

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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RAMIFICATIONS OF THE *AQUIND* JUDGEMENTS FOR ‘NON-PERMANENT’ BOARDS OF APPEAL

*Le implicazioni della giurisprudenza Aquind
per le commissioni di ricorso ‘non permanenti’*

*Les conséquences de la jurisprudence Aquind
pour les chambres de recours ‘non permanentes’*

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1. Introduction

Currently there are approximately 8 EU Boards of Appeal affiliated to separate EU Agencies (BoAs)¹. Of these, 6 are so-called ‘non-permanent’ Boards of Appeal, and 2 so-called ‘permanent’ Boards of Appeal². The majority of the EU Boards of Appeal are therefore non-permanent Boards of Appeal. Despite this, academic and legal debate surrounding Boards of Appeal is often dominated by a focus on the so-

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¹ These include: (i) EUIPO Boards of Appeal; (ii) ACER Board of Appeal; (iii) ECHA Board of Appeal; (iv) EASA Board of Appeal; (v) ERA Board of Appeal; (vi) CPVO Board of Appeal; (vii) the Joint Board of Appeal of the ESAs; (viii) the Appeal Panel of the SRB.

² The permanent Boards of Appeal being: (i) the EUIPO Boards of Appeal; and (ii) the ECHA Board of Appeal.

called ‘permanent’ Boards of Appeal. Debate surrounding the non-permanent Boards of Appeal can be more limited.

The *Aquind* Judgments are important for all Boards of Appeal. However, the *Aquind* Judgments may be of most importance, and have the most significant ramifications, for the so-called ‘non-permanent’ Boards of Appeal. This article focuses on the ramifications of the *Aquind* Judgments on non-permanent Boards of Appeal, in particular the challenges facing non-permanent Boards of Appeal in the wake of those Judgments.

2. ‘Permanent’ vs ‘Non-permanent’ Boards of Appeal

Labels are often unhelpful and can create misunderstandings. Dividing EU Boards of Appeal into permanent and non-permanent Boards of Appeal is, itself, perhaps not useful. It may, for example, give the impression that a Board of Appeal can only operate on a permanent or non-permanent basis, when, in reality, this is not per se the case. A Board of Appeal can operate on ‘semi-permanent’ basis where, for example, at least one of the BoA members work full-time³.

Nonetheless, the general current practice is to categorise a Board of Appeal as either having a permanent structure (i.e. as a ‘permanent’ Board of Appeal), or not (i.e. as a ‘non-permanent’ Board of Appeal).

A permanent Board of Appeal is, generally speaking, a Board of Appeal where everyone of its members⁴ is employed by the Agency on a full-time basis⁵ and where it has support staff working in the registry and elsewhere, also working on a full-time basis. The EUIPO Boards of Appeal are therefore a permanent Board of Appeal – employing approximately 160 people on a full-time basis⁶. The ECHA Board of Appeal is also therefore a permanent Board of Appeal – employing approximately 12 people on a full-time basis⁷.

³ Where, for example, the BoA chairperson is employed on a full-time basis.

⁴ As opposed to alternate members.

⁵ The Agencies have also decided to appoint individuals to work in support functions (such as in the registry, or as researchers etc) on a full time or permanent basis.

⁶ This number includes: 1 President of the EUIPO BoAs; 4 chairpersons of the EUIPO BoAs; 15 members of the EUIPO BoAs; legal assistants; administrative assistance and other persons (including seconded national experts, trainees and interims etc). It also includes: those individuals working at EUIPO BoA registry (currently approximately 19 persons); those working in the EUIPO BoA president’s cabinet (currently approximately 19 persons); and those working within the EUIPO BoA KIS (currently approximately 12 persons).

