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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 ?

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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].

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[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

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.