal act as if they were purely internal and administrative authorities and never claim greater independence from their agency, nor do they apply the guarantees set forth by Article 47 of the Charter to their cases (the main exception being the declaration of the ESAs' Joint Board of Appeal that it does not stand in functional continuity with its agencies, which, however, as discussed by Agrati, has not led to any concrete consequences either for the institutional position of the Board vis-à-vis its agencies, or for the rights of the parties).

In the academic debates on the future of EU Agencies' Boards of Appeal it has been argued that these bodies should remain administrative entities, precisely in order to allow them the possibility of becoming testing grounds for experimenting with new interpretations of the settled case-law of the Court of Justice, particularly with regard to the principles related to individuals' access to justice[7]. However, this research has demonstrated that the opposite occurs: thus far, the administrative nature of the Boards of Appeal has always pushed these bodies to strictly apply the settled case-law of the Court of Justice, though without enjoying (and offering to the parties) the latter's judicial privileges and guarantees.

Therefore, the Boards of Appeal currently combine the disadvantages of being first-instance judges with those of being bodies embedded in the

[6] The literature on this point is extremely rich. See, *ex multis* and also for the references included therein, C. AMALFITANO, *Standing (Locus Standi). Court of Justice of the European Union (CJEU)*, in *Max Planck Encyclopedia of International Procedural Law*, 2021.

[7] C. TOVO, *The Boards of Appeal of Networked Services Agencies: Specialized Arbitrators of Transnational Regulatory Conflicts?*, in M. CHAMON, A. VOLPATO, M. ELIANTONIO (eds.), *Boards of Appeal of EU Agencies - Towards Judicialization of Administrative Review?*, Oxford, 2022, p. 54-57.

authority whose decisions they are called on to review. This looks like a lose-lose situation. On the one hand, the Boards of Appeal strictly apply CJEU case-law as if they were actual judges and do not experiment with any procedural approaches that could be useful, in their specific policy field, for addressing the technical concerns raised by applicants and exercising scrutiny over the decisions of their agency. On the other hand, even if they act like judges, they do not enjoy all the guarantees that the EU legal order demands from judicial entities. Combining the negative sides of their hybrid nature, instead of the positive ones, sounds like a missed opportunity, since the Boards' capacity to exercise scrutiny and ensure the protection of individuals' rights is not fully exploited.

In his chapter, Prek intriguingly raises the question of whether there is "room for manoeuvre for the Boards to detach themselves from the mental slavery and become slightly more creative, respecting the needs of the areas of law covered by their respective agencies and, above all, the appellants and other stakeholders, and the need for administrative review to be properly conducted (before it can be submitted to judicial review)". The studies included in the first part of this Volume reply in the affirmative to this question and offer many examples, which will be discussed in depth afterwards[8].

3. The interpretation and application of *Aquind* by the Boards of Appeal

The second part of this Volume extensively addresses, and from different perspectives, the impact of *Aquind* on the Boards' activity and its applicability beyond the ACER domain.

Not surprisingly, *Aquind* has been perceived as less relevant by the Boards of Appeal dealing with intellectual property cases (namely, those of the EUIPO and CPVO) or by a Board whose workload is still too small for it to draw a conclusion (ERA). However, even in these Boards have started to increase the thoroughness of their review, thanks to other factors, already discussed in the introduction, that are pushing towards an evolution of the Boards' role. In particular, as discussed by Humphreys, since the entry into force of Article 58a of the CJEU Statute the EUIPO Boards of Appeal have strengthened their review by increasing the oral hearings, involving the Grand Board more frequently and creating the so-called Consistency Circles to avoid conflicting jurisprudences.

Conversely, in all the other cases *Aquind* (and, of course, its predecessors, such as *BASF* in the case of the ECHA Board) has been

[8] See below, § 6.

said to have had a crucial impact on the Boards' activity. The most relevant example thereof can certainly be found within the ACER domain (where else?). As reported by Prek, the need for a more in-depth review was expressly mentioned in the call for expression of interest for the selection of new members of the Board of Appeal, published shortly after the decision of the General Court in *Aquind*.

It is worth mentioning that, somewhat paradoxically, every Board has also argued that even before *Aquind* it was already performing deep scrutiny over its agency's acts. As the most careful readers will certainly have noticed, however, this claim is not fully upheld by the findings of the study conducted by Oosterhuis and included in Part I, as the author reports that the Boards' standard of review has actually changed many times over the last decades, swinging back and forth from a deferential to a more intrusive approach and sticking to the latter only in the most recent years.

