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

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

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

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1. Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Life before *Aquind*

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

[9] See, in this *Volume*, M. NAVIN-JONES, *Ramifications Of The Aquind Judgements For 'Non Permanent' Boards Of Appeal*, p. 191. As for the impact of *Aquind* on EUIPO BoAs, see in this *Volume*, G. HUMPHREYS, *Standard Of Review And The Right To An Effective Judicial Protection: A Reflection From The Euipo's Perspective*, p. 180.

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

2.1 Limited review: 'manifest errors of assessment'

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

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

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

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

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

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

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

[15] *Ivi* para 74.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[25] *Ibidem*.

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

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

[28] *Ivi* p. 97.

[29] *Ivi* p. 98.

2.2 Intensification of the review

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

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

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

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

[32] *Ivi* para 46.

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

[34] *Ivi* para 40.

[35] *Ivi* para 74.

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

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

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

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

[38] *Ibidem*.

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

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

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

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

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

2.3 From full review to limited review

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[54] *Ivi* para 110.

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

[56] *Ivi* p. 292.

[57] *Ivi* p. 291.

2.4 Observations

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

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

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

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

3.1 ECHA: 'vitiated in error'

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

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

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

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

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

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

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

[61] *Ibidem.*

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

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

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

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

3.2 ACER: full review?

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

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

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

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

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

3.2.1 Context

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

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

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

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

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

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

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

3.2.2 Composition and powers

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

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

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

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

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

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

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

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

3.2.3 New standard

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

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

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

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

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

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

3.3 Implications

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

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

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

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

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

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

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

4. The post-*Aquind* era

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

4.1 ECHA

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

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

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

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

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

4.2 ACER

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

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

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

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

[92] *Ivi* para 83.

[93] *Ivi* paras 84-96.

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

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

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

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

4.3 SRB Appeal Panel

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

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

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

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

[98] *Ivi* paras 38-44.

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

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

4.4 Observations

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

[100] *Ivi* paras 61-69.

[101] *Ivi* para 77.

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

5. Conclusion

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

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

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

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