

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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Special Volume of the
*Rivista del Contenzioso Europeo | Revue du Contentieux Européen |
Review of European Litigation*

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THE BOARD OF APPEAL OF THE EUROPEAN CHEMICALS AGENCY. STRUCTURE AND POWER OF REVIEW

*La commissione di ricorso dell'Agenzia europea per le sostanze chimiche.
Struttura e poteri in fase di scrutinio*

*La chambre de recours de l'Agence européenne des substances chimiques.
Structure et pouvoirs de contrôle*

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1. Introduction

Without having the intention to take the opposite view of the opinion recently expressed by Advocate General Campos Sánchez-Bordona in a landmark case¹, it is important to underline at the outset that the common characteristics shared by all the EU Agencies' appeal bodies cannot entirely eclipse the existence of actual differences in their structure and functioning. Therefore, before examining what standard of review is applied by the Board of Appeal of the European Chemicals Agency (ECHA), it appears necessary to understand how it works and over what types of decisions it exercises its power of review.

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¹ Opinion of Advocate General Campos Sánchez-Bordona, September 15th 2022, case C-46/21 P, *ACER v Aquind Ltd*, ECLI:EU:C:2022:695.

2. Structure

2.1. Legislative and regulatory framework

The ECHA has been founded by Regulation n. 1907/2006 (REACH Regulation)². Under Art. 76(1)(h) of the REACH Regulation, the Board of Appeal is one of the bodies composing ECHA. The establishment of the Board of Appeal forms part of an overall approach, adopted by the EU legislature since several years, to provide EU Agencies with review bodies where they have been given decision-making powers on complex technical or scientific issues capable of directly affecting the legal situation of the parties concerned³.

The provisions regarding the Board of Appeal and its powers are not very much developed in the REACH Regulation. Those provisions are implemented in a more detailed manner in two separate instruments: the Commission Regulation n. 1238/2007 (Regulation on qualifications)⁴, dealing with the members' regime, and the Commission Regulation n. 771/2008 (Rules of Procedure)⁵, concerning the organisation and functioning of the Board.

2.2. Main characteristics

The Board of Appeal is an internal independent body of ECHA, composed of three members, two of whom are legally qualified, and one of whom is technically qualified. The REACH Regulation and the Rules of Procedure ensure that the three members are independent and impartial⁶. The Regulation on qualifications specifies that chairpersons and

² 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, in *OJ L* 396, 30.12.2006, p. 1 ff.

³ Court of Justice, March 9th 2023, case C-46/21 P, *ACER v Aquind Ltd*, ECLI:EU:C:2023:182, para 56.

⁴ Commission Regulation (EC) n. 1238/2007 of 23 October 2007 laying down rules on the qualifications of the members of the Board of Appeal of the European Chemicals Agency, in *OJ L* 280, 24.10.2007, p. 10.

⁵ 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, 02.08.2008, p. 5 ff. The Rules of Procedure have lastly been amended by Commission implementing Regulation (EU) n. 2016/823 of 25 May 2016 in *OJ L* 137, 26.05.2016, p. 4 ff.

⁶ See Articles 89 to 94 of the 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

legally qualified members must be graduates in law and have recognised experience in EU law. Technically qualified members must hold a university degree or an equivalent qualification and have substantial professional experience in hazard assessment, exposure assessment or risk management with regard to human health or environment risks of chemical substances or in related fields.

The Board of Appeal is a permanent structure within the Agency⁷. The three full-time members have alternates, who replace them in their absence. There are currently nine alternates (one alternate chairperson, three alternate technically qualified members and five alternate legally qualified members).

All members – and their alternates – are appointed by the Management Board of ECHA from a list of suitable candidates prepared by the Commission, following public calls for expression of interest⁸, for a five-year term, renewable once for an identical period⁹. The full-time members are staff members of the Agency, appointed as temporary agents, and are subject to the Staff Regulations of officials and the conditions of employment of other servants of the European Union¹⁰.