⁷ This number includes: chairperson, the legally qualified member, the scientifically qualified member, the registrar, the 4 legal advisors, the 1 scientific advisor, and the 3

In contrast, a non-permanent Board of Appeal is, generally speaking, a Board of Appeal where its affiliated Agency has taken the view that neither the chairperson, nor any member of the Board of Appeal, should be employed on a full-time basis, and which is not supported with any full-time assistance. As such, in reality, non-permanent Boards of Appeal essentially do not exist at all, unless a Board of Appeal is convened to decide a specific appeal case. When convened to decide an appeal case, the Board of Appeal is then generally restricted in its ability to operate and function, confined to solely and only deciding the appeal case in question. Non-permanent BoAs are, therefore, not generally able to operate independently from the Agency, by taking decisions on their own general affairs. They generally cannot, for example, take decisions on: (i) how the Board of Appeal itself should operate generally (e.g. how the BoA should interact with other Agency and outside bodies, how the BoA budget is decided and allocated, how staff are appointed, whether BoA members receive training, whether the BoA is involved cases before the EU Courts, etc); (ii) how the BoA itself processes appeal cases (e.g. what its Rules of Procedure should be); (iii) what measures are put in place to ensure BoA members adhere to EU law (including requirements to ensure deliberations are secret, compliance with Regulation (EU) n. 2016/679, etc); and (iv) how BoA registry should operate and whether it should report to the BoA or the Agency. Instead, these are decisions taken by the Agencies themselves.

Why some Boards of Appeal currently find themselves operating as non-permanent Boards of Appeal, rather than permanent Boards of Appeal, or vice-versa – is an interesting question.

In the case of the EUIPO Boards of Appeal, those BoAs currently receive more than 2.500 appeal cases per year⁸. This number is approximately 25 times more cases than all the other Boards of Appeal put together. It would, of course, be currently impossible to operate the EUIPO BoAs using any other structure than a permanent one⁹.

In the case of the ECHA Board of Appeal, in 2007 when the ECHA Board of Appeal was initially established, ECHA¹⁰ estimated that there would be a very significant number of appeal cases¹¹. The Board of Appeal

legal/administrative assistants.

⁸ In 2021, the number of appeal cases filed before the EUIPO BoAs was approximately 2,231. In 2022, the number of appeal cases filed before the EUIPO BoAs was approximately 2,536. In 2023, the number of appeal cases filed before the EUIPO BoAs was approximately 2,535.

⁹ Although with the advent of artificial intelligence, this could be an open question.

¹⁰ Together with the European Commission.

¹¹ In the 2007, the ECHA Staff Model document set out the estimated number of appeal cases which the ECHA Board of Appeal would receive. These estimations

was therefore initially established with a permanent structure to address the predicted wave of appeal cases. In reality, the predicted number of appeal cases never materialised¹². Its permanent structure today, could therefore be regarded as a result of historic circumstance, more due to accident than by design, but this would not be correct. Although the number of appeal cases has not materialised, the impact, complexity and importance of the appeal cases has necessitated its permanent organisational model.

At the same time, some of the non-permanent Boards of Appeal often deal with a comparable number of appeal cases, sometimes receiving more appeal cases, than Boards of Appeal with permanent structure. Moreover, the appeal cases dealt with by the non-permanent Boards of Appeal are in no way less complex than those dealt with by the permanent Boards of Appeal, where, for example, written legal and technical submissions can be thousands of pages in length. In many situations, appeal cases dealt with by non-permanent BoAs concern issues of high financial value – exceeding the financial value of appeal cases dealt with by permanent BoAs.

3. Fundamental legal duty of all EU Boards of Appeal

There is increasing legal consensus on the fundamental role and duties of all Boards of Appeal. All EU Boards of Appeal must decide cases independently and impartially. When deciding cases, all EU Boards of Appeal must conduct a review of the facts and law of a sufficient legal standard. That is to say, the quality of the BoA review (i.e. the nature, standard and intensity of the BoA review) must be sufficiently high and thorough, to fulfil the legal requirements. Given the legal consensus on these points, it would seem to naturally follow that EU Boards of Appeal should be put into a position where they are able to function independently so as to decide appeal cases in an independent and impartial manner. It would also seem to follow, that EU Boards of Appeal should be given the resources (time, personnel, finances, etc) to allow them to carry out reviews of sufficient legal quality.

