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ROLE AND PERSPECTIVES OF THE BOARDS OF APPEALS OF EU AGENCIES IN LIGHT OF THE REFORM OF THE STATUTE OF THE COURT OF JUSTICE

Ruolo e prospettive delle commissioni di ricorso delle agenzie europee alla luce della riforma dello statuto della Corte di giustizia

Rôle et perspectives des chambres de recours des agences européennes à la lumière de la réforme du statut de la Cour de justice

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1. Introduction

EU Agencies are interesting creatures. They have developed following different paths, at different times and with different purposes and missions. Yet, sometimes, the institutions treat them as a relatively uniform category, an approach that lies at the verge of oversimplification. That has been the case, for instance, with the system of judicial remedies

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concerning the decisions issued by the boards of appeal (BoAs) of the Agencies having decisional powers, for which a mechanism of filter of appeals at the level of the Court of Justice has been introduced following the reform of the Statute of the Court of Justice of the European Union (Statute).

This mechanism runs on the presumption that the review of those Agencies' decisions made by the BoAs concurs to the compliance with the fundamental right to an effective judicial protection, which is in fact a recognition of the reliability of the work done by the BoAs themselves. Nevertheless, one cannot deny that some criticisms have been directed towards the introduction and then the generalisation of this mechanism in the Statute.

Through the present contribution we will explore the relative heterogeneous nature of the EU decentralised Agencies and of the BoAs created within some of them, and the tensions which may derive from the combination of this diversity with the homogeneous treatment stemming from the mechanism of filter of appeals. Then, we will analyse how this mechanism raises the stakes for the protection that BoAs are required to offer to the appellants, and we will explore the possible avenues they have to be up to the task.

2. The tension between heterogeneity and common features among the EU Agencies and among the BoAs

2.1 Heterogeneity as a consequence of the different functional necessities of the EU Agencies and of their BoAs

Agencies in the European Union have appeared gradually.

Initially, they were conceived as poles of technical expertise in support of the work of the Commission. The first two Agencies, CEDEFOP (for vocational training) and EUROFUND (for the improvement of living and working conditions)[1], created in the Seventies in the domain of social policy, had as their main aim gathering and disseminating knowledge in their respective fields of competence through the organisation of courses and seminars, carrying and publishing studies, setting up working groups and facilitating contacts between researchers and stakeholders.

[1] Council Regulation (EEC) n. 337/75 of 10 February 1975 establishing a European Centre for the Development of Vocational Training, in *OJ* L 39, 13.02.1975, p. 1 ff.; Council Regulation (EEC) n. 1365/75 of 26 May 1975 on the creation of a European Foundation for the improvement of living and working conditions, in *OJ* L 139, 30.05.1975, p. 1 ff.

As EU law extended to new policy areas and increased in technical complexity, a number of new Agencies were established in the Nineties. Some of them were conferred tasks similar to the previous Agencies. That is the case, for instance, of the European Environment Agency or the European Agency for Safety and Health at Work[2], whose mission consisted in providing, connecting and sharing technical expertise in their respective areas of competence, and thus assisting the Commission in the elaboration and implementation of its policies. However, were also created a couple of Agencies entrusted with genuine regulatory powers: the Office for Harmonization in the Internal Market (today's EU Intellectual Property Office, EUIPO) and the Community Plant Variety Office (CPVO). Since these Agencies were tasked to implement centralised authorisation procedures and were given decisional powers, it appeared expedient to provide in their founding Regulations with appeal systems to allow the affected parties obtain administrative redress[3]. This is how the first BoAs sprung in the EU context.

The process of 'agentification' continued and intensified in the following years. Some of the newly created bodies were called to assist the Commission in the adoption of decisions authorising the use in manufacturing processes or the marketing of certain products in sectors requiring particular high-level scientific expertise – e.g. the European Medicines Agency (EMA) and the European Food and Safety Authority (EFSA)[4] – or even to adopt themselves such kind of decisions – e.g. the European Chemicals Agency (ECHA)[5]. Other Agencies were tasked with directly exercising supervision at European level upon the operators active

[2] Council Regulation (EEC) n. 1210/90 of 7 May 1990 on the establishment of the European Environment Agency and the European Environment Information and Observation Network, in *OJ* L 120, 11.05.1990, p. 1 ff.; Council Regulation (EC) n. 2062/94 of 18 July 1994 establishing a European Agency for Safety and Health at Work, in *OJ* L 216, 20.08.1994, p.1 ff.