The alternate members are not staff members of the Agency. When working and deciding on appeals lodged before the Board of Appeal, the alternate members must respect a certain number of rules that are enumerated and described in a Code of conduct¹¹. They receive an appropriate level of remuneration for the services they provide when designated to act in appeal cases¹².

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* 396, 30.12.2006, p. 1-849 (REACH Regulation) and Articles 1 to 3 of the Rules of Procedure (available at: https://echa.europa.eu/documents/10162/7614610/FINAL_MB_33_2020_Revised_MB_Rules_of_Procedure_MB58.pdf/eccf6f4b-b81f-ae6a-02b0-f77d2794714c?t=1593783174334).

⁷ See Recital 4 of Commission implementing Regulation (EU) n. 2016/823 amending the Rules of Procedure, *cit.*

⁸ The latest calls are available here for [chairperson](#), [technically qualified member](#) and [legally qualified member](#) respectively.

⁹ Art. 89 and 90 of the REACH Regulation; see also the Regulation on qualifications.

¹⁰ See the last consolidated version of the staff Regulations, published in *OJ L* of 1 January 2024. See in particular Title II of the conditions of employment, concerning temporary staff (p. 190).

¹¹ The Code is available at this link: https://echa.europa.eu/documents/10162/17085/code_of_conduct_en.pdf/8bad6751-8dcb-4c87-a049-fd5729d680fa.

¹² Decision of the Management Board of ECHA on the remuneration, available at this link:

As they are not part of the ECHA staff, the alternate members of the Board of Appeal are not as such covered by the seventh Protocol on the privileges and immunities of the European Union¹³, although they are performing tasks of a crucial importance in adopting decisions that are decisions of an Agency of the European Union. Some of the alternate members are staff members of other organs or institutions of the European Union and are therefore working under the umbrella of the seventh Protocol¹⁴, but this is not a pre-condition to become an alternate member, and many of them do not fall within the scope of the protections offered in particular by Articles 11, 12 and 13 of that Protocol¹⁵.

The full-time members conclude contracts of employment with the Agency in accordance with the Staff Regulations (Art. 2(f)). They are therefore bound by the Staff Regulations, and the measures adopted by the Management Board of the Agency, in agreement with the Commission, to implement the rules contained in the Staff Regulations.

However, certain special rules apply to the members of the Board of Appeal.

In the course of their five-year mandate, members may be removed from office only by the Commission – after obtaining the opinion of the Management Board – and only on serious grounds¹⁶. Such a situation has never occurred so far.

Furthermore, administrative arrangements, signed by the Executive Director of ECHA and the chairperson of the Board of Appeal, ensure the independence of the members of the Board of Appeal¹⁷. For example,

https://echa.europa.eu/documents/10162/2200121/mb_40_2020_remuneration_boa_aam_en.pdf/27e474f2-fab2-f016-3a60-4c63e824247c.

¹³ Attached to the Treaties, and published in its latest version in *OJ C* 202, 07.06.2016, p. 1 ff.

¹⁴ When an alternate member is a member of the EU civil service, and is therefore subject to the EU Staff Regulations, that member does not perceive any additional remuneration for the tasks performed for the Board of Appeal of ECHA. In practice, ECHA concludes a service level agreement with the EU organ or institution that employs that alternate member, notably to include the tasks of alternate member of the Board of Appeal of ECHA in the job objectives defined by the organ or institution of origin. This ensures that the alternate member is available more easily when required.

¹⁵ In the past, some alternate members have expressed concerns in this respect, notably as regards the absence of immunity from legal proceedings in respect of acts performed by them in their official capacity, including their words spoken or written, and as regards the taxation of their income by National Authorities.

¹⁶ Art. 90(4) of the REACH Regulation. A decision to such effect can be taken by the Commission, after obtaining the opinion of the Management Board.