Only the banking and financial Boards (namely, the SRB Appeal Panel and the ESAs Joint Board of Appeal) have maintained a distance from *Aquind*. In particular, Lamandini and Ramos Muñoz have questioned the applicability of this decision to the Boards which do not stand in functional continuity with their agencies. Moreover, according to the same Authors, the "marginal v full review debate is […] more academic than practical", since as long as "a full assessment of facts, to the extent that procedural rules allow a proactive evidentiary role, Q&A and expert witness, and a stringent review of the interpretation and application of law (and thus of the substantive legality) is possible, […] full legal accountability and full effective judicial protection is warranted".

This brings us to the discussion on the interpretation of *Aquind* and thus on how a full review can be conducted in practice. On these issues, the Boards of Appeal have very similar perspectives.

On the one hand, and on a very pragmatic level, every Board has highlighted how a full review is carried out first and foremost thanks to the crucial contribution made by their technical members and the specialised expertise that legal members also always have. According to Siri, "there is a lot of added value […] in the ability of Board members to rely on their expertise in financial law, something a traditional judge may find more difficult to do". Likewise, Verslype highlights that the composition of the panel of the ERA Board of Appeal is determined also taking into account the need to combine the technical competences of its members. From that perspective, it is worth noting that the studies included in Part II also highlight that there is some room for improvement in this regard. According to Sanchez-Rydelsky, "it is also regrettable that the chairperson is not entrusted with the power to select for each case the

best-qualified technical members out of the 'pool' of members and alternates to ensure the best composition of the board to hear a case". Similarly, while directing his critical remarks towards some future developments of the EUIPO Boards of Appeal, Humphreys discusses the current (purely legal) background of the members of this latter body and calls for the involvement of some technical members if and when the EUIPO Boards' competence is extended in the future in areas such as geographical indications, standard essential patents and supplementary patent certificates.

On the other hand, on a more theoretic level the Boards of Appeal have virtually unanimously argued that *Aquind* implies that the intensity of scrutiny should be measured according to two benchmarks: the arguments raised by the parties and the facts and evidence on which the agency's decision was based. These elements come one before the other and circumscribe the area within which the review of the Boards of Appeal will operate. As pointed out by Sanchez-Rydelsky, "how far the review goes will depend on how good the pleas are". Likewise, Buchet argues that "the procedure before the Board of Appeal […] remains of an adversarial nature, based on the pleas and arguments put forward by those who challenge the decisions of the Agency" and thus "a full review does not, and cannot, lead the Board of Appeal to substitute its own scientific opinion for the opinion on the basis of which the Agency took its decision".

Therefore, from the studies published in the second part of this Volume, a full review emerges as a combination between technical and legal expertise, with the former helping to provide a thorough understanding of the arguments of the parties and the decision of the agency and the latter enabling the Board to deliver a decision which, despite being highly technical, does not encroach upon the prerogatives of the agency.

4. The lack of innovation in the Board of Appeal model

Despite the innovations brought by *Aquind* and the reform of the CJEU Statute, the studies included in the third part of this Volume have demonstrated that the institutional model of the Boards of Appeal has not undergone any major change over the last decades.

As reported by Lukàcsi and Zadra, in the most recent recasts of the regulations establishing EU Agencies neither the Parliament, nor the Council, nor the Commission has expressed any interest in changing the Boards' legislative framework or strengthening their governance, their resources or their position vis-à-vis the agency to which they belong.

Moreover, a similar approach was replicated in the very recent negotiations for the reform of the CJEU Statute, where none of the above-mentioned institutions proposed a single amendment to Article 58a, despite the clear impact that this provision has on the Boards' role and on their relationship with the EU Courts.

The reasons for this 'institutional apathy' towards the Boards of Appeal may well lie in the fact that their statute is always included in the regulation establishing the agencies to which they belong. Thus, the debates on their evolution are often overshadowed by the general ones on the recasting of the overall regulation of the policy field in which their agencies operate. A similar trend was also observed with the recent reform of the CJEU Statute[9], when the attention was wholly captured by the issue of the transfer of the preliminary ruling, at the expense of that of the extension of the filter mechanism to all the Boards of Appeal. Moreover, the fact that neither the European Commission, nor the Council, nor the European Parliament has an office dedicated to dealing with these bodies, as already discussed in the Introduction of this Volume, equally hinders the development of a critical assessment of their role.