[3] Council Regulation (EC) n. 40/94 of 20 December 1993 on the Community trade mark, in *OJ* L 11, 14.01.1994, p. 1 ff., Title IV, Section 1 and Title VII; Council Regulation (EC) n. 2100/94 of 27 July 1994 on Community plant variety rights, in *OJ* L 227, 1.09.1994, p. 1 ff., Part Three, Chapter IV.

[4] Council Regulation (EEC) n. 2309/93 of 22 July 1993 laying down Community procedures for the authorization and supervision of medicinal products for human and veterinary use and establishing a European Agency for the Evaluation of Medicinal Products, in *OJ* L 214, 24.08.1993, p. 1 ff.; Regulation (EC) n. 178/2002 of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety, in *OJ* L31, 1.02.2002, p. 1 ff.

[5] Regulation (EC) n. 1907/2006 of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, in *OJ* L396, 30.12.2006, p. 1 ff., Title II.

in specific economic sectors, like the three supervisory authorities in the financial sectors – i.e. the European Banking authority (EBA), the European Securities and Markets Authority (ESMA) and the European Insurance and Occupational Pension Authority (EIOPA)[6] – and the Agencies active in the transport sector – the European Aviation Safety Agency (EASA) and the EU Agency for Railways (ERA)[7].

In the last decade, the EU legislator continued to establish Agencies in a punctual way, when it considered necessary or appropriate to have a dedicated EU entity able to provide assistance to the Commission in the form of technical or scientific advice; to create a network of national competent authorities and to organise the cooperation between them in the interests of the Union – e.g. the Agency for the Cooperation of Energy Regulators (ACER)[8] – or to monitor and regulate the activities of economic operators, including through binding decisions and enforcement actions – e.g. the Single Resolution Board (SRB)[9].

Currently, we count 35 so-called decentralised Agencies, a notion which regroups all the entities with legal personality created by the EU legislator in order to accomplish a specific policy mission and which are fully independent from the EU institutions (as opposed to the executive Agencies, which are controlled by the European Commission). The proliferation of this kind of Agencies has been explained on different reasons: the Member States' aim to counterbalance the centralisation of powers in the Commission; the need to shed some transparency over the highly technical decision-making at EU level; the need to have well contained poles of expertise able to react to future crises; and even the change in trends in public management[10]. Irrespective of the reason

[6] Regulation (EU) n. 1093/2010 of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), in *OJ* L331, 15.12.2010, p. 12 ff.; Regulation (EU) n. 1094/2010 of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), in *OJ* L331, 15.12.2010, p. 48 ff; Regulation (EU) n. 1095/2010 of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), in *OJ* L331, 15.12.2010, p. 84 ff.

[7] Regulation (EC) n. 1592/2002 of 15 July 2002 on common rules in the field of civil aviation and establishing a European Union Aviation Safety Agency, in *OJ* L240, 7.09.2002, p 1 ff.; Regulation (EC) n. 881/2004 of 29 April 2004 establishing a European Railway Agency, in *OJ* L164, 30.04.2004, p. 1 ff.

[8] Regulation (EC) n. 713/2009 of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators, in *OJ* L211, 14.08.2009, p. 1 ff.

[9] Regulation (EU) n. 806/2014 of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund, in *OJ* L 225, 30.07.2014, p. 1 ff.

[10] See M. EGENBERG, J. TRONDAL, *Agentification of the European Union administration:*

behind their blossoming, the truth is that each Agency has been considered, at the moment of its institution, the right answer to a specific functional necessity in a specific policy area.

