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PRIVATE APPLICANTS' LOCUS STANDI BEFORE 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

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'*Contribution to Horizontal studies on EU Agencies' Boards of Appeal*'

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SUMMARY: 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,

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[1] See, without claiming to be complete, A. BARAV, 'Direct and Individual Concern:

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however, has been dedicated to another configuration of the same topic, namely the private individuals' locus standi before the Boards of appeal (hereinafter 'BoA' and 'BoAs').[2]

An Almost Insurmountable Barrier to the Admissibility of Individual Appeal to the EEC Court', *Common Market Law Review*, 1974, 191 ff.; A. ARNULL, 'Private applicants and the action for annulment under article 173 of the EC Treaty', *Common Market Law Review*, 1995, 7 ff.; R. BARATTA, 'Un "nuovo" limite al controllo giurisdizionale degli atti comunitari incidenti sulla sfera giuridica dei singoli', *Giustizia civile*, 1995, 632 ff.; C. AMALFITANO, 'La protezione giurisdizionale dei ricorrenti non privilegiati nel sistema comunitario', *Il Diritto dell'Unione europea*, 2003, 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', *Diritto pubblico comparato ed europeo*, 2006, 968 ff.; S. BALTHASAR, 'Locus standi rules for challenges to regulatory acts by private applicants: the new Art. 263(4) TFEU', *European Law Review*, 2010, 542 ff.; V BARNARD, O. ODUDU, 'Regulatory Acts within Article 263(4) TFEU – A dissonant Extension of Locus Standi for Private Applicants', *The Cambridge Yearbook of European Legal Studies*, 2011, 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', *The Cambridge Law Journal*, 2012, 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, 36 ff.; B. BERTRAND, J. SIRINELLI, 'Le principe du droit au juge et à une protection juridictionnelle effective', J. DUTHEIL DE LA ROCHÈRE (sous la direction de), *Traité de droit administratif européen*, Bruylant, 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', *American University International Law Review*, 2015, 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?', *Federalismi.it*, 2020, 301 ff.; R. CARANTA, 'Knock, and it shall be opened unto you: standing for non-privileged applicants after Montessori', *Common Market Law Review*, 2021, 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', *Rivista Italiana di Diritto Pubblico Comunitario*, 2016, 1311 ff.; A. CASSATELLA, 'Appeals Before the European Aviation Safety Agency', A. MARCHETTI (ed.), *Administrative Remedies in the European Union. The Emergence of a Quasi-Judicial Administration*, Giappichelli, Torino, 2017, 21 ff.; A. MAGLIARI, 'Administrative Remedies in European Financial Governance. Comparing Different Models', *ivi*, 99 ff.; M. CHAMON, D. FROMAGE, 'Between Added Value and Untapped Potential: The Boards of Appeal in the Field of EU Financial Regulation', M. CHAMON, A. VOLPATO, M. ELIANTONIO (eds.), *Boards of Appeal of EU Agencies*, Oxford University Press, Oxford, 2022, 8 ff., at 21-24; D. HANF, 'The Trailblazers: The Boards

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

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of Appeal of EUIPO and CPVO', *ivi*, 59 ff., at 71; M. SIMONCINI, M. VERISSIMO, 'The EASA BoA in Search of Identity: An Effective Filter between Administration and Courts?', *ivi*, 103 ff., at 107-109; C. TOVO, 'The Boards of Appeal of Networked Services Agencies: Specialized Arbitrators of Transnational Regulatory Conflicts?', *ivi*, 34 ff., at 43 and 54-55; A. VOLPATO, E. MULLIER, 'The BoA of the European Chemicals Agency at a Crossroads', *ivi*, 84 ff., at 94; L. MUZI, 'Who Litigates before the Boards of Appeal?, *ivi*, 221 ff., at 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', *Rivista trimestrale di diritto pubblico*, 2013, 323 ff.; P. CHIRULLI, L. DE LUCIA, 'Tutela dei diritti e specializzazione nel diritto amministrativo europeo: le commissioni di ricorso delle agenzie europee', *Rivista italiana di diritto pubblico comunitario*, 2015, 1305 ff.; C. TOVO, *Le agenzie decentrate dell'Unione europea*, Editoriale scientifica, Napoli, 2016, 323 ff.; J. ALBERTI, *Le agenzie dell'Unione europea,* Giuffrè, Milano, 2018, 205 ff.; G. GRECO, *Le commissioni di ricorso nel sistema di giustizia dell'Unione europea*, Giuffrè, Milano, 2020.