However, it would be undoubtedly *naïf* to reduce the reasons for the lack of evolution of the Board of Appeal model to these issues alone. Indeed, one of the main reasons explaining the lack of interest of EU institutions in evolving the model of the Boards – which, however, often remains quite implicit in the legal debates – is their workload. As discussed by Silvestri, the number of decisions taken by these bodies over recent years varies greatly (from the 2500 cases managed each year by the EUIPO to the few handled by ERA or EASA, with an average of ten decisions per year for the others) and fluctuates over time (see, by way of example, the ups and downs of the SRB Appeal Panel). Thus, EU institutions often perceive debating over these bodies as irrelevant and consider it uneconomical to give them further resources to strengthen their role.

However, choices that appear uneconomical in the short term may prove to be fruitful in the long run. As is well known, according to Jean Monnet's plan even the Court of Justice itself should have been established as a non-permanent international court of arbitration[10]; and the fear of a limited workload might be included in the causes of this approach, if the "(perhaps apocryphal) story" told by Barnard and Sharpston on the production of champagne commissioned by the Court

[9] See the negotiations that have led to the adoption of Regulation (EU, Euratom) n. 2024/2019 of the European Parliament and of the Council of 11 April 2024, in *OJ* L, 12.08.2024.

[10] M. RASMUSSEN, *The Origins of a Legal Revolution – The Early History of the European Court of Justice*, in *Journal of European Integration History*, 2008, p. 83.

of Justice to celebrate the first reference for a preliminary ruling three years after the entry into force of the Rome Treaties holds true[11]. Luckily, during the negotiations for the ECSC Treaty the German and the Benelux delegations strongly pushed for the establishment of a permanent court with a pivotal role in the institutional set-up of the Community[12]; and, thanks to this intuition, European integration has benefitted from the inestimable contribution of the Court of Justice. The same applies, albeit on a far smaller scale, to the Boards of Appeal, which are here to stay and, as demonstrated by the same Court of Justice in *Aquind*, can considerably improve the overall system of judicial protection. Thus, their evolution should be promoted as a political choice, even if it may appear uneconomical at a first sight.

This brings us to the discussion on what is probably the main reason – or, at least, the one that is most commonly made explicit – for the lack of interest of EU institutions in developing the Board of Appeal model: simply, the fact that these bodies have performed well so far. Leaving aside some minor criticisms made in the past[13], the Boards of Appeal are perceived by EU Institutions as bodies that have properly managed the tasks that have been assigned to them and thus do not need any intervention.

As pointed out by Lukacsi, the European Parliament's lack of intervention on the extension of Article 58a during the negotiations for the reform of the CJEU Statute demonstrates a "tacit endorsement of the synergy with [the Boards of Appeal] in the field of political control of the executive". Moreover, EU institutions seem to fear the risk of breaking the current balance of the Boards of Appeal. As discussed by Zadra, transforming these bodies into judicial-like entities "would limit the BoAs's revisional powers, contrary to the co-legislators' intention. Adhering to strict judicial conditions would inevitably restrict the power of review only within the limits provided for purely judicial bodies". This argument is not fully convincing, since the intensity of scrutiny mostly derives from the technical expertise of the judging panel, and not from its nature. Indeed, fully-fledged judges can well perform an in-depth review over technical acts (as the German *Bundespatentgericht* does at national level or the Unified Patent Court at a European one)[14]. No matter how

[11] C. BARNARD, E. SHARPSTON, *The changing face of Article 177 References*, in *Common Market Law Review*, 1997, p. 1117.

[12] M. RASMUSSEN, *The Origins of a Legal Revolution – The Early History of the European Court of Justice*, *cit.*, p. 83.

[13] See J. ALBERTI, *Le agenzie dell'Unione europea*, 2018, Milan, in particular p. 236.

[14] See, for similar conclusions, M. CHAMON, D. FROMAGE, *Between Added Value and Untapped Potential: The Boards of Appeal in the Field of EU Financial Regulation*, in M. CHAMON,

debatable, this point clearly reveals the reluctance of EU institutions to amend the status quo.