Due to their 'spontaneous' establishment, on a case-by-case basis and to address punctual and specific issues, every Agency has been moulded to meet the needs underlying its own creation, without following a general plan and a single institutional structure. This initially generated a conspicuous heterogeneity in the design of the governing bodies of these Agencies and in their relations with the Commission, as well as concerning the nature and scope of their powers. Realising that such fragmentation could be problematic, the Commission published, in 2008, a communication highlighting the need for a more consistent approach towards EU Agencies[11]. This led to the launching of an inter-institutional dialogue that produced the 2012 Joint Statement on decentralised Agencies, carrying the so-called Common Approach[12]: a template for the creation of future Agencies that touches aspects like their seat, their governance structures, their operation and budget and their transparency and accountability. The decentralised Agencies established since then actually present more common features than in the past, without losing the particular characteristics that make them suitable to achieve their respective missions.

Ten of the existing decentralised Agencies have a BoA among their internal organs[13]. In essence, they are all Agencies which are entrusted with the power of adopting decisions or other normative acts affecting the legal situation of interested parties (referred to as regulatory Agencies). The EU legislator considered necessary to provide for internal means of redress against their acts and, like for the Agencies, the creation of the BoAs was dictated on a case-by-case basis by a purely functional need, i.e. enhancing the right to an effective remedy of the concerned economic operators. In relation to the BoAs, the so-called Common Approach of 2012 only stresses the need to ensure their impartiality and independence, "on the basis of transparent and objectively verifiable criteria to be defined by the Agencies"[14].

Connecting the dots, in *TARN Working Paper 1/2016*, pp. 4-5; E. PANDER MAAT, M. SCHOLTEN, *Historical Development of Boards of Appeal of EU Agencies*, 2021, p. 3, available at SSRN: https://ssrn.com/abstract=4139150.

[11] Communication from the Commission to the European Parliament and the Council – European Agencies – The way forward, COM (2008) 135 final.

[12] European Parliament, Council of the European Union and European Commission, Joint Statement on decentralised Agencies.

[13] EUIPO, CPVO, EASA, ECHA, EBA, ESMA, EIOPA, SRB, ERA, ACER.

[14] European Parliament, Council of the European Union and European Commission, Joint Statement on decentralised Agencies, Annex, Common Approach,

The heterogeneity of the regulatory Agencies is also reflected in their BoAs, which present different structural characteristics: some BoAs sit and act in a permanent manner, while others are more *ad hoc*, depending on the rather unequal workloads before them. They have also different powers: some BoAs can gather evidence on their own initiative while others are limited to the evidence provided by the parties; some BoAs not only can annul, but also can replace the decisions taken by the Agencies' authorities which are challenged before them, while others can only refer them back to those authorities in case, they consider that the challenged decisions are vitiated.

2.2 The commonalities among BoAs and the effect of Article 58a of the Statute of the Court of Justice

Despite coming in different shapes and forms, BoAs of the regulatory Agencies also share some important commonalities. First, they are statutorily independent from the Agencies for which they operate. Moreover, they are composed of lawyers and specialists on the areas of expertise of their respective Agencies. Furthermore, they have jurisdiction over an exhaustive list of Agencies' decisions and constitute a prior mandatory step before bringing a case before the EU Courts[15]. Finally, they are typically requested to adjudicate rapidly, sometimes within strict and rather short deadlines imposed by their founding acts.

These shared characteristics have been considered sufficient to recognise that BoAs provide such a homogeneous and satisfactory degree of protection for the concerned economic operators that, when the Statute was modified in 2019, a new provision was inserted – Article 58a – which introduces a filtering mechanism , whereby an appeal against a judgement delivered by the General Court may not be admitted by the Court of Justice if it concerns the decision of the BoAs of EUIPO, CPVO, ECHA or EASA, unless it "raises an issue that is significant with respect to the unity, consistency or development of Union law".

There had been discussions as to the reasons why only the cases concerning decisions issued by the BoAs of the four expressly mentioned Agencies were subject to this mechanism. The wording of Article 58a of the Statute may be misleading, to the extent that it may be interpreted as if the filter of appeals was applicable only to the BoAs that reached a certain level of independence. In reality, there are no indications from the founding acts or from the practical experience that the BoAs of these four

para 21.

[15] See P. CHIRULLI, L. DE LUCIA, *Specialised Adjudication in EU Administrative Law: The Boards of Appeal of EU Agencies*, in *European Law Review*, 2015, p. 835.

