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Quo vadis, Boards of Appeal?

The Evolution of EU Agencies' Boards of Appeal and the Future of the EU System of Judicial Protection

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THIRD PARTIES' INTERVENTION BEFORE THE BOARDS OF APPEAL

L'intervento di terzi nel contenzioso dinanzi alle commissioni di ricorso

L'intervention des tiers devant les chambres de recours

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1. Introduction

The figure of the third party has always generated definitional uncertainties in different procedural contexts (included the EU judicial system): it has always been considered a subject different from the main parties, but still with an own interest (personal or, in some cases, general) to defend within the trial. It has been stated that the difficulty of understanding the figure of the third party in the administrative trial seems to depend largely on that sort of definitional apriorism which, by contrasting third parties with the parties, that is, with the subjects – other than the judge – who animate the process, leads to consider the third party as someone alien to the procedural event[1].

The third party's intervention before the Court of justice of the European Union (CJEU) is provided by Art. 40 of the Statute. This rule, in its first paragraph, provides that Member States and institutions may always intervene in disputes before the CJEU, thus without the need to demonstrate a particular interest in bringing proceedings. On the

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[1] See M. OCCHIENA, *Processo amministrativo e terzi*, in C. AMALFITANO, Z. CRESPI REGHIZZI, S. VINCRE (eds.), *I terzi nei processi nazionali e sovranazionali: poteri e tutele*, Turin, 2023, p. 117.

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contrary, the second paragraph of Art. 40 of the Statute provides that: "[t]he same right shall be open to the bodies, offices and Agencies of the Union and to any other person which can establish an interest in the result of a case submitted to the Court". Therefore, for all other parties (other than Member States and institutions) the possibility of intervening is conditional on the demonstration of a specific interest, qualified by the Court's case law as "a direct, existing interest in the ruling on the forms of order sought, and not as an interest in relation to the pleas in law or arguments raised"[2]. In addition to that, Art. 40 specifies that "natural or legal persons shall not intervene in cases between Member States, between institutions of the Union or between Member States and institutions of the Union": therefore, irrespective of the interest in the resolution of the dispute, these categories of 'non-privileged' entities are completely precluded from intervening in these kind of cases which have a 'constitutional' nature (or, to put it mildly, that involve parties with exclusively public interests)[3].

In any case, Art. 40 of the Statute specifies that "[a]n application to intervene shall be limited to supporting the form of order sought by one of the parties", limiting the powers of this kind of participants to the trial.

It is worth remembering that Art. 40 of the Statute only apply to direct actions, while the third parties before the ECJ in the context of a preliminary ruling may join the trial in Luxembourg only if they are already a party within the national one or if they are the subjects included in Art. 23 of the Statute list (namely, States or institutions)[4].

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[2] See, *ex multis*, Court of Justice, March 10th 2023, case C-611/22 P, *Illumina* v *Commission*, ECLI:EU:C:2023:205, para 6 and case law cited.

[3] For an in-depth analysis of the institution of intervention in proceedings before the CJEU see: D. ADAMO, *L'intervento di terzi nel processo dinanzi ai giudici dell'Unione europea*, Naples, 2012; R. MASTROIANNI and A. MAFFEO, *Art. 23 Statuto*, in C. AMALFITANO, M. CONDINANZI, P. IANNUCCELLI (eds.), *Le regole del processo dinanzi al giudice dell'Unione europea,* Naples, 2017, p. 125; F. PILI, *Art. 40 Statuto*, in C. AMALFITANO, M. CONDINANZI, P. IANNUCCELLI (eds.), *cit.,* p. 197; M. CONDINANZI, *Artt. 96 e 97 Reg. proc. Corte giust.*, in C. AMALFITANO, M. CONDINANZI, P. IANNUCCELLI (eds.), *cit.,* p. 606; F. PILI, *Artt. 129 – 132 Reg. proc. Corte giust*., in C. AMALFITANO, M. CONDINANZI, P. IANNUCCELLI (eds.), *cit.,* p. 738 and ID., *Artt. 142-145 Reg. Proc. Trib.,* in C. AMALFITANO, M. CONDINANZI, P. IANNUCCELLI (eds.), *cit.,*p. 1288; M. LATERZA, *Il ruolo delle parti diverse da quelle principali nel processo davanti al giudice dell'Unione europea*, in C. AMALFITANO, M. CONDINANZI (eds.), *La Corte di giustizia dell'Unione europea oltre i Trattati: la riforma organizzativa e processuale del triennio 2012-2015*, Milan, 2018, p. 199; D. DOMENICUCCI, *Riflessioni su alcuni aspetti problematici dell'attuale disciplina della partecipazione dei terzi al processo dinanzi al giudice dell'Unione europea*, in C. AMALFITANO, M. CONDINANZI (eds.), *cit.*, p. 233; A. MAFFEO, *I 'terzi' nel rinvio pregiudiziale e la durata ragionevole del processo*, in C. AMALFITANO, M. CONDINANZI (eds.), *cit.*, p. 263; D. DOMENICUCCI, *L'intervento di terzi nei ricorsi diretti dinanzi al giudice dell'Unione: questioni scelte*, in *Review of European Litigation*, 1/2023, p. 17.