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

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 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

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[4] See Case T-583/14, *Giand Srl v OHMI*, ECLI:EU:T:2015:943, para 70: Case T-72/17, *Gabriele Schmid v EUIPO*, ECLI:EU:T:2018:335, paras 25 and 62; Case T-266/17, *Kwizda Holding GmbH v EUIPO*, ECLI:EU:T:2018:569, para 85; Case T-498/18*, ZPC Flis sp.j. v EUIPO*, ECLI:EU:T:2019:763, para 129; Case T-281/21, *Nowhere Co. Ltd v EUIPO*, ECLI:EU:T:2022:139, para 47.

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

[6] See Case T-125/17, *BASF Grenzach v. ECHA*, ECLI:EU:T:2019:638, para 89.

[7] See Case C-46/21 P, *ACER v Aquind*, cit., para 65.

[8] On the matter, see, in this Special Issue, G. AGRATI, 'Procedural guarantees in the litigation before the Boards of Appeal'.

– 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 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

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[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 18.

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

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 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

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

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

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.

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

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".

[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) No 1093/2010, (EU) 1094/2010, (EU) 1095/2010, (COM(2021)0421 – C9-0340/2021 – 2021/0240(COD)).

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 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

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[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.*, 542 ff.; see also, *ex plurimis*, Case C-132/12 P, *Stichting Woonpunt e altri v Commission*, ECLI:EU:C:2014:100, para 43.

[16] See 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] Case T-18/10, *Inuit Tapiriit Kanatami v Commission*, ECLI:EU:T:2011:419, paras 42-45.

[18] See 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 222.

[20] Case C-270/12, *United Kingdom v Parliament and Council*, ECLI:EU:C:2014:18, para

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.

Therefore, if, in the light of a literal and systematic interpretation of the Treaties, the Boards of Appeal are entitle 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*"

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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', *European Law Review*, 2014, 380 ff.

(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 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,

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[21] As rightly observed by G. GRECO, *op. cit.*, at 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".

[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*, Giuffrè, Milan, 2008; M. MAGRI, *L'interesse legittimo oltre la teoria generale. Neutralità metodologica e giustizia amministrativa. «Per una piena realizzazione dello Stato di diritto»*, Maggioli Editore, Rimini, 2017; E.N. FRAGALE, 'Le posizioni legittimanti nel processo amministrativo e il ruolo dei diritti costituzionali', *Diritto Pubblico*, 2023, 395 ff. In the foreign literature, see also A. SCALIA, 'The Doctrine of Standing as an Essential Element of the Separation of Powers', *Suffolk University Law Review*, 1983, 881 ff.; M. SCHMIDT-PREUß, *Kollidierende Privatinteressen im Verwaltungsrecht*, Duncker and Humblot, Berlin, 1992.

[23] Article 66 (1) and (2) of Regulation (EU) No 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*

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) No 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 to the qualification of "party": third parties cannot access to EUIPO's BoAs, unless as interveners, as discussed elsewhere in this *Special Issue*.[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 No 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]

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shall be parties to the appeal proceedings as of right" (emphasis added).

[24] See, in this Special Issue, I. ANRÒ, 'Third parties' intervention before Boards of Appeal'.

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

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]

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,

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[27] See, without claiming to be complete, A. ARNULL, 'Private Applicants and the Action for Annulment Under Article 173 of the EC Treaty', *cit.*; ID, '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', *European Law Review*, 2005, 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', *LSE Law Review*, 2017, 101 ff.; C. AMALFITANO, 'Standing (Locus Standi). Court of Justice of the European Union (CJEU)', *Max Planck Encyclopedia of International Procedural Law*, 2021.