Agencies are more independent[16] or more powerful and effective[17] than the other ones.

In practice, as the literature reflects[18], the 2019 reform of the Statute had as its ultimate aim to lighten the Court's workload. In particular, the introduction of the mechanism of the filter of appeals was dictated by the wish to dispense the Court from a subset of very technical litigation which is already subject to two instances of scrutiny, rather than by a detailed analysis of the status and performance of the BoAs. Recital 4 of Regulation (EU) n. 2019/629, which is the legal act having materially amended the Statute, also points in this direction: "many appeals are brought in cases which have already been considered twice, initially by an independent Board of Appeal, then by the General Court, and … many of those appeals are dismissed by the Court of Justice because they are patently unfounded or on the ground that they are manifestly inadmissible"[19]. The fact that Article 58a of the Statute ultimately listed only four Agencies was somewhat contingent on the circumstance that in the original proposal of the Court the BoAs of these Agencies were mentioned as examples of effective legal remedy[20].

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[16] One might argue that the BoA of EUIPO is more independent because it is not established as an organ of the Agency, but this is also the case of the BoA of SRB, which was not included in the list. In addition, the appointment of the members of the BoAs of CPVO and EUIPO is done by the Council, while the members of the BoAs of ECHA and EASA are selected by the Management Boards of these Agencies from a list elaborated by the Commission.

[17] The scope of powers of the BoA of EASA was amended in 2018 by Regulation (EU) n. 2018/1139, removing its power to replace decisions taken by the Agency and providing instead for a system of remit of the vitiated decisions (Regulation (EU) 2018/1139 of the European Parliament and of the Council of 4 July 2018 on common rules in the field of civil aviation and establishing a European Union Aviation Safety Agency, and amending Regulations (EC) No 2111/2005, (EC) No 1008/2008, (EU) No 996/2010, (EU) No 376/2014 and Directives 2014/30/EU and 2014/53/EU of the European Parliament and of the Council, and repealing Regulations (EC) No 552/2004 and (EC) No 216/2008 of the European Parliament and of the Council and Council Regulation (EEC) No 3922/91, in *OJ* L 212, 22.08.2018, p. 1-122). The BoAs of most of the Agencies not listed in the 2019 reform of the Statute, instead, have the power to substitute their decisions to those taken by the Agencies' authorities.

[18] See L. DE LUCIA, *The Boards of Appeal as Hybrid Adjudicators: On Some Shortcomings of Article 58a of the Statute of the Court of Justice of the European Union*, in M. CHAMON, A. VOLPATO AND M. ELIANTONIO (eds.) *Boards of Appeal of EU Agencies: Towards Judicialization of Administrative Review?*, Oxford, 2022, p. 193.

[19] Regulation (EU, Euratom) n. 2019/629 of the European Parliament and of the Council of 17 April 2019 amending Protocol No 3 on the Statute of the Court of Justice of the European Union, in *OJ* L111, 25.04.2019, p. 1 ff.

[20] See Commission Opinion on the draft amendments to Protocol No 3 on the Statute of the Court of Justice of the European Union, presented by the Court of Justice on 26 March 2018, para 40.

Be it as it may, the problem with the apparently accidental character of the list of Art. 58a will soon be solved. The already agreed, further reform of the Statute will extend the mechanism of filter of appeals to the cases concerning the decisions of all the ten existing Agencies having a BoA, plus – as already provided in the original version of the norm in point – to the cases concerning decisions of independent BoAs set up after May 2019 (the date when the mechanism was first introduced)[21]. The reason falls in line with that given in 2019: "[s]uch appeals concern cases which have already been considered twice, initially by an independent Board of Appeal, then by the General Court, with the result that the right to effective judicial protection is fully guaranteed"[22].

Thus, the European Parliament and the Council, in their capacity of constitutional co-legislators (the Statute is contained in a Protocol to the EU Treaties and is therefore part of the primary law of the EU), explicitly acknowledge that the remedy offered by the BoAs contributes decisively to the full realisation of the fundamental right to effective judicial protection, relying essentially on the independence of these bodies. In fact, the co-legislators largely echo the recognition by the Court of Justice itself that the BoAs constitute an appropriate and effective remedy in the specific domains of activities of the Agencies entrusted with genuine regulatory powers, while referring to their *certain independence* and stressing the *quasi-judicial* nature of the functions they perform[23].