¹⁷ Available at this link: https://echa.europa.eu/documents/10162/17085/boa_administrative_arrangements_en.pdf/1e59d915-e2f0-403c-87b9-badef483f56.

full-time members are subject to annual performance appraisal and contract renewal in accordance with the usual procedures for ECHA staff. However, due to their independent position, the Executive Director is not involved in the appraisal of their tasks or the renewal of their contract, which are decided only by the Management Board. Other specific rules apply to the potential reclassification of a member to a higher grade, as a promotion cannot be decided in a process where the Executive Director of the Agency would have a predominant role.

Due to their independence, members cannot and should not be held responsible for their opinions and the content of their deliberations.

Since 2009, a total of nine individuals have been appointed as full-time members of the Board of Appeal in various roles (2 chairpersons, 3 technically qualified members, 4 legally qualified members).

2.3. Organisation

Each appeal is decided by three members of the Board of Appeal, where at least one member is legally qualified and at least one member is technically qualified¹⁸. Each member is independent from the others and there is no hierarchical relationship among them. Equal voting rights are explicitly established by law¹⁹.

Any new appeal case is automatically, and by default, allocated to the three full-time members. Should one of the full-time members have a conflict of interest or be unavailable for any reason (for example, due to an extreme workload or to health issues), he or she may ask the chairperson to replace him or her and designate an alternate in the pending case²⁰.

The possibility to have recourse to additional members is also provided in the REACH Regulation and in the Rules of Procedure, in order to ensure that appeals can be processed at a satisfactory rate. This is to cover situations where there would be a need for a more structural reinforcement of the Board of Appeal, not to replace a member in one or several ongoing cases, but to allocate new cases to additional members, creating a kind of ‘second chamber’, because of a temporary or more long-lasting increase in the number of appeals filed. Such a decision is taken by the chairperson, after consultation of the Management Board²¹. This

¹⁸ Art.1(1), second sub paragraph, of the Rules of Procedure.

¹⁹ See Art. 89(5) and 90(2) of the REACH Regulation.

²⁰ Art. 90(5) to (7) of the REACH Regulation; Art. 2 and 3 of the Rules of Procedure.

²¹ Art. 89(3), second subparagraph, of the REACH Regulation; Art. 1(4) of the Rules of Procedure.

possibility has so far never been used by the Board of Appeal of ECHA, as the workload has been kept within manageable boundaries.

A registry is established under the auspices of the Board of Appeal²². The registry currently consists of a registrar (heading it), four legal advisors, one scientific advisor, and three administrative and legal assistants. They are tasked with supporting activities of the Board of Appeal.

In practice, the registry has a double function. On the one hand, it is responsible for managing and implementing different steps of the appeal procedure (e.g., public announcements, notifications, hearing organisation). Where the applicable rules and procedures so provide, the registry seeks instructions from the chairperson as regards procedural measures to be taken in a case. On the other hand, the legal and scientific advisors in the registry support the members of the Board of Appeal in their substantive work on appeals (e.g., research, memoranda, drafting decisions).

Since their amendment by the Commission in 2016, the Rules of Procedure provide that the registrar is appointed by the chairperson, who has managerial and organisational powers to give directions to the registrar on matters relating to the exercise of the functions of the Board of Appeal²³. This is also reflected in the Administrative Arrangements, which state that the registrar is the head of unit of the registry and reports to the chairperson. The Executive Director takes formally the relevant decisions and actions based on joint proposals from the chairperson and the director for resources who will ensure coherence with the general rules of the Agency²⁴.

2.4. Scope of competence

The REACH Regulation places many of the individual decisions adopted by ECHA under the competence of its Board of Appeal²⁵. Similarly, several decisions adopted by ECHA under the Biocidal Products Regulation (BPR Regulation)²⁶ fall within the remit of competence of the

²² Art. 5(1) of the Rules of Procedure.

²³ Art. 5(5) of the Rules of Procedure.

²⁴ Administrative Arrangements, p. 4-5.