It is in this context that non-permanent Boards of Appeal, and their respective Agencies, should likely consider the *Aquind* Judgments. More

predicted that, for example, in 2010 the ECHA BoA would receive more than 500 appeal cases, and that in 2011, 2012, 2013 the ECHA BoA would receive approximately 200 appeal cases in each of these years.

¹² In reality, the ECHA BoA has only ever received a significantly lower overall number than initially expected. In 2010, for example, there was approximately 1 case filed. In 2011, 2012 and 2013 the ECHA BoA received, in total, less than 50 appeal cases.

specifically, the *Aquind* Judgments require non-permanent Boards of Appeal to consider whether they are able to fulfil their fundamental legal role and discharge their onerous legal duties – given the organisational and administrative arrangements that EU Agencies have put in place. Or whether, alternatively, the legal requirements are now so high and onerous that there is now a mismatch between what is legally expected of non-permanent Boards of Appeal, and what they can reasonably deliver in reality – given the administrative and operational arrangements their Agencies have put in place.

4. Disconnect between non-permanent Boards of Appeal and outside bodies/institutions/courts

Non-permanent Boards of Appeal, like permanent Boards of Appeal, now form part of the EU legal justice system¹³. Appellants, and the public at large, therefore, rightly expect and depend on EU Boards of Appeal to deliver the rule of law. However, there is, generally, a significant disconnect between non-permanent Boards of Appeal and other parts of the EU justice system – particularly the Courts. Currently, there is no independent auditor or review committee of EU Boards of Appeal to ensure they are able to function independently. The general understanding of how EU Boards of Appeal in general operate can be limited. This disconnect can be particularly challenging for non-permanent Boards of Appeal. Communications between Boards of Appeal and EU Institutions (such as the Commission and Courts) is generally between permanent Boards of Appeal and those bodies – not involving direct engagement with non-permanent Boards of Appeal. Where EU Institutions engage with Agencies on Board of Appeal issues, they most often engage with the registry of Boards of Appeal – not non-permanent Boards of Appeal themselves.

One particular problem for non-permanent Boards of Appeal is the defence of their decisions before the EU Courts. For permanent Boards of Appeal, where their decisions are challenged before the EU Courts, their Agencies generally involve the permanent Boards of Appeal in those cases. This is often not the case for non-permanent Boards of Appeal. Instead, for many non-permanent Boards of Appeal, where their decisions are challenged before the EU Courts, their respective Agencies generally do not involve the Board of Appeal. This means that the interaction

¹³ Having, for example, been included in Art. 58a of the Statute of the Court of Justice of the European Union (Regulation (EU, Euratom) n. 2019/629 of the European Parliament and of the Council of 17 April 2019, amending Protocol N. 3 on the Statute of the CJEU, in *OJ L* 111, 25.04.2019, p. 1 ff.).

between non-permanent BoA and EU Courts – concerning their very own BoA decisions – is generally non-existent. It also means that the non-permanent BoA decisions are particularly vulnerable to being undermined, as their defence before the EU Courts is often left to individuals or bodies who do not agree with the BoA decision and have no vested interest in upholding them per se.

5. Non-permanent Boards of Appeal: operational arrangements

The disconnect between the outside bodies and persons (including the EU Judiciary) and with members of non-permanent Boards of Appeal can be so stark as to mean the fundamental facts and challenges faced by non-permanent Boards of Appeal is not clearly understood and, indeed, misunderstood. Non-permanent Boards of Appeal are regarded as operating in the same way as permanent Boards of Appeal. Outside bodies and persons may labour under the misconception that, for example non-permanent BoA members are: employed on a full-time basis; remunerated for all their work; protected in the discharge of their duties by the EU Staff Regulations or some other legal measures. However, this is not the case in reality. Outside bodies and persons may believe that the administrative and operational arrangements in place – dictating how a Board of Appeal operates and functions in reality and whether it operates with functional independence – have been put in place by the Board of Appeal itself. However, again, this is generally not the case.