[4] See P. DE PASQUALE, *Il ruolo delle parti nel rinvio pregiudiziale: problemi vecchi e nuovi,*

In the end, it must be remembered that the CJEU does not allow any intervention of third parties acting as *amicus curiae*[5]. The *amicus curiae* is a peculiar figure of participant in the proceedings that must be distinguished from the third party intervener in the technical sense. In general, *amicus curiae* can be considered as a subject that, although not a party to the trial, voluntarily chooses to participate with the aim of providing support to the adjudicating body. This figure differs from the more traditional institution of the third party intervener, who participates to defend its own right or interest that might be prejudiced by the outcome of pending litigation between other parties. In the practice of supranational jurisdictions, however, these figures tend to overlap and be confused, the *amicus curiae* being more and more often the bearer of significant interests, albeit diffuse, coinciding with those of one of the parties or independent from them, so much so that Scholars have spoken of a 'litigating *amicus curiae*'[6]. The main difference between the third party and the *amicus curiae* is that the former usually becomes an actual party to the case, while the latter remains an external figure with the task of providing additional information to the judges.

As far as the Boards of Appeal (BoAs) of the Agencies are concerned, it is possible to observe a great variety of solutions for third parties' intervention within their proceedings.

In some cases, third parties are completely prevented from intervening in proceedings before the BoAs: this is the case of the European Union Intellectual Property Office (EUIPO) (with a peculiar exception), the Community Plant Variety Office (CVPO), the European Union Aviation Safety Agency (EASA), the Single Resolution Board (SRB), European Supervisory Authorities (ESAs) whose Rules of Procedure (as reported in the following) do not contain any norms on the intervention[7].

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in *Review of European Litigation*, 2/2023, p. 1.

[5] See I. ANRÒ, *L'*amicus curiae *presso la Corte di giustizia dell'Unione europea: qualche riflessione per l'apertura delle porte del Kirchberg*, in *Review of European Litigation*, 1/2023, p. 62.

[6] See M. K. LOWMAN, *The litigating amicus curiae. When does the party begin after the friends leave?*, in *American University Law Review,* 1992, p. 1243 ff. and L. CREMA, *Testing Amici Curiae in International Law: Rules and Practice*, in *Italian Yearbook of International Law,* 2012, p. 91 ff., pp. 131-132.

[7] The BoAs Rules of Procedure are included in soft law documents published on the relevant website: for EUIPO see Rules of Procedure of the Boards of Appeal, Decision 2020-1 of 27 February 2020 of the Presidium of the Boards of Appeal on the Rules of Procedure before the Boards of Appeal, as amended on 12 December 2023 (Presidium decision 2023-22); for CVPO see information on the website https://cpvo.europa.eu/en/about-us/law-practice/board-appeal; for EASA see Rules of Procedure of the Boards of Appeal, Decision 2020-1 of 27 February 2020 of the Presidium of the Boards of appeal on the Rules of Procedure before the Boards of

In other cases, this is possible, as long as a "direct and existing interest in the result of the case"[8], as in the case of the Agency for the Cooperation of Energy Regulators (ACER) or just "an interest in the result of the case", as in the case of the European Chemical Agency (ECHA)[9] or a "legitimate interest in the result of the proceedings", as in the case of the European Union Agency for Railways (ERA)[10] is established.

This paper will briefly analyse the BoAs' intervention rules in the context of the specificities of each Agency, in order to assess whether the current rules are sufficient to allow third parties' interests to be duly taken into account, distinguishing between general and specific interests. Finally, some possible solutions are outlined to improve the position of third parties before the BoAs.

2. A variable geometry intervention before the Boards of Appeal

As previously mentioned, the Rules of Procedure of the BoAs do not prescribe a single model of intervention. Instead, there are various norms and options available for involving third-party interests: it is therefore possible to speak of a 'variable geometry intervention' in the context of the BoAs.

In certain cases, third parties may not have the opportunity to intervene before the BoAs, but this does not imply that they are entirely excluded from the process. In other cases, intervention is possible, but only if a qualified interest is demonstrated.

Appeal, as amended on 12 December 2023 (Presidium decision 2023-22); for SRB Appeal Panel of the Single Resolution Board see Rules of Procedures entered into force on 7 September 2020; for ESAs see Board of Appeal of the European Supervisory Authorities Rules of Procedure (BoA 2020 01). On third parties and BoAs see G. GRECO, *Le commissioni di ricorso nel sistema di giustizia dell'Unione europea*, Milano, 2020, p. 286. See also A. MONICA, *Il 'terzo' nei procedimenti amministrativi europei*, in D. FROMAGE (ed.), *Jacques Ziller, a European Scholar*, Firenze, 2022, p. 120. For a recent study on the Boards of Appeal see M. CHAMON, A. VOLPATO, M. ELIANTONIO (eds.), *Boards of Appeal of EU Agencies,* Oxford, 2022.