Echoing Koopmans' classic essay on the future of preliminary references[15], one may wonder whether the Boards of Appeal are, to some extent, *victimes de leur succès*, since their evolution is hindered first and foremost by the results that they have achieved. While the 'if it ain't broke, don't fix it' approach shown by EU institutions towards the Boards of Appeal certainly has some merits, the time to repair a roof is when it is not raining: and several contributions to this Volume have actually highlighted that the model of the Boards of Appeal does need certain amendments in order to remain up to date and rise to the new challenges arising from *Aquind* and the reforms of the CJEU Statute.

5. Some proposals for updating the Board of Appeal model

The first set of issues that should be taken into account when rethinking the model of the Boards of Appeal are those having an institutional and organisational nature.

Indeed, even Authors who argue in favour of leaving the Boards' hybrid nature as it currently is admit that some changes are needed in the governance of these bodies. According to Zadra, even if "the current available legal framework, while fragmented, does not seem to raise particular concerns, […] some reflection seems nevertheless necessary to further improve the legal framework from the point of view of organic independence. Prevention is always better than cure. The Commission, in the light of its right of initiative, could take the lead in this respect and launch such reflection (even at informal/services level) with the co-legislators".

Strengthening the independence of the Boards of Appeal is indeed an issue addressed throughout this Volume by many Authors, who echo proposals that had already been debated among legal scholars[16]. According

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A. VOLPATO, M. ELIANTONIO (eds.), *Boards of Appeal of EU Agencies - Towards Judicialization of Administrative Review?*, Oxford, 2022, p. 24; S. OOSTERHUIS, R. WIDDERSHOVEN, *Rethinking the Position of the Boards of Appeal from a Comparative Perspective*, ivi, p. 218. For a discussion from the perspective of antitrust law, see A. MACGREGOR, B. GECIC, *Due Process in EU Competition Cases following the introduction of the new best practices guidelines on antitrust proceedings*, in *Journal of European Competition Law & Practice*, 2012, p. 425, fn 72.

[15] T. KOOPMANS, *La procedure prejudicielle - Victime de son succes?*, in F. CAPOTORTI, P. PESCATORE (eds.), *Du droit international au droit de l'integration - Liber amicorum Pierre Pescatore*, Baden-Baden, 1987, p. 347-357 and in *Juridisch Stippelwerk*, 1991, p. 371-381.

[16] The literature on this point is quite rich. See, *ex multis* and also for the references included therein, J. ALBERTI, *The Threshold Guardians. The future of EU Agencies' Boards of*

to Stancanelli and Menendez Fernandez, the appointment and removal of Board members, the Boards' financial independence, the lack of staff and the silence of the regulations establishing the Agencies on the employment conditions of Board members are all elements that, "taken together, may give rise to questions on the expediency to improve the level of independence of the BoAs in order to provide the necessary guarantees of impartiality to the parties subject to their jurisdiction."

In particular, a distinction should be made between permanent and non-permanent Boards of Appeal – i.e., between the Boards of the EUIPO and ECHA on the one hand, and their counterparts on the other. Indeed, as summarised by Buchet, "[i]n Helsinki, the Board of Appeal of ECHA appears to be in a rather enviable situation in this respect. […] Non-permanent appeal bodies are in a less comfortable position. The high level of expertise required to become a member of such an appeal body is not mirrored by the existence, within the agency concerned, of a permanent support structure with an equivalent level of expertise. If there is a registry, it is often under resourced. The non-permanent appeal bodies lack an autonomous relay, within the agency, that would be entirely dedicated to their activities. […] There is still a long way to go to make this difficult mission accessible to all appeal bodies within the EU agencies."

Navin Jones seeks to raise awareness about the personal status of the members of the non-permanent Boards of Appeal, who "are not, per se, agency or EU staff – covered by the EU Staff Regulation. Therefore, there is nothing in place, per se, to stop vexatious or other litigants from taking action against individual BoA members if they disagree, or take issue with, BoA decisions or actions. They may, for example, sue BoA members in their personal names or submit requests for BoA members to be removed from BAR lists – preventing BoA members from practising law in the future. In other words, when lawfully discharging their BoA duties, non-permanent BoA members may be subjected to legal and administrative action, in their personal capacities (and face the risk of personal financial loss and other personal damage), which judges and/or EU agency staff – would not."