[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 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 ACER BoA, decision of 16 July 2020, 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

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 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) 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

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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 (ESAs Joint BoA, decision of 13 September 2019, 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] Case T-660/14, *SV Capital v EBA*, ECLI:EU:T:2015:608, paras 42-50.

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 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

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[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.

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 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]

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[34] In the CJEU's case law see, for instance, 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, ESAs Joint BoA, decision of 19 July 2023, Case BoA-D-2023-02, *Euroins Insurance Group AD v EIOPA*, para 55; CPVO BoA, decision of 1 July 2023, Case A018/2021, *House Foods Group Inc v CPVO*, para 13.6.

[35] In the CJEU's case law see, for instance, Case C-239/12 P, *Abdulrahim v Council and Commission*, ECLI:EU:C:2013:331; 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, EUIPO Fourth BoA, decision of 30 May 2018, Case R 1030/2017-4, *Damandis, S.A v Penpe Bilikçi and a.*, paras 19 ff.; ACER BoA, *TenneT TSO B.V.; Vereniging Energie-Nederland v ACER*, cit., para 64; SRB Appeal Panel, decision of 14 April 2022, Case 1/2022, *BNP Paribas S.A., BNP Paribas Personal Finance and BGL BNP Paribas v SRB*, para 93.

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

[37] See, for instance, EASA BoA, decision of 30 April 2013, case AP/03/2012/LUCK, *Stephen Luck v EASA*, para 51; ACER BoA, decision of 6 August 2019, case A-004-2019, *Hungarian Energy and Public Utility Regulatory Authority and a. v ACER*, para 45; ESAs Joint BoA, *Creditreform Rating AG v EBA*, cit., para 64; SRB Appeal Panel, decision of 29 June 2022, Case 1/2022, *X v SRB*, para 58, where it is written:

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]

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

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"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, *op. cit.*, at 250.

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

[40] See ESAs BoA, decisions of 19 July 2023, Case BoA-D-2023-02, *Euroins v EIOPA*, para 52; *Euroins Insurance Group AD v EIOPA*, cit., para 52; 23 October 2023, Case BoA-D-2023-03, *Dubai Commodities Clearing Corporation v ESMA*, para 16; SRB AP, decisions *X v SRB*, cit., para 65; *BNP Paribas S.A., BNP Paribas Personal Finance and BGL BNP Paribas v SRB*, cit., para 94; ECHA BoA, decisions of 28 February 2023, Case A-013-2021, *GruberChem GmbH v ECHA*, para 16; 28 February 2023, Case A-014-2021, *GruberChem GmbH v ECHA*, para 26. Before the EU Courts see, *ex multis*, Case C-134/19 P, *Bank Refah Kargaran v Council*, ECLI:EU:C:2020:793, para 25.

[41] See, *amplius*, Case T-160/07, *Color Edition*, ECLI:EU:T:2008:261, paras 22-26; Case T-396/11, *Ultrafilter International*, ECLI:EU:T:2013:284, para 24.

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.

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

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[42] Case C-110/99, *Emsland-Stärke*, ECLI:EU:C:2000:695, para 52.

[43] Case C-423/15, *Kratzer*, ECLI:EU:C:2016:604, para 39.

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

[45] Case 25-62, *Plaumann & Co. v Commission*, ECLI:EU:C:1963:17.

[46] See, for instance and without claiming to be exhaustive, Case C-50/00 P, *Unión de Pequeños Agricultores v Council*, ECLI:EU:C:2002:462; and the latest Case C-565/19 P, *Carvalho and Others v Parliament and Council*, ECLI:EU:2021:252; Case C-453/19, *Deutsche Lufthansa v Commission*, ECLI:EU:C:2021:608; 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

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 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 No 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 No 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.

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concernent...individuellement'", *Festschrift fur Ulrich Everling*, 1995, 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*, Giuffrè, Milano, 1998, 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.

[47] See *SV Capital v EBA*, cit.

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 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 [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

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

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 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

[49] *Ibidem*, para 33.

[50] *Ibidem*, para 36.

[51] *Ibidem*, para 32.