[8] Art. 11 of Rules of Organisation and Procedure of the Board of Appeal of the European Union Agency for the Cooperation of Energy Regulators, A10-BoR-01-03.

[9] Art. 8 of Commission Regulation (EC) n. 771/2008 of 1 August 2008 laying down the Rules of Organisation and Procedure of the Board of Appeal of the European Chemicals Agency, in *OJ* L 206, 2.08.2008, p. 5.

[10] Art. 15 Commission implementing Regulation (EU) 2018/867 of 13 June 2018 laying down the Rules of Procedure of the Board(s) of Appeal of the European Union Agency for Railways, in *OJ* L 149, 14.06.2018, p. 3.

2.1 BoAs which prevents third parties from intervening in the proceedings

The majority of the BoAs Rules of Procedure do not provide for the possibility for third parties to intervene in the pending proceedings: as anticipated, this is the case of EUIPO, CPVO, EASA, SRB, ESAs, whose Rules of Procedure are silent on this point. This does not mean that third parties' interests are completely disregarded in the context of the Agency's works, but they may be raised (and considered) in different stages of the administrative (that is the proceedings before the Office) and quasi-judicial path (that is before the BoAs)[11].

The case of EUIPO is emblematic. In the EUIPO Rules of Procedure[12] there is no general rule allowing the participation of third parties before the BoAs (not even for the sole purpose of submitting written or oral observations), so that the BoAs proceedings doors are closed. In fact, the parties before the BoAs are the same that have participated in the administrative phase before the Office[13].

It needs to be considered that, before the EUIPO BoAs, the Office as author of the first-instance decision is not a party to the proceedings as well.

The EUIPO Rules of Procedure provides, instead, for limited possibilities to introduce general interests' observations. The first one is provided by Art. 23 of the Rules of Procedure that states that "a group or body representing manufacturers, producers, suppliers of services, traders or consumers, invoking an interest in the result of a case before the Grand Board may, pursuant to Article 37(6) EUTMDR[14], file written observations in the language of proceedings within two months following the publication in the Official Journal of the referral to the Grand Board".

Art. 37(6) of the Commission Delegated Regulation (EU)2018/625 supplementing Regulation (EU) 2017/1001 on the European Union

[11] ECJ confirmed BoAs' quasi-judicial features in its judgement: Court of Justice, March 9th 2023, case C-46/21 P, *Aquind,* ECLI:EU:C:2023:182, para 59.

[12] See Rules of Procedure of the Boards of Appeal, decision 2020-1 of 27 February 2020 of the Presidium of the Boards of Appeal on the Rules of Procedure before the Boards of Appeal, as amended on 12 December 2023 (Presidium decision 2023-22).

[13] As stated by Art. 67 Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trademark, in *OJ* L 154, 16.06.2017, p. 1 ff.

[14] Commission delegated Regulation (EU) 2018/625 of 5 March 2018 supplementing Regulation (EU) 2017/1001 of the European Parliament and of the Council on the European Union trademark, and repealing Delegated Regulation (EU) 2017/1430, in *OJ* L 104, 24.04.2018, p. 1.

trademark, and repealing Delegated Regulation (EUTMDR)[15], in fact, states that "[g]roups or bodies representing manufacturers, producers, suppliers of services, traders or consumers which can establish an interest in the result of a case on appeal or a request for a reasoned opinion brought before the Grand Board, may submit written observations within two months following the publication in the Official Journal of the Office of the decision of referral or, as the case may be, the request for a reasoned opinion. They shall not be parties to the proceedings before the Grand Board and shall bear their own costs". Therefore, only before the EUIPO Grand Board it is possible to introduce third parties' considerations of general interest. Technically, this is not an intervention, as the group or body representing manufacturers, producers, suppliers of services, traders or consumers does not become a party and it can only file written observations, so that it could almost be considered an *amicus curiae* brief. It could also be interpreted as the contribution of a qualified subject similar to the one in the context of the preliminary ruling according to Art. 23 CJEU Statute[16]: it is anyway required by Art. 37(6), to have "an interest in the result" of the case, that is, instead, a typical requirement for genuine third parties.