The need to enhance the human, financial and practical resources of the Boards of Appeal has also been linked by many Authors to the new tasks requested to them as a result of *Aquind*. Looking at the composition of the Board, Prek discusses the possibility of having "at least one permanent, full time, member of the registry and one permanent, full time,

Appeal in light of the recent reforms of CJEU Statute, in *Review of European Administrative Law*, 2023, in particular p. 85-92.

member of the Board, even if not the President or the Vice-President." Even more pragmatically, Sanchez-Rydelsky (but this issue is also mentioned by Navin-Jones) points out that "a revision of the current daily rates should be envisaged". Both points are crucial. Permanent members can give stability to a body which, otherwise, conveys just for debating cases (and, thus, can help in dealing with tasks that go beyond the sheer solution of pending cases, such as revising rules of procedure, organising training and updates, etc.). A reflection on how to calculate the salaries of the Board's members would definitely improve the full-review that *Aquind* now asks to the Boards of Appeal. Indeed, one may wonder whether a time-based fee is still the best option to pay the Board's member, or whether a flat rate would better avoid that the intensity of scrutiny becomes influenced by financial considerations.

Yet how can the independence and the internal organisation of Boards of Appeal be reinforced, so as to adapt these bodies to the new role arising from *Aquind* and from the recent reforms of the CJEU Statute?

According to Stancanelli and Menendez Fernandez, "the most effective solution to address these questions would consist in introducing legislative harmonisation […]. However, one must acknowledge that, at the moment, there is no political momentum for proposing those changes". Thus, the same Authors propose exploring "alternative avenues", such as administrative arrangements between the Boards of Appeal and the governing bodies of the agencies concerned to ensure supporting staff and a reasonable budget, as well as ethics rules applicable to Board members (declarations of interest to avoid conflicts of interest, incompatibilities, etc.). This proposal is definitely worth considering, since it protects the peculiarity of each Board. A horizontal regulation is also theoretically conceivable (and, after all, many proposals for adopting common rules for EU administrative proceedings have been brought forward in the recent past)[17]. However, one of the reasons why the Boards of Appeal have been successful over the years is certainly that – unlike the specialised courts provided for by Article 257 TFEU – they have left the EU legislator the option of adapting the model to the technical and political peculiarities of each sector. Thus, harmonising these bodies according to common rules may sound appealing on a theoretical level, yet less so on a pragmatic one.

Avoiding a 'one-size-fits-all' approach does not mean that the best practices of each Board cannot be taken as an inspiration for improving the others. As already discussed elsewhere[18], the guarantees on the

[17] P. CRAIG, H.C.H. HOFFMAN, J.-P. SCHNEIDER, J. ZILLER (eds), *ReNEUAL Model Rules on EU Administrative Procedure*, Oxford, 2017.

[18] J. ALBERTI, *The Threshold Guardians. The future of EU Agencies' Boards of Appeal in*

removal of Board members could well be modelled after the experience of the EUIPO and CPVO, whose Boards are the only ones to involve the Court of Justice as the ultimate arbiter in determining the existence of genuinely serious grounds[19]. The privileges and immunities provided for in Protocol No. 7 annexed to the Treaties should always be applied to the persons composing the Boards when they exercise their duties as members of the latter, as happens with the Boards of the EUIPO and ECHA (a more effective protection, modelled after that guaranteed by the Statute of the Court of Justice, could certainly be explored, yet perhaps in the longer run). The Statutes of the Boards should always provide for their members to receive full support in terms of IT resources and training, since information on aviation safety, plant varieties, energy etc. cannot be exchanged through personal email addresses and laptops. The budget of the Boards of Appeal could always be protected with the clauses included in the SRB and ACER founding regulations[20].

Furthermore, avoiding harmonisation does not mean avoiding the pooling of the resources of non-permanent Boards of Appeal. As proposed by Navin Jones, indeed, another 'alternative avenue' could be to improve the latter's current organisational setting by: "(i) [using] one single, central registry; (ii) [using] a common IT system for the submission of documents; (iii) [using] the same physical premises for oral hearings and ADR; (iv) [using] the same translators; (v) [using] the same website/communications tools/summary of cases/announcement of cases; (vi) [developing] common tools such as common Rules of Procedure, common template documents, (vii) [developing] common employment and financial agreements which are kept up-to-date so that BoA members are not left out-of-pocket for expenses incurred in their work, and remunerated fairly for all the work they do."

6. The untapped potential of EU Agencies' Boards of Appeal

At the same time, as discussed by many Authors in the first part of this Volume, the Board model could be strengthened also while leaving its

light of the recent reforms of CJEU Statute, *cit.*, p. 87-88.