6. *Aquind* judgements

The *Aquind* Judgments follow the *BASF* and *Germany* Judgments and, before that, the *Ralf Schröder* Judgments¹⁴. Indeed, the *Ralf Schröder* Judgments are, perhaps, the starting point in understanding the evolution of what EU Boards of Appeal are, and what they are legally required to do, when deciding appeal cases.

What the *Aquind*, *BASF*, and *Germany* Judgments serve to illustrate, perhaps above all else, is that the review that Boards of Appeal must carry out when deciding appeal cases is not the same as the examination conducted by Courts. Boards of Appeal cannot generally conduct the

¹⁴ See General Court, September 20th 2019, case T-125/17, *BASF Grenzach v ECHA*, ECLI:EU:T:2019:638; General Court, September 20th 2019, case T-755/17, *Germany v ECHA*, ECLI:EU:T:2019:647; General Court, September 18th 2012, joined cases T-133/08, T-134/08, T-177/08 and T-242/09, *Ralf Schröder v CPVO*, ECLI:EU:T:2012:430, paras 137 and 190 and Court of Justice, May 21st 2015, case C-546/12 P, *Ralf Schröder v CPVO*, ECLI:EU:C:2015:332, para 73.

same assessment as the Courts directly applying the same legal tests, and assess the facts and evidence in the same way as the Courts. Instead, Boards of Appeal have been endowed with specific discretionary powers, technical expertise, and review functions and must exercise those powers of review. This means that Boards of Appeal must, in principle, go further, in certain assessments, in their review of the facts and evidence than the courts, and also apply what are, effectively, more stringent tests in determining whether an Agency decision should be vitiated. In short, Boards of Appeal must conduct 'deep dive', in-depth assessments, particularly in certain areas of Agency decision-making – where the assessments are deeper and more in-depth than those generally expected of the Courts.

In the *Aquind* Judgments, the EU Courts compared a non-permanent Board of Appeal with a permanent Board of Appeal. Indeed, the EU Courts went one step further than that, and seemingly supported the operational and administrative arrangements in place *vis-à-vis* the non-permanent BoA on the basis that the permanent BoA received a *significantly higher* number of cases than the non-permanent BoA¹⁵. This is likely of particular concern to non-permanent Boards of Appeal.

It is clear that one of the permanent Boards of Appeal, specifically the EUIPO Boards of Appeal, receive a significantly higher number of appeal cases as compared to any other EU Board of Appeal. Indeed, it could be argued that the EUIPO Boards of Appeal receive a significantly higher number of appeal cases as compared to all the other Boards of Appeal put together. However, it is difficult to see that the ECHA BoA receives a 'significantly higher' number of appeal cases as compared to some of the non-permanent BoAs, such as, for example, the CPVO BoA and ACER BoA. ECHA BoA members themselves have stated that it is the complexity and importance of the appeal cases brought before the ECHA Board of Appeal which justify its permanent structure, not, per se, the number of cases it receives¹⁶. According to the current records, in 2023 the CPVO BoA (a non-permanent BoA) received more appeal cases than the ECHA BoA (a permanent BoA)¹⁷. For the EU Courts to seemingly take the view that the permanent structure of the ECHA BoA is justified on the basis that it receives a 'significantly higher' number of appeal cases (and to apparently imply that other BoAs should remain non-permanent as they, according to the Courts, do not) – is therefore problematic.

¹⁵ General Court, November 18th 2020, case T-735/18, *Aquind Ltd v ACER*, ECLI:EU:T:2020:542, para 66.