Probably because of these restrictions, the praxis shows a moderate use of this possibility, while it entails some useful perspective as well. In 2022, in a proceeding concerning the appeal against the EUIPO decision that declared invalid the mark 'Iceland' registered in 2002 by a company, the Iceland Foods Limited, some associations presented their observations: the Fisheries Iceland and the Swiss Association Against the Misuse of Swiss Indications of Source supported the contested decision, maintaining that it is not possible to register a country name as trademark. The International Trade Mark Association (INTA), instead, presented a more general position, recalling that fundamental principles of public international law do not recognise an exclusive right of states to geographic terms, including country names, and therefore they are registrable (under the Paris Convention and TRIPS) inasmuch as they are distinctive, inviting the BoA to carry a detailed, reality-based assessment of each type of product and services is necessary in order to assess the validity of the 'Iceland' registration[17]. The final decision of the BoA does

[15] Commission delegated Regulation (EU) 2018/625 of 5 March 2018 supplementing Regulation (EU) 2017/1001 of the European Parliament and of the Council on the European Union trade mark, and repealing delegated Regulation (EU) 2017/1430 (EUTMDR), in *OJ* L 104, 24.4.2018, p. 1 ff.

[16] Cfr. P. DE PASQUALE, *Il ruolo delle parti nel rinvio pregiudiziale: problemi vecchi e nuovi*, in *Review of European Litigation*, 2/2023, p. 1.

[17] See decision of the EUIPO Grand Board of 15 December 2022 in case R

not contain any comment or reply to these observations, while they reveal anyway a useful tool to get information and data.

In another case, *Zoraya*, INTA provided an opinion to demonstrate the trend of the beverage industry to switch to non-alcohol drinks, which was referred to by the EUIPO Grand Board, demonstrating the usefulness of such input to the proceedings[18]. The other way to get input from sources/subjects not already involved in the BoA's proceedings is linked to Art. 29 of EUTMDR which provides that "[t]he Board of Appeal may, on its own initiative or upon the written, reasoned request of the Executive Director of the Office, invite the Executive Director to comment on questions of general interest which arise in the course of proceedings pending before it. The parties shall be entitled to submit their observations on the Executive Director's comments". In this context, it may be quite controversial as it is questionable whether the Executive Director is a third party (even if EUIPO is not part of the proceedings). The BoAs case law shows little use of this instrument and limited to the inquiry on the Office's practice[19].

Although it is clear from the above that third parties cannot intervene, this does not mean that third parties' interests are completely neglected in the whole EUIPO's system[20]. First of all, it is necessary to distinguish: (a) third parties that have a direct and actual interest in the proceedings from (b) third parties who act to support collective or general interests.

Concerning the former, the Regulation (EU) 2017/1001 on the European Union trademark (EUTMR)[21] provides for a wide range of subjects that may be involved in the first-instance proceedings to defend their interests and rights. For instance, Art. 46 EUTMR provides that a lot of subjects may give notice of opposition, from the proprietors of earlier trademarks to persons authorized to exercise those rights under national law. Then, they will participate in the following first-instance proceedings. Furthermore, Art. 67 EUTMR provides that "any party to proceedings adversely affected by a decision may appeal. Any other parties to the

1238/2019-G, *Iceland Foods Limited,* spec. para 15. There is also a parallel Decision concerning the figurative mark R 1613/2019-G.

[18] See decision of the EUIPO Grand Board of 13 April 2022 in case R 964/2020-G, *Zoraya*, spec. para 30.

[19] See decision of EUIPO Grand Board of 28 June 2021 in case R 2142/2018-G, *Wolfgang Diesel* v *DIESEL S.p.A.*: the Executive Director was questioned about the interpretation of Art. 10(1) EUTMDR concerning the request for proof of use.

[20] For a comprehensive analisys of the EUIPO and CPVO proceedings see D. HANF, *The Trailblazers: The Board of Appeal of EUIPO and CPVO*, in M. CHAMON, A. VOLPATO, M. ELIANTONIO (eds.), *cit.*, p. 59.

[21] Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark, in *OJ* L 154, 16.06.2017, p. 1 ff.

proceedings shall be parties to the appeal proceedings as of right". These different subjects, like the owner of a previously registered trademark or an entity that maintain that a certain trademark should be declared invalid, may appear to be 'third parties' ('counter-interested') while confronted with the EUIPO and the applicant, but are main parties in the so called *inter partes* proceedings.

Therefore, it appears highly probable that subjects having a direct interest concerning a EUIPO decision are already part of the first-instance proceedings and therefore are part of right in the BoA stage. This participation of the third parties should be framed in the context of Art. 41 of the Charter of Fundamental Rights of the European Union (CFREU), Right to good administration[22], that includes "the right of every person to be heard, before any individual measure which would affect him or her adversely is taken". Therefore, it appears that the EUIPO system is 'satisfied' with the participation of these parties in the administrative phase, not considering to introduce such possibility before the BoA, that, as Scholars say, is a 'quasi-judicial' body (and therefore, apparently, in the middle between the administrative and judicial phases)[23].

