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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

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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.

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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].

[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. 191 and A. BUCHET, *The Boards of Appeal of the European Chemicals Agency. Structure and Power of Review*, p. 213.

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.