Yet, there is no consensus in the literature nor among practitioners about the effectiveness and the fairness of the protection offered by the system of BoAs[24]. Interestingly, those criticisms have gone unnoticed during the legislative process that led to the recent reform of the Statute. Neither the Commission nor the co-legislators have made any remarks on the generalisation of the mechanism of filter of appeals concerning BoAs decisions originally proposed by the Court. Nevertheless, one may be left wondering to what extent the rosy picture that lies at the basis of the

[21] Document 16848/1/23 of 16 January 2024, Council of Ministers of the EU, available at: https://data.consilium.europa.eu/doc/document/ST-16848-2023-REV-1/en/pdf.

[22] Position of the European Parliament adopted at first reading on 27 February 2024 with a view to the adoption of Regulation 2024/… amending Protocol No 3 on the Statute of the Court of Justice of the European Union, recital 23.

[23] See Court of Justice, March 9th 2023, case C-46/21 P, *ACER* v *Aquind*, ECLI:EU:C:2023:182, para 59.

[24] See E. PANDER MAAT, M. SCHOLTEN, *Historical Development of Boards of Appeal of EU Agencies*, *cit.*, pp. 18-19; M. KRAJEWSKI, *Relative Authority of Judicial and Extra-Judicial Review. EU Courts, Boards of Appeal, Ombudsman*, Oxford, 2021, p. 137; P. CHIRULLI, L. DE LUCIA, *Non-Judicial Remedies and EU Administration: Protection of Rights versus Preservation of Autonomy*, London, 2021, pp. 255-256.

generalisation of that mechanism, i.e. the assumption that BoAs provide effective remedies, fully reflects the reality or whether there is some room for improvement in the system of BoAs.

To answer this question, we first need to check what type of independence and protection can be expected from BoAs to ensure that they comply with the Charter of Fundamental Rights of the EU (CFREU). It is only against the benchmarks of the CFREU that we can check BoAs' performance and identify fields for improvement – if needed.

3. Is the recognition of the role and effectiveness of the BoAs stemming from Article 58a of the Statute of the Court of Justice fully deserved?

3.1 What the Charter expects from BoAs

The operation of the mechanism of filter of appeals has clear consequences on the overall protection offered to the concerned economic operators, who are (almost) deprived of a second layer of judicial review. Hence, what is removed 'from the top' ought to be compensated 'at the bottom' of the proceedings. In this regard, it is worth noting that the rationale of Article 58a in the 2024 reform of the Statute goes one step further than that of 2019. It is justified not only on that the listed Agencies are 'independent', but also on that they play a role in guaranteeing 'effective judicial protection'. We should therefore examine what those two requirements mean for BoAs and to what extent the current paradigm lives up to them.

There is discussion as to the applicability of the right of Article 47 of the CFREU to remedial proceedings of administrative nature[25]. It should be stressed that the added value of BoAs' review lies, precisely, on factors that courts normally lack: specialised technical knowledge provided by the non-lawyer members of the panels, procedural flexibility and swiftness. Actually, BoAs complement the judicial review, rather than substitute it[26]. Hence, a rigid translation of the standards set forth by Article 47 of the CFREU to the activity of BoAs may risk hampering the benefits they provide. They are not courts and the reform of Article 58a of the Statute cannot artificially transform them into such.

In addition, Article 47 of the CFREU does not require, as a rule, the existence of a systematic double degree of judicial review[27]. Similarly, the

[25] See D. RITLENG, *Boards of Appeal of EU Agencies and Article 47 of the Charter: Uneasy Bedfellows?*, in M. CHAMON, A. VOLPATO AND M. ELIANTONIO (eds.), *cit.*, p. 299 ff.

[26] See P. CHIRULLI, L. DE LUCIA, *cit.*, 2021, p. 243.