Moreover, the EUTMR provides an option to join the proceedings also for third parties with general interests: Art. 45 provides, in this regard, that "[a]ny natural or legal person and any group or body representing manufacturers, producers, suppliers of services, traders or consumers may submit to the Office written observations, explaining on which grounds, under Articles 5 and 7, the trade mark should not be registered *ex officio*" specifying that they "shall not be parties to the proceedings before the Office" and therefore they will not be allowed to join the BoAs procedure, as only the parties to first instance proceedings can be party to the appeal procedure.

Therefore, it appears that, for third parties that have a direct and actual interest in the proceedings there may no need to provide a possibility to intervene before the BoA. In fact, subjects who bear a direct (and personal) interest concerning EUIPO decision have already the possibility to initiate the first-instance procedure according to EUTMR and then to participate in the BoA proceedings. In addition to that, they will be able to challenge the BoA decision before the General Court or at least to meet the requirements to intervene according to Art. 40 of the Statute.

Conversely, third parties that bear general interests should be allowed

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[22] See the comment of P. PIVA, *Art. 41*, in R. MASTROIANNI, O. POLLICINO, S. ALLEGREZZA, F. PAPPALARDO, O. RAZZOLINI (eds.), *Carta dei diritti fondamentali dell'Unione europea*, Milan, 2017, p. 753.

[23] See J. ALBERTI, *The Position of Boards of Appeal: Between Functional Continuity and Independence,* in M. CHAMON, A. VOLPATO, M. ELIANTONIO (eds.), *cit.*, p. 245.

to intervene before the BoA for three main reasons: (i) they are already granted the possibility to join the first-instance procedure according to Art. 45 EUTMR, so that it appears to be inconsistent not to provide the same possibility before the BoAs; (ii) this possibility should be granted in a general way (not only before the Grand Board), to balance the Office Executive Director possibility to present observation on general interests questions; (iii) third parties under the (b) category may be granted the leave to intervene before the General Court if they meet the requirements of Art. 40 of the Statute, so that it is a bottleneck to prevent them to participate before the BoAs.

In the end, it is curious to recall that the 'winning' party before the EUIPO BoA (e.g. the applicant for mark registration when the BoA confirms the Office decision rejecting the opposition)[24] will be an intervener with special powers before the General Court, as there the procedure will be between the Office and the opponent. Art. 173(1) of the General Court's Rules of Procedure provides that "[a] party to the proceedings before the Board of Appeal other than the applicant may participate, as intervener, in the proceedings before the General Court by responding to the application in the manner and within the time limit prescribed", and Art. 173(2) that "before the expiry of the time limit prescribed for the lodging of a response, a party to the proceedings before the Board of Appeal other than the applicant shall become a party to the proceedings before the General Court, as intervener, on lodging a procedural document […]". Art. 173(3) states that he "shall have the same procedural rights as the main parties. He may support the form of order sought by a main party and may apply for a form of order and put forward pleas in law independently of those applied for and put forward by the main parties".

Recently, the General Court has specified that this is a peculiar kind of intervener, with the powers and the responsibilities of a party, and therefore the intervention regime pursuant to Art. 40 Statute does not apply to the other party to the proceedings before the Board of Appeal which, having regard to Art. 173(1),(2) of those rules, has not become timely a party to the proceedings before the General Court[25].

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[24] See as an example: General Court, July 26th 2023, case T-591/21, *Apart sp.z.* v *EUIPO,* ECLI:EU:T:2023:433, where the other party in the proceeding before the BoA, the company S. Tous S.L., who successfully registered the figurative sign of a bear with EUIPO, was an intervener before the General Court.

[25] General Court, February 8th 2024, case T-30/23*, Fly Persia and Barmodeh* v *EUIPO-Dubai Aviation,* ECLI:EU:T:2024:86. See also the comment by K. POCHEC-PILIPAVICIUS, *Le Tribunal clarifie le statut de l'intervenant dans le contentieux en matière de la propriété intellectuelle*, in *Review of European Litigation*, 2/2024.

The Rules of Procedure of CPVO are quite similar to EUIPO's. These rules (that are not even collected in a document, being limited to some guidelines on the CPVO website)[26] do not provide for the possibility of a third party's intervention before its BoA.

Thus, Art. 1 of the Commission Regulation (EC) n. 874/2009 (CPVOIR)[27] provides, as EUIPO's, a variety of subjects that may join the first-instance proceedings: (a) the applicant for a Community plant variety right; (b) the objector, as referred to in Art. 59(2) of Council Regulation (EC) n. 2100/94 on Community plant variety rights (CPVRR)[28], (c) the holder or holders of a Community plant variety right (d) any person whose application or request is a prerequisite for a decision of the Office. In addition to that, the Office may allow other persons to be parties to the proceedings, if they so request in writing and are directly and individually concerned.

Then, according to Art. 68 of CPVRR "[a]ny natural or legal person may appeal, subject to Article 82, against a decision, addressed to that person, or against a decision which, although in the form of a decision addressed to another person, is of direct and individual concern to the former. The parties to proceedings may, and the Office shall, be party to the appeal proceedings".