[19] See the EUIPO Regulation (namely Regulation (EU) n. 2017/1001 of the European Parliament and of the Council of 14 June 2017, in *OJ* L 154, 16.06.2017, p. 1) at Article 166(1) and the CPVO Regulation (namely Council Regulation (EC) n. 2100/94 of 27 July 1994, in *OJ* L 227, 1.09.1994, p. 1, as subsequently amended) at Article 47(5).

[20] See the ACER Regulation (namely Regulation (EU) n. 2019/942 of the European Parliament and of the Council of 5 June 2019, in *OJ* L 158, 14.06.2019, p. 22) at Article 25(3); and the SRB Regulation (namely Regulation (EU) n. 806/2014 of the European Parliament and of the Council of 15 July 2014, in *OJ* L 225, 30.07.2014, p. 11) at Article 85(2).

fundamental structure untouched by simply making the most of these bodies, with the aim of increasing the protection of individuals' rights and reducing the workload of the EU Courts. This could be done by either fostering an innovative interpretation of certain principles of EU litigation (thus without undertaking any legislative amendment) and/or amending certain minor elements of their statutes.

With regard to the former, three issues stand out as particularly relevant: the interest in bringing proceedings, the direct and individual concern and the requirements for suspending the effect of a challenged act.

As highlighted by Burelli, the regulation establishing the EUIPO is the only one explicitly requiring that an applicant should demonstrate an interest in bringing proceedings before the Boards of Appeal. The regulations establishing all the other Boards of Appeal remain silent in this regard. Nevertheless, all the Boards of Appeal ask the applicants to satisfy this requirement, which is interpreted and applied exactly according to the notion of 'interest in bringing a proceeding' developed by the Court of Justice. Leaving aside the EUIPO peculiarity, one may wonder why Boards of Appeal, unless they evolve into fully-fledged judicial bodies, would establish such a prerequisite for lodging an appeal and why that notion is taken exactly from the case-law of the Court of Justice, even if the proceedings before the Boards of Appeal are not judicial in nature.

The same applies for individuals' locus standi: as reported in that same study, Boards of Appeal apply the notion of preparatory act and that of direct and individual concern – which, in this case, is always explicitly mentioned in their establishing regulations – exactly quoting the case-law of the Court of Justice, with no innovation. Even though the Boards' adherence to the Kirchberg case-law certainly has some merits, as discussed above, one may wonder whether these bodies could not, at least partly, overcome the strict and narrow approach of the Court of Justice with regard to the admissibility of an appeal[21]. Indeed, the conditions for bringing a request for an internal administrative review may well differ from those for asking for purely judicial protection, without hindering the overall coherence of the EU judicial order. Moreover, the Boards' workload is clearly not equivalent to that of the EU Courts and the risks of *actio popularis* are significantly lower[22]. Furthermore, the Boards of

[21] See above, at fn 6.

[22] As it is well known, one of the main reasons why the EU system of judicial protection has always had a restricted approach on the locus standi of private parties is the risk of permanent litigation on Union acts of general application: see, *ex multis*, K. LENAERTS, K. GUTMAN, J. T. NOVAK, *EU Procedural Law*, Oxford, 2023, in particular p. 326. As for the case-law, see General Court, order of November 22nd 2017, case T-

Appeal are the first watchdogs of EU agencies: given the shaky legal bases that these latter bodies still have[23], and in view of the relevance given by *Meroni* to ensuring judicial protection over the delegation of powers in the EU legal order[24], softening the conditions for lodging an appeal against EU Agencies' technical acts, at least before their own Boards of Appeal, could definitely enhance the overall legitimacy of the EU regulatory machinery.

Finally, also the study of the interim protection delivered by Boards of Appeal offers other interesting examples. As discussed by Orzan, the conditions whereby some Boards may suspend the effects of a challenged act are modelled after those of the EU Courts. While, on the one hand, there is no doubt that the Kirchberg experience is an inestimable source of inspiration for judicial-like bodies, on the other hand one may wonder whether administrative entities, which the Boards theoretically are, might not develop their own conditions, so as to meet the needs of their policy field.

The studies offered by this Volume have also highlighted some potential enhancements of the Boards' power that require a formal, albeit minor, amendment of the establishing regulations. In this case as well, the main examples can be found in the fields of interim protection and reviewable acts.