¹⁶ See in this *Volume A*. BUCHET, *The Board of Appeal of the European Chemical Agency. Structure and Power of Review*, p. 221.

¹⁷ See IAAPN 2023 Scoreboard.

7. Securing functional independence

Permanent Boards of Appeal have been better able, than their non-permanent counterparts, to secure administrative and operational arrangements with their respective Agencies, which ensure they are able to function independently. This should not be regarded as coincidental. For non-permanent Boards of Appeal, there is often little clarity on the competences and responsibilities of the Board of Appeal as opposed to the Agency. To minimise costs, Agencies can be inclined not to involve non-permanent BoAs even in BoA appeal cases themselves – but to retain operational control of the BoA and the BoA appeal cases. Agencies with non-permanent BoAs may treat members of their BoAs as outside experts, as opposed to Agency staff. It may be challenging for members of non-permanent BoAs to establish and maintain functional independence from their respective Agencies, in an environment where they are not informed of what is going on by Agency bodies which do not report to the BoA but the Agency – such as the BoA registries.

8. The potential gap between what BoAs must legally do and what they are able to do in reality

Fundamentally, Agencies decide how their Boards of Appeal are allowed to function and operate in reality. Agencies decide what operational and administrative arrangements are in place which Boards of Appeal must to adhere to in practice. Where the EU Courts hand down Judgments which unambiguously clarify and set out the very significant and onerous legal duties incumbent on Boards of Appeal, including the quality of the reviews which they are required to conduct, it is still, in reality, for the Agencies to decide whether the Boards of Appeal will be put into a position to comply with those legal duties in practice. Where EU Courts go one step further, and do not merely clarify the very onerous legal duties which Boards of Appeal must comply with – but start to seemingly support or legitimise the non-permanent nature of a particular BoA (and/or the administrative arrangements in place), it may tip the balance against non-permanent BoAs: requiring them to adhere to onerous legal requirements without non-permanent BoAs being able to actually achieve compliance with those onerous legal requirements due to the operational and administrative arrangements put in place by their Agencies. In other words, it risks pushing non-permanent BoAs into an impossible situation, where, on the one hand, they are legally required to conducted deep-dive assessments (even more in-depth than those carried out by EU Court in certain instances), and where, on the other hand, the

non-permanent BoAs also are required to retain, in full, their non-permanent status and operate under exactly the same administrative arrangements – where it is those very administrative arrangements which prevent the BoAs from conducting the independent and in-depth assessments required by law.

9. Harmonised approach?

They should be put into a position where they are able to decide cases independently and impartially, and where they are able to carry out thorough and deep-dive reviews consistent with the *Aquind* Judgments. The question is: how should Boards of Appeal achieve this in practice?

Non-permanent Boards of Appeal are comprised of individuals working geographically outside of their Agencies and who live and work throughout the EU. Given the absence of a permanent physical seat, it should raise fewer problems for non-permanent BoAs to join together and pool resources so that, for example, non-permanent Boards of Appeal: (i) used one single, central registry; (ii) used a common IT system for the submission of documents; (iii) used the same physical premises for oral hearings and ADR; (iv) used the same translators; (v) used the same website/communications tools/summary of cases/announcement of cases; (vi) developed common tools such as common Rules of Procedure, common template documents, (vii) developed common employment and financial agreements which are kept up-to-date so that BoA members are not left out-of-pocket for expenses incurred in their work, and remunerated fairly for all the work they do. This type of harmonised approach would likely ultimately save costs and enable more consistency amongst non-permanent Board of Appeals in their decision-making procedures. It would also likely significantly assist non-permanent Boards of Appeal, who generally find it more difficult to secure operational and administrative arrangements with their Agencies, ensuring they are able to operate with functional independence.