Differently from EUIPO's, the Office becomes *ex lege* a party of the appeal proceedings so that there is no need to provide for the possibility to ask for its Executive Director's observations.

Pursuant to Art. 47(2) of CPVOIR, the parties may participate in the appeal proceedings if they so request within two months of the notice received. The CPVOIR does not regulate the procedural faculties of these parties, but it is to be assumed that the very request to be a party to the appeal proceedings entails the possibility of submitting defensive pleadings at the same time.

These parties, therefore, may participate in the cross-examination and may defend the act they consider favourable in full autonomy, with different arguments from those of the Office.

Therefore, it is possible to conclude that third parties with a direct interests have a sufficient room to join both the proceedings (before the

[26] See again the information on the website https://cpvo.europa.eu/en/about-us/law-practice/board-appeal.

[27] Commission Regulation (EC) No 874/2009 of 17 September 2009 establishing implementing rules for the application of Council Regulation (EC) No 2100/94 as regards proceedings before the Community Plant Variety Office (recast), in *OJ* L 251, 24.09.2009, p. 3.

[28] Council Regulation (EC) No 2100/94 of 27 July 1994 on Community Plant Variety rights, in *OJ* L 227, 1.09.1994, p. 1.

Agency and before the BoAs), while for third parties who act in the general interests the considerations made for EUIPO apply. Also, before the General Court, Art. 173 of the Rules of Procedures applies to CPVO as for EUIPO.

Concerning the SRB, Art. 85 of Regulation (EU) n. 806/2014 (SRBR)[29] provides that "[a]ny natural or legal person, including resolution authorities, may appeal against a decision of the Board [the Agency] referred to in Article 10(10), Article 11, Article 12(1), Articles 38 to 41, Article 65(3), Article 71 and Article 90(3) which is addressed to that person, or which is of direct and individual concern to that person". All the decisions mentioned by the latter Article, are adopted by the SRB after the consultation of different subjects, mainly the national resolution authorities. It could be deemed that there is sufficient room to allow the SRB to consider general interests. In any case, any third party directly affected by the decision could appeal it before the SRB BoA and in case before the General Court.

Furthermore, it seems that the main litigation before the SRB BoA concerns the minimum requirements for own funds and eligible liabilities, a decision that may not be known by third parties and that implies technical evaluation.

For EASA, Regulation (EU) 2018/1139 (EASAR)[30] provides at Art. 108 that "[a]n appeal may be brought against decisions of the Agency taken pursuant to Article 64, 65, Article 76(6), Article 77 to 83, 85 or 126" and Art. 109, Persons entitled to appeal, that: "[a]ny natural or legal person may appeal against a decision addressed to that person, or against a decision which, although in the form of a decision addressed to another person, is of direct and individual concern to the former. The parties to proceedings may be party to the appeal proceedings". Again, third parties that may have an interest directly connected with the decision adopted by EASA are already in the procedure.

The same considerations apply to the ESAs', where the challengeable

[29] Regulation (EU) No 806/2014 of the European Parliament and of the Council 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 and amending Regulation (EU) No 1093/2010, in *OJ* L 225, 30.07.2014, p. 1 ff.

[30] 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 ff.

acts are the decisions referred to in Art. 17, 18, 19 and 72(3) of the Regulation (EU) n. 1093/2010, Regulation (EU) n. 1094/2010 and n. 1095/2010 (ESAs' Regulations)[31] and decisions adopted pursuant to the acts referred to in Art. 1(2) of the ESAs' Regulations and the applicants are natural or legal persons that are addressees of the decisions, or directly and individually concerned[32].

2.2 BoAs which provide for third parties intervention

The ERA, ECHA and ACER Rules of Procedure provide, instead, for the explicit possibility for third parties to join the proceedings before their BoA, even if with some differences.

Concerning ECHA, Art. 8(1) Regulation (EU) n. 771/2008 provides that: "[a]ny person establishing an interest in the result of the case submitted to the Board of Appeal may intervene in the proceedings before the Board of Appeal".

In addition to that, Art. 8 of Regulation (EU) n. 771/2008 does not provide for the distinction between privileged interveners and non-privileged, that is – instead – the rule before the CJUE. This has been clearly stated by the ECHA case law as well: "[t]he Board of Appeal observes that, for the purposes of intervening in proceedings before the Court of Justice of the European Union, the European Union Institutions and the Member States are considered to be privileged applicants and, as such, do not need to establish an interest in the result of the case in which they intervene. The distinction between privileged applicants and non-privileged applicants is not however provided for in the Board of Appeal's Rules of Procedure. As a result, the Board of Appeal considers that, regardless of who submitted an application to intervene, that application has to comply with the requirements of Art. 8 of the Rules of Procedure.