With regard to the former, Orzan has highlighted that in some Boards of Appeal (namely, within EASA and CPVO) the power to suspend a challenged act lies in the hands of the agencies themselves and not in those of the Boards of Appeal; in others (such as ECHA) there is an automatic suspension of the effects of the challenged act; in all of them, the interim powers are weaker than those of the EU Courts, since the Boards of Appeal are only able (if and insofar as they bear interim powers, of course) to suspend the effects of the challenged acts and they cannot impose penalties or injunctions.

While this approach could certainly fit the old setting where Boards of Appeal were simply technical, mid-step entities for scrutinising only certain acts adopted by EU Agencies before the 'real' protection given by the General Court, or where the Boards stood in functional continuity with their agency, does it still make sense in the brave new world arising from the fading of this latter principle, the reforms of the CJEU Statute and *Aquind*? If Boards of Appeal are entitled to exercise a first deep scrutiny over EU agencies' decisions, in absence of which the EU system

670/16, *Digital Rights Ireland* v *Commission*, ECLI:EU:T:2017:838, para 50.

[23] See, *ex multis*, J. ALBERTI, *Le agenzie dell'Unione europea*, *cit.*, in particular p. 273-398 and the literature included therein.

[24] *Ivi* p. 280-287 and 367-390.

of judicial protection is not able to respect Article 47 of the Charter[25], they should possess all the powers related to that role, including those of interim protection. The suspension of the effects of a challenged act can no longer be automatic or reserved to the agency, as during the functional continuity era.

Similar reflections have been made with regard to the impossibility to challenge acts that do not fall within the Boards' competence, as discussed by Silvestri with regard to the more than 250 cases on SRB decisions pending before the General Court and by Burelli mainly (but not only) with regard to regulatory acts. In those cases, individuals have to lodge an appeal directly before the General Court, losing a (specialised) level of protection and increasing the workload both of the latter (which will adjudicate upon those acts as a first-instance tribunal, without relying on the previous assessment made by the Board) and of the Court of Justice itself, which is not 'protected' by the filter mechanism set forth by Article 58a of the CJEU Statute. While in order to expand the SRB Appeal Panel's 'jurisdiction' an amendment of the regulation establishing the SRB itself is needed, as regards the reviewability of regulatory acts by the Boards of Appeal some innovation may also come from the pending *RWE Supply & Trading* case[26].

In all these circumstances, the EU system of legal protection has the possibility, by untapping the Boards' potential, to enhance the protection of individuals' rights while reducing the workload of the EU Courts.

7. An agenda for future research

As it calls for a new approach in the studies of Boards of Appeal, this Volume cannot but welcome the fact that many issues regarding the Boards' role and their future development are still open and that further research is needed to monitor these bodies and the EU judiciary as a whole.

Indeed, following the very recent extension of the scope of application of Article 58a of the CJEU Statute, scholars and practitioners will be called on to monitor how the Court of Justice applies this provision and whether decisions originally taken by the Boards of Appeal will hold up against the scrutiny of both EU Courts. Interestingly enough, the application of *Aquind* itself (and its recent successors)[27] will require careful

[25] Court of Justice, March 9th 2023, case C-46/21 P, *ACER* v *Aquind*, ECLI:EU:C:2023:182, para 67.

[26] General Court, case T-95/23, *RWE Supply & Trading* v *ACER*, appeal lodged on 17th February 2023.

[27] General Court, September 25th 2024, case T-482/21, *TenneT TSO*, *cit.*

monitoring in order to understand whether the Boards of Appeal will be able to maintain those standards, and thereby support the EU judiciary in ensuring respect for the principle of effective judicial protection.

How the EU Courts will (or should) evolve thanks to new role of the Boards of Appeal is a topic that is little discussed in this Volume, but one which involves some very interesting issues. As pointed out by Prek, the General Court may well consider the possibility of increasing the appointment of Advocates General as well as the "occasional reopening of the oral part of the procedure" to "contribute to the thorough examination of all the relevant facts and applying the law to them". This, indeed, would be an intriguing way to further enhance scrutiny over the decisions of the Boards of Appeal and thus the protection of individuals' rights. Likewise, Stancanelli and Menendez Fernandez have called for greater attention towards the Court of Justice, which should opt for a "strict application of the filter of appeals" so as to ensure better control over the Boards' activities.