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 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

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[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', *Eurojus*, 2018, 1 ff., at 8; see also K. LENAERTS, K. GUTMAN, J. TOMASZ NOWAK, *EU Procedural Law*, Oxford University Press, Oxford, 2023, at 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, Case T-670/16, *Digital Rights Ireland v Commission*, ECLI:EU:T:2017:838, para. 50.

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

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 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

[54] Order, Case T-760/20, *Jakeliūnas v ESMA*, ECLI:EU:T:2021:512.

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 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

[55] Order, Case T-669/15, *Lysoform and others v ECHA*, ECLI:EU:T:2016:610, para 33; and Case C-386/96 P, *Dreyfus v Commission*, ECLI:EU:C:1998:193, paras 43 and 44.

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 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]

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[56] ACER BoA, *TenneT TSO B.V.; Vereniging Energie-Nederland v ACER*, cit., para 85, quoting expressly Case T-63/16, *E-Control v ACER*, EU:T:2016:644, para 20.

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

[58] 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,

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 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.

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', *Federalismi.it*, 1 ff.

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

[59] ESAs Joint BoA, *Creditreform Rating AG v EBA*, cit., para 55.

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 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

[60] *Ibidem*, para 59.

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 No 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 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

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[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', *Rivista del Contenzioso Europeo | Revue du Contentieux Européen | Review of European Litigation*, 2023, 1 ff.

[62] See order, Case T-673/13*, European Coalition to End Animal Experiments v ECHA*, ECLI:EU:T:2015:167, para 67; Case T-276/13, *Growth Energy e Renewable Fuels Association v Consiglio*, ECLI: EU:T:2016:340, para 65; Case T-492/15, *Deutsche Lufthansa AG v Commission*, ECLI:EU:T:2019:252, para 211.

[63] See, for both decisions, ACER BoA, decisions of 9 December 2022, Cases A-002-2022, *RWE Supply & Trading GmbH v ACER*, para 52. See also, for instance, Case C-650/18, *Hungary v Parliament*, ECLI:EU:C:2021:426, para 37.

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 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

[64] See Cases T-684/19 and T-704/19, *MEKH v. ACER*, ECLI:EU:T:2022:138, para 50.

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 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

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

[66] *Ibidem*, at 45.

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 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

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[67] 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 87.

[69] See, for instance, J. ALBERTI, 'The Position of Boards of Appeal: Between Functional Continuity and Independence', M. CHAMON, A. VOLPATO, M. ELIANTONIO (eds.), *cit.*, 245 ff., at 271.

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

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, 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

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

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

[73] *Ibidem*, at 54-55; and M. SIMONCINI, M. VERISSIMO, 'The EASA BoA in Search of Identity: An Effective Filter between Administration and Courts?', *cit.*, at 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 36.

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 exist and should not be, at from a theoretical perspective, underestimated.

ABSTRACT

The article explores the issue of individuals' locus standi before EU Agencies' Boards of Appeal. The objective of the paper, pursued through the analysis of the decisions of these bodies, is to verify whether and to what extent the *droit au 'juge'* and the principle of effective judicial protection are, in this peculiar context, effectively satisfied and, consequently, to understand the role of the Boards of Appeal in the judicial system of the European Union.

Il contributo approfondisce il tema della legittimazione ad agire dei privati dinanzi alle commissioni di ricorso delle agenzie dell'Unione europea. L'obiettivo ultimo del lavoro, perseguito attraverso l'analisi delle decisioni di tali organi, è quello di verificare se e in che misura il *droit au 'juge'* e il principio a una tutela giurisdizionale effettiva siano, in questa sede, effettivamente soddisfatti e, di riflesso, quello di comprendere il ruolo delle commissioni di ricorso nel sistema *lato sensu* giurisdizionale dell'Unione europea.

L'article approfondit la question de la qualité pour agir des particuliers devant les chambres de recours des agences de l'Union européenne. L'objectif du travail, poursuivi à travers l'analyse des décisions de ces organes, est de vérifier si et dans quelle mesure le droit au 'juge' et le principe d'une protection juridictionnelle effective sont effectivement satisfaits ici et, par conséquent, de comprendre le rôle des chambres de recours dans le système juridictionnel de l'Union européenne.