[31] Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC, in *OJ* L 331, 15.12.2010, p. 12; Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC, in *OJ* L 331, 15.12.2010, p. 48 ff.; Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC, in *OJ* L 331, 15.12.2010, p. 84 ff.

[32] For an overview see M. LAMANDINI, *The ESA's Board of Appeal as a Blueprint for the Quasi-Judicial Review of the European Financial Supervision*, in *European Company Law*, 2014, p. 290.

In particular, any applicant wishing to intervene in a case brought before the Board of Appeal has the obligation to establish that it has an interest in the result of the case"[33].

This rule has an important exception, as with the 2016 reform, the 'privileged' intervention of the State has been introduced for a specific case, modifying Art. 8(2) of Regulation (EU) n. 771/2008, that today states "[b]y derogation to the first paragraph, in cases relating to Title VI Chapter 2 of Regulation (EC) No 1907/2006, the Member State whose competent authority has carried out the substance evaluation may intervene without having to establish an interest in the result of that case", meaning that in all the other cases, Member States have to demonstrate their interest in the result of the case as all the private parties.

ECHA BoA requires to establish that the decision challenged before it has a direct impact on the situation of the intervener, failing that the application for intervene is rejected. According to the BoA case law such interest "must be defined in the light of the precise subject-matter of the dispute and be understood as meaning a direct, existing interest in the ruling on the forms of order sought and not as an interest in relation to the pleas in law and arguments put forward. The expression 'result' is to be understood as meaning the operative part of the final decision of the Board of Appeal"[34].

According to this notion of interest, simply participating in the procedure for the adoption of the contested decision is not sufficient to be granted the leave to intervene as a National Authority[35].

The BoA has a wide conception of the 'interest in the result of the case' as well. It has considered a sufficient interest to the purpose of the intervention the one of a Europe's leading alliance of animal protection organisations: "[a] representative association whose object is to protect its members' interests in cases raising questions of principle liable to affect those members may be granted leave to intervene. More particularly, a representative association may be granted leave to intervene in a case if it represents an appreciable number of those active in the field concerned,

[33] See decision of ECHA Board of Appeal of 13 October 2014 in case A-006-2014.

[34] Decision of ECHA Board of Appeal of 20 December 2017 in case A-005-2017.

[35] *Ibidem*: "The Board of Appeal considers that, by simply stating that it contributed to the decision-making leading to the adoption of the Contested Decision, the Applicant failed to establish an interest in the result of the case as opposed to an interest in the pleas in law put forward (see, by analogy, Court of Justice, case C-186/02 P, *Ramondín and Others* v *Commission*, ECLI:EU:C:2003:141, paras 14 to 17). In particular, the Applicant has not demonstrated that its legal position or economic situation may actually be directly affected by the operative part of the decision of the Board of Appeal (see, by analogy, General Court, December 14th 2010, case T-537/08, *Cixi Santai Chemical Fiber and Others* v *Council*, ECLI:EU:T:2010:514, paras 16 to 17)".

its objects include that of protecting its members' interests, the case may raise questions of principle capable of affecting those interests, and the interests of its members may therefore be affected to an appreciable extent by the judgment to be given (see, by analogy, for example, the Order of the President of the First Chamber of the General Court of 26 February 2007 in case T-125/03 Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v Commission, ECLI:EU:T:2007:57, paragraph 14)"[36]. Therefore, interveners before ECHA are public entities and Non-Governmental Organizations[37].

The interest involved may also be the counterparty's, e.g. the company that has made a joint registration[38].

The application stating the circumstances establishing the right to intervene shall be submitted within three weeks from the date of publication of the announcement of the appeal on the Agency's website: it is to be noted that in the previous version of the Rules of Procedure the time limit for the submission of applications to intervene was two weeks[39]. The extension has been made to facilitate third parties' participation.

The scope of the intervention shall be limited to supporting or opposing, in whole or in part, the form of remedy sought by one of the parties (Art. 8(3)), meaning that the third party has limited powers, just like before the CJEU.

Third parties' intervention is formulated in a similar way in the context of ACER: Art. 11 of its Rules of Procedure[40] provides that "[a]ny person establishing direct and existing interest in the result of the case submitted to the Board of Appeal may intervene in the proceedings before the Board of Appeal".

The ACER BoA is silent on the differences between privileged and non-privileged interveners.

As for ECHA, the intervention is only to support or oppose "in whole or in part, the form of remedy sought by one of the parties" (Art. 11(2)

[36] Decision of ECHA Board of Appeal of 2 June 2014 in case A-001-2014.

[37] See L. MUZI, *Who litigates before the Boards of Appeal?,* in M. CHAMON, A. VOLPATO, M. ELIANTONIO (eds.), *cit.*, p. 221.

[38] Decision of ECHA Board of Appeal of 20 December 2017 in case A-005-2017.