Horizontal studies on the decisions taken by the Boards of Appeal can likewise be improved by further research looking for example into how these bodies assess the capability of an act to produce legal effects (which, obviously, leads into a discussion on the de facto bindingness of EU agencies' soft law before the Boards of Appeal) and the use of references in the Boards' decisions (do they refer to national or international Courts, legal doctrine, other Boards' decisions? And how do they use their own case-law?). These are all issues that could not be addressed in this Volume, but can now be explored thanks to the Common Database of EU Agencies' Boards of Appeal and would definitely deserve greater attention in future studies.

However, what will certainly require in-depth scrutiny over the years to come is the evolution of the Boards of Appeal themselves, in order to understand how the current tension between an administrative and a judicial nature will be resolved as well as to assess whether they will keep meeting the new expectations concerning their role arising from *Aquind* and the reforms of the CJEU Statute.

As pointed out by Prek, the response of ACER to the initial shock given by *Aquind* was "that there need to be serious changes introduced in the functioning of the Board of Appeal". However, by now "it seems that everyone has already recovered from the relative surprise it created and has gone back to business as usual". The aim of this Volume is precisely to avoid this scenario and to turn the spotlight on bodies that have already contributed a great deal to the EU system of judicial protection but have even more to offer. Bodies that have performed well so far, but mainly because of a modest workload and the high professionalism of their

members. Bodies that, therefore, need a series of refinements in order to untap[28] their potential and fully support the EU system of judicial protection.

The current political times are, unfortunately, not very propitious for reforming the EU, even its minor bodies. Curiously, the situation is not so different to the one faced by Koopmans in the late Eighties when discussing the future of preliminary rulings, when "*le climat politique actuel est au réalisme*" and "*nous pouvoûs trouver de la consolation à penser, avec Montesquieu, qu'il y a 'une infinité de choses où le moins mal est le meilleur*"[29].

Yet, no revolution is needed in order for the Boards of Appeal to evolve: just targeted innovations, fully respectful of the peculiarity of each Board and of the policy fields in which they operate.

[28] See, for this evocative expression, M. CHAMON, D. FROMAGE, *Between Added Value and Untapped Potential: The Boards of Appeal in the Field of EU Financial Regulation*, *cit.*, p. 8.

[29] T. KOOPMANS, *La procedure prejudicelle - Victime de son succes?*, *cit.*, p. 357.

AUTHORS

AGRATI GIULIA, Research Fellow of EU Law at the University of Milan.

ALBERTI JACOPO, Associate Professor of EU Law at the University of Ferrara and Coordinator of the Jean Monnet Module *EU Specialized Judicial Protection*.

ANRÒ ILARIA, Associate Professor in European Union Law at the University of Milan.

BUCHET ANTOINE, Chairman of the ECHA Board of Appeal.

BURELLI CAMILLA, Assistant Professor of EU Law at the University of Milan.

HUMPHREYS GORDON, President *ad interim* of the EUIPO Board of Appeal.

LAMANDINI MARCO, Full Professor of Commercial Law, *Alma Mater Studiorum* University of Bologna; Member of the Appeal Panel of the SRB.

LUKÁCSI TAMÁS, Member of the Legal Service of the European Parliament.

MENÉNDEZ FERNÁNDEZ ALEJANDRO, EU Legal Advisor at RECLAIM.

NAVIN-JONES MARCUS, Vice-President of the CPVO Board of Appeal and former Alternate Member of the ECHA Board of Appeal.

OOSTERHUIS SOFIE, PhD Candidate in European Administrative Law at the Utrecht University.

ORZAN MASSIMO FRANCESCO, Legal Secretary at the General Court, Court of Justice of the European Union.

PREK MIRO, Chairman of the ACER Board of Appeal and former Judge at the EU General Court.

RAMOS MUÑOZ DAVID, Associate Professor of Commercial Law, Universidad Carlos III de Madrid; Alternate Member of the Joint Board of Appeal of the ESAs and of the Appeal Panel of the SRB.

SÁNCHEZ RYDELSKI MICHAEL, Chairman of the EASA Board of Appeal.

SILVESTRI PAOLO GIUSEPPE, PhD Candidate in EU Law at the University of Ferrara.

SIRI MICHELE, Professor of Commercial Law at the University of Genoa and President of the ESAs Joint Board of Appeal.

STANCANELLI PAOLO, Principal Legal Adviser of the Legal Service of the European Commission.

TORRESAN RICCARDO, Interim Member of the Legal Service, Single Resolution Board.

VERSLYPE MARCEL, Chairman of the ERA Board of Appeal.

ZADRA CARLO, Director of the Justice and Home Affairs team of the Council Legal Service.

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