[27] Court of Justice, July 28th 2011, case C-69/10, *Samba Diouf*, ECLI:EU:C:2011:524,

non-regression principle does not prohibit any reform of the judiciary that modifies the degree of judicial oversight; it rather precludes those reforms that amount to an overall and systemic reduction in the protection of the value of the Rule of Law or of the judicial independence[28]. In any case, the General Court has recognised that the administrative review offered by BoAs does contribute to upholding the right to an effective remedy[29].

Furthermore, many of the principles enshrined in Article 47 of the CFREU find parallelisms in those of Article 41 of the CFREU, which is certainly applicable to the BoAs. The right to a good administration already encompasses the obligation for BoAs to handle their cases fairly and impartially, to take careful consideration of the points of fact and law raised by the applicants, to ensure the right to be heard and to state reasons for their decisions[30].

In the case of BoAs, two aspects deserve particular attention in view of ensuring compliance with the requirements of Article 41 of the CFREU: the intensity of their review over the decisions of their respective Agencies and their independence from these Agencies.

The problem with the intensity of BoAs' review lies in the absence of a well-established standard of review in their founding Regulations. The lighter the review, the cheaper, faster and easier it is to carry it out, but lower the protection it offers to individuals. Yet in the absence of standards, some BoAs initially opted for a review similar to that of EU Courts[31]. The latter, when examining complex and technical decisions – like the ones adopted by EU Agencies – limit themselves to checking whether the decision is "vitiated by a manifest error, a misuse of powers or whether the author of the decision clearly exceeded the limits of its discretion"[32].

However, the EU Courts have rejected the applicability of that standard to BoAs. In *BASF* v *ECHA* the General Court underlined the technical expertise of ECHA's BoA to argue that the latter should not only

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para 69; Court of Justice, May 30th 2013, case C-168/13 PPU, *F.*, ECLI:EU:C:2013:358, para 44.

[28] Court of Justice, April 20th 2021, case C-869/19, *Repubblika,* ECLI:EU:C:2021:311, paras 64-65.

[29] General Court, September 20th 2019, case T-755/17, *Germany* v *ECHA,* ECLI:EU:T:2019:647, paras 56-57.

[30] D. RITLENG, *Boards of Appeal of EU Agencies and Article 47 of the Charter: Uneasy Bedfellows?*, in M. CHAMON, A. VOLPATO AND M. ELIANTONIO (eds.), *cit.*, pp. 312-314.

[31] S. OOSTERHUIS, *More than the EU Courts, less than the Agencies: intensifying the Boards of Appeals' standard of review after the* Aquind-*Judgement,* in this *Volume*, p. 102; M. KRAJEWSKI, *cit.*, p. 116-119.

[32] General Court, September 20th 2019, case T-125/16, *BASF* v *ECHA,* ECLI:EU:T:2019:638, para 87.

examine whether the decision is vitiated by 'manifest errors', but rather by (plain) 'errors'[33]. The Court of Justice confirmed this line of interpretation in *Aquind*. It relied on the composition, accessibility of procedures and competence of ACER's BoA to argue that the limited review of technical assessments proper of EU Courts does not apply to BoAs[34]. Otherwise, the Court argued, when EU Courts are seized of BoA decisions, they would be carrying out a limited review of an already limited review, something which is incompatible with ensuring effective judicial protection[35]. The Court then flagged that its review could be vitiated by the lack of safeguards at the administrative level and thus defined a uniform standard of BoAs' review.

The other sensitive aspect of the system of administrative review of the BoAs relates to their independence. Undoubtedly, there exists a tension between BoAs' statutory independence and the fact that they still operate within their Agencies, as the General Court recognised in *Procter and Gamble*[36]. On the one hand, independence underpins the impartial and fair handling of cases by BoAs – as required by Article 41 CFREU – while ensuring that the overall system of administrative and judicial review guarantees the right to an effective remedy – as mandated by Article 47 CFREU and emphasized in *Germany* v *ECHA* and *Aquind*. On the other hand, BoAs still keep organisational and budgetary ties with their Agencies[37], with some authors underscoring the need for improvement in this regard[38].