10. Future

The *Aquind* Judgment clearly illustrates the heavy legal duties now on Boards of Appeal to carry out in-depth, deep-dive assessments into Agency decisions. The requirements for Boards of Appeal to carry out these assessments, and to do so independently and impartially, is therefore in no doubt. This brings with it, particular concerns for non-permanent Boards of Appeal. Can they actually do these types of assessment in reality? Do they have the resources (time, finance, personnel, etc)? Can

they do these types of assessment in reality – in a truly independent and impartial way?

One of the particular concerns for non-permanent Boards of Appeal is that their members are not, per se, Agency or EU staff – covered by the EU Staff Regulation¹⁸. Therefore, there is nothing in place, per se, to stop vexatious or other litigants from taking action against individual BoA members if they disagree, or take issue with, BoA decisions or actions. They may, for example, sue BoA members in their personal names or submit requests for BoA members to be removed from BAR lists – preventing BoA members from practising law in the future. In other words, when lawfully discharging their BoA duties, non-permanent BoA members may be subjected to legal and administrative action, in their personal capacities (and face the risk of personal financial loss and other personal damage), which judges and/or EU Agency staff – would not. It is therefore particularly important for non-permanent members to find a way of ensuring their BoA, and they themselves, are able to comply with the onerous legal duties now clearly evident from the *Aquind* Judgments.

In the absence of any harmonised approach, each Board of Appeal will need to work out its own way of trying to ensure its Agency has in place operational and administrative arrangements which secure a degree of functional independence for the BoA – thereby allowing it decide cases independently. Non-permanent Boards of Appeal have begun to work together to try and agree recommendations and best practices in this area. Non permanent Boards of Appeal (and I in particular) have, for example, established a Working Group within the EU BoA Inter-Agency Appeal Proceedings Network (IAAPN). However, progress on these issues has been modest. Whereas non-permanent BoAs have worked extensively to draft detailed documents and agree recommendations and best practices – the name of the Working Group still has not been resolved as between permanent BOAs and non-permanent BoAs. The challenges faced by permanent Boards of Appeal are generally not the same as the challenges faced by non-permanent Boards of Appeal. IAAPN BoA structures in place are generally geared towards the needs of the permanent Boards of Appeal, not the non-permanent Boards of Appeal. Communications between Boards of Appeal (as single group of entities) and EU Institutions continues to be between permanent Boards of Appeal, where non-permanent Boards of Appeal cannot directly contribute to discussions. It may therefore be necessary for non-permanent Boards of Appeal to

¹⁸ Regulation (EEC) n. 31, laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community, in *OJ L* 45, 14.06.1962, p. 1385.

consider other alternative routes and forms of collaboration to address the specific challenges relevant to them.

In any event, the ability for all Boards of Appeal, including non-permanent BoAs to decide cases independently and in compliance with EU law (including the *Aquind* Judgments) is important. It is important for the members of the Boards of Appeal themselves, as, currently, they are personally exposed. It is important for Boards of Appeal and parties in BoA appeal proceedings (including Agencies). But is it perhaps of most important for the EU justice system itself. Where the first decision-making body in the EU justice system is unable to independently deliver the rule of law – it erodes confidence in that system. It is also problematic for the EU justice system (particularly the Courts) to require EU Member States to respect EU requirements obliging them to ensure national decision-making bodies are essentially independent¹⁹, when it may not be possible to conclude that parts of EU justice system itself operate in this way. It is therefore incumbent on the EU justice system (including the EU Courts) and the EU Institutions, to have in place, amongst other things: (i) means of communicating directly with non-permanent BoAs, (ii) measures to ensure the independence on non-permanent BoAs is independently monitored and guaranteed, and (iii) measures in place to ensure non-permanent BoAs have the resources they need (personnel, financial, etc) to discharge their legal duties in practice. It is likely that only with these measures in place that non-permanent BoAs will be able to fully address the challenges they now face in the wake of the *Aquind* Judgment.

¹⁹ See, for example, Article 9a of Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (EIA Directive), in *OJ L* 26, 28.01.2012, p. 1.