[39] See Commission implementing Regulation (EU) 2016/823 of 25 May 2016 amending Regulation (EC) No 771/2008 laying down the Rules of Organisation and Procedure of the Board of Appeal of the European Chemicals Agency, in *OJ* L 137, 26.05.2016, p. 4 ff.

[40] See rules of organisation and procedure of the Board of Appeal of the European Union Agency for the Cooperation of Energy Regulators https://www.acer.europa.eu/sites/default/files/documents/en/The_agency/Organisation/Board_of_Appeal/BoA_Public_Docs/ACER_BoA_Rules_of_Procedure_2023.pdf.

ACER Rules of Procedure). This wording has been read as giving the intervener greater power than before the CJEU, as Art. 40 of the Statute only allow to support (and not to oppose) one of the parties' conclusions[41].

ACER Rules of Procedure provides also that: "[i]t shall not confer the same procedural rights as those conferred on the parties and, in particular, shall not give rise to any right to request that a hearing be held" (Art. 11(2) ACER Rules of Procedure).

In addition to that, the time limit for the submission of a request of intervention is only limited to two weeks.

The ERA Rules of Procedure provides that "[t]he Board of Appeal may grant any person demonstrating a legitimate interest in the result of the proceedings, the right to intervene in the proceedings before it"[42]. The time limit for the submission of the appeal to intervene is only 10 working days following the publication of the announcement of the appeal on the website of the Agency. As for the ECHA and ACER "[t]he intervention shall be limited to supporting or opposing the remedy sought by one of the parties" (Art. 15(4)).

The limited number of cases decided by ERA does not allow the characterisation of this type of interest to be verified. For sure, the fact that the ERA Rules of Procedure request a 'legitimate interest' seems hinting towards a more administrative (rather than jurisdictional) connotation of the third parties' intervention before ERA BoA.

3. Do we really need a right of intervention before the BoAs?

The variety of possibilities for third parties to intervene before the BoA is indicative of the hybrid nature of these bodies, which lie somewhere between administrative and judicial remedies[43].

The widespread absence of a rule granting general leave to intervene is evidence that the BoAs were originally set up as an administrative review body.

In appeal proceedings where there is no provision for third party intervention, third parties who may appear to have a countervailing

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41 See G. GRECO, *cit.*, p. 295.

42 Commission implementing Regulation (EU) n. 2018/867 of 13 June 2018 laying down the Rules of Procedure of the Board(s) of Appeal of the European Union Agency for Railways, in *OJ* L 149, 14.06.2018, p. 3 ff.

43 See J. ALBERTI, *Le 'attrici non protagoniste' delle riforme dello Statuto: le commissioni di ricorso delle agenzie dell'Unione europea*, in C. AMALFITANO, M. CONDINANZI(eds.), *Il giudice dell'Unione europea alla ricerca di un assetto efficiente e (in)stabile: dall'incremento della composizione alla modifica delle competenze*, Milan, 2022, p. 147 and ID., *The position of the Boards of Appeal: Between Functional Continuity and Independence*, in M. CHAMON, A. VOLPATO, M. ELIANTONIO (eds), *cit.,* p. 248.

interest tend to be already involved in the proceedings before the Office. If they have a direct interest affected by the decision of the BoAs, they can also intervene before the General Court under Art. 40 of the Statute.

Where the right to intervene is expressly provided for, it is based on a model that aims to identify all third parties that have a direct or 'legitimate' interest in the outcome of the case.

Given the nature of typical BoAs litigation, which is aimed at administrative review of the Office's decision, it can be concluded that, as long as third parties directly affected by the Office's decision can intervene in the Office proceedings, there is no need to provide for third party intervention before the BoA.

But is it sufficient to have the possibility to join the 'administrative' stage of the procedure? If the BoAs are only a further step in a non-judicial context, in a unitary conception of the Office and its BoA, the answer is affirmative, and we may assume that compliance with Art. 41 of the CFREU is fulfilled. If, on the other hand, we consider that the model of the BoAs is closer to the judicial than to the administrative character, we should insist on a proper right of intervention for third parties who could prove that they have a direct interest in the outcome of the case, in accordance with Art. 40 of the Statute, in order to comply with the fair trial standards of Art. 47 of the CFREU[44].

In any case, it could be useful to give the BoAs the possibility to acquire the contribution offered by third parties that act in collective or general interest, at least as *amici curiae*. Even without conferring a proper intervention right, it could be provided for the possibility for these subjects to deposit a written brief, to give data and information to the BoAs. Any contribution from the outside could represent an enrichment without interfering with the timing or the procedure of the BoAs.

[44] On the relationship between Art. 47 CFREU to the BoAs see G. GRECO, *EUIPO Boards of Appeal in the Light of the Principle of Fair Trial*, in *European Public Law*, 2022. p. 19; G. AGRATI, *Procedural Guarantees in the Litigation before the Boards of Appeal*, in this *Volume*, p. 65.