It is settled case law of the Court of Justice that independence has two mirroring dimensions, one objective and one subjective: it requires absence from external control as well as impartiality on the handling of proceedings[39]. On its objective dimension, then, independence "require[s] rules, particularly as regards the composition of the body and the appointment, length of service and grounds for abstention, rejection and

[33] *Ivi* para 89.

[34] Court of Justice, March 9th 2023, C-46/21 P, *ACER* v *Aquind*, ECLI:EU:C:2023:182, para 66.

[35] *Ivi* para 67.

[36] General Court, December 12th 2002, case T-63/01, *Procter and Gamble* v *OHIM,* ECLI:EU:T:2002:317, paras 19-22.

[37] See M. KRAJEWSKI, *cit.*, pp. 104-108; J. ALBERTI, *The Position of Boards of Appeal: Between Functional Continuity and Independence*, in M. CHAMON, A. VOLPATO AND M. ELIANTONIO (eds.), *cit.*, pp. 254-257.

[38] See E. PANDER MAAT, M. SCHOLTEN, *Historical Development of Boards of Appeal of EU Agencies*, *cit.*, pp. 18-19; J. ALBERTI, *The Position of Boards of Appeal: Between Functional Continuity and Independence*, in M. CHAMON, A. VOLPATO AND M. ELIANTONIO (eds.), *cit.*, p. 272.

[39] Court of Justice, June 24th 2019, case C-619/18, *Commission* v *Poland (Independence of the Supreme Court)*, ECLI:EU:C:2019:531, paras 72-74.

dismissal of its members, that are such as to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it"[40]. Even if this is the standard developed by the Court to assess judicial independence under Article 19 TEU, it can also offer some guidance as to what to expect from BoAs[41].

As mentioned above, all the founding Regulations of EU Agencies establish that BoAs are independent from the governing bodies of their respective Agencies and cannot receive instructions from them[42]. Some Regulations complement this provision with rules on revolving doors for BoA members[43]. In practice, however, the members of the BoAs are not completely immune from possible influence by their Agencies.

First, for most BoAs, the Management Boards of the respective Agencies play a role in the appointment of their members, even if a third party (like the Commission) intervenes by coming up with a list of names[44]. Similarly, the same boards mostly decide on the removal of the members of the BoAs, in some cases subject to a prior notification to the Commission[45]. Nonetheless, the Court of Justice has consistently stated that the appointment of judges by the executive or by the legislative does not affect their independence insofar as they are free from the appointers' influence when exercising their role[46].

Moreover, BoAs do not have control over their budget and staff; as a rule, the budget of the BoAs is integrated into that of their respective Agencies[47] and, in addition, the members of the BoAs should rely for their daily work on the support of the staff paid or seconded by those Agencies. This can have an impact on the capacity of the BoAs to adjudicate: the higher the resources available, the more thorough the examination of a case will be[48].

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[40] *Ibid*, para 74.

[41] See E. PANDER MAAT, M. SCHOLTEN, *Historical Development of Boards of Appeal of EU Agencies*, *cit.*, p. 10.

[42] See J. ALBERTI, *The Position of Boards of Appeal: Between Functional Continuity and Independence*, in M. CHAMON, A. VOLPATO AND M. ELIANTONIO (eds.), *cit.*, p 258.

[43] *Ibid.*

[44] See E. PANDER MAAT, M. SCHOLTEN, *Historical Development of Boards of Appeal of EU Agencies*, *cit.*, p. 8.

[45] *Ivi* p. 10.

[46] Court of Justice, April 20th 2021, case C-896/19, *Repubblika* v *Il-Prim Ministru,* ECLI:EU:C:2021:311, para 56.

[47] See J. ALBERTI, *The Position of Boards of Appeal: Between Functional Continuity and Independence*, in M. CHAMON, A. VOLPATO AND M. ELIANTONIO (eds.), *cit.*, p. 260.

[48] See M. KRAJEWSKI, *cit.*, p. 137.

Last, the founding Regulations of the regulatory Agencies are typically silent on questions like employment conditions of the members of the BoAs, ethics rules applicable to them and their enforcement, staffing and financial autonomy or the capacity of the BoAs to defend autonomously their decisions.

All these elements, taken together, may give rise to questions on the expediency to improve the level of independence of the BoAs in order to provide the necessary guarantees of impartiality to the parties subject to their jurisdiction.

3.2 Room for improvement: enhancing the organic independence of the BoAs

The most effective solution to address these questions would consist in introducing legislative harmonisation on aspects like the rules on selection and removal of the members of the BoAs and in providing for genuine budgetary autonomy of those bodies. However, one must acknowledge that, at the moment, there is no political momentum for proposing those changes.

Thus, the governing bodies of the concerned Agencies may need to explore alternative avenues to guarantee that the independence of BoAs is CFREU-proof, looking into the margins for manoeuvre at their disposal. In this respect, it is worth recalling – as mentioned above – that the 2012 Common Approach highlights the Agencies' own responsibility in terms of ensuring the independence of the members of their BoAs[49].

For instance, the governing bodies of the concerned Agencies could agree with their respective BoAs, through administrative arrangements, on appropriate measures to provide the latter with control on their supporting staff and a certain autonomy in the determination and management of their operational budget. Appropriate measures may also be envisaged in relation to the ethics rules applicable to BoA members, like declarations of interest to avoid conflicts of interest[50] or allowing the parties to submit a request of recusal of a member of a BoA to dispel any doubts about the impartiality of proceedings[51]. Similarly, an explicit list of BoA members' incompatibilities may also be helpful to guarantee internal independence[52].

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[49] See n. 14.

[50] See M. KRAJEWSKI, *cit.*, p. 107.

[51] *Ibid.*

[52] See J. ALBERTI, *The Position of Boards of Appeal: Between Functional Continuity and Independence*, in M. CHAMON, A. VOLPATO AND M. ELIANTONIO (eds.), *cit.*, p. 258.

In addition, the degree of protection offered by the administrative review may be made more uniform if BoAs learn from one another and share best practices. In this respect, a precious role can be played by the Inter Agency Appeal Panel Network, which is the informal network of the Chairs of the BoAs and a privileged space for exchanges and mutual learning about developments concerning the organizational and functional features of all the BoAs.

Finally, what could bring further protection for appellants – without requiring any legislative modifications – would be a less strict application of the filter of appeals by the Court of Justice. In the course of the legislative proceedings which led to the 2024 reform of the Statute, the Council of Bars and Law Societies of Europe flagged this as a concern, arguing that the filter "cannot result in the total elimination of the appeals in all the areas concerned"[53]. Nevertheless, as desirable as this may be, such a change would be neutral in respect of the question of strengthening the BoAs' organic independence.

4. Conclusion

The EU regulatory Agencies have decision-making powers which may affect, sometimes very substantially, the sphere of rights of natural and legal persons. The BoAs created by the founding Regulations of these Agencies provide reinforced protection to those persons, who can make recourse to reliable, professional and fast proceedings to make their cases and defend their rights.

The effectiveness of the remedy offered by the BoAs has been *de facto* recognised by Article 58a of the Statute, which introduces a mechanism of filter of appeals concerning the decisions issued by the BoAs, thus acknowledging the reliability of their scrutiny over their respective Agencies' decisions.

Yet, with the upcoming extension of this mechanism to the cases concerning the decision of all the existing and future BoAs, the need to ensure the full compliance with the fundamental rights to an effective remedy and to a good administration calls for a closer examination of the administrative review made by the BoAs. Certain guarantees in terms of independence of the members of the BoAs and effectiveness of their review must be ensured across the concerned Agencies, which does not mean that they necessarily have to be cut from the same cloth; diverse systems can still provide similar protection. Nonetheless, the

[53] See P. PERAKIS, CCBE comments on the draft amendment to Protocol No 3 on the Statute of the Court of Justice of the European Union, presented by the Court of Justice on 30 November 2022, Brussels, May 5th 2023.

responsibilities implicitly imposed by Article 58a of the Statute on the BoAs are substantial, as they are positioned as the gatekeepers at the entrance hall of the EU Courts. In particular, they will need to fully embrace the challenge of combining their special features of administrative independent bodies – which have nonetheless significant links with the governing bodies of the Agencies whose decisions they scrutinise – with the guarantees of the quasi-judicial review they are expected to provide.