²⁵ Art. 91(1) of the REACH Regulation. There are some exceptions, such as decisions on the verification of the declared company size of registrants, and related invoices, under Art. 13(4) of Commission Regulation (EC) n. 340/2008 of 16 April 2008 on the fees and charges payable to the European Chemicals Agency, in *OJ L 107*, 17.04.2008, p. 6 ff.

²⁶ Regulation (EU) n. 528/2012 of the European Parliament and of the Council of 22 May 2012 concerning the making available on the market and use of biocidal products,

Board of Appeal. It is not excluded that, in the future, ECHA will get more decision-making powers, allocated by new legislative instruments, which might then confer additional review powers on its Board of Appeal.

However, the Board of Appeal is not conceived as an internal review mechanism before which *any* decision taken by the Agency would be challenged; its scope of jurisdiction is limited and precisely described by the REACH Regulation. In fact, one could say that, in principle, all decisions of the Agency are directly challengeable before the EU Courts, under the conditions set out in the Treaties, except those that are explicitly listed in the REACH and BPR Regulations as falling within the remit of competence of the Board of Appeal²⁷. For those decisions, litigants must submit their appeals first to the Board of Appeal, which is not an alternative dispute resolution mechanism, but a mandatory procedural step before having the right to have recourse to the EU judicature. Decisions of the Board of Appeal can then be challenged before the General Court and, if permission is granted, the judgment of the General Court can be appealed to the Court of Justice²⁸.

The legislative history of the REACH Regulation suggests that the Board of Appeal was initially expected to deal with a large number of relatively straightforward cases every year²⁹. The cases before the Board of Appeal have turned out to be a small fraction of the expected number³⁰, but the impact, complexity and importance of each case has turned out to be considerably greater, both from a legal and scientific or technical point of view.

The REACH Regulation has put in place an extremely complex system of legal rules of various origins which mix and sometimes intermingle. The provisions of the main legislative instrument refer to long and dense technical annexes which themselves refer to binding test-methods, supplemented by non-binding guidance documents. The

in *OJ L* 167, 27.06.2012, p. 1 ff. See the list of decisions actionable before the Board of Appeal in Art. 77(1).

²⁷ The list of decisions that can be appealed before the Board of Appeal is subject to a strict interpretation. See General Court, May 8th 2018, case T-283/15, *Esso Raffinage*, ECLI:EU:T:2018:263, paras 33 to 37.

²⁸ See Art. 94 of the REACH Regulation and Art. 58a of the Statute of the Court of Justice.

²⁹ See for example Art. 88(2) and Art. 89(1) of the Commission's legislative proposal (COM(2003) 644 final): the appeal, together with the statement of the grounds thereof, was to be filed within 1 month of the notification of the Agency decision, and the Board of Appeal was supposed to examine whether the appeal is well-founded within 30 days of the appeal being filed.

³⁰ This is confirmed by the initial resource planning for the Board of Appeal and its registry, which has been prepared by the Commission at the time of the drafting of its legislative proposal.

interplay between those rules and guidelines appears to be a fertile source of litigation.

But appeals that are filed against Agency decisions and brought before the Board of Appeal raise questions which very often go beyond the framework of legal interpretation and relate to the relevance of the scientific choices which are made by ECHA in its decisions, particularly in the context of the evaluation of chemical substances. In assessing whether the Agency correctly took into consideration all the relevant circumstances of a case before exercising its power of discretion, the Board of Appeal must often verify, in light of the pleas and arguments submitted by the appellant, whether the decision being challenged is based on sufficient and correctly articulated scientific data. This work requires not only time and expertise, but also an acute understanding of the legal and scientific elements of the files³¹.

2.5. Procedure

The appeal procedure is modelled on the procedure for actions for annulment before the General Court. In principle, it consists of a written part and an oral part (hearing).

When an appeal case is filed, it is assigned to the three full-time members, except where there is a need to have recourse to alternate or additional members, as previously explained. One of the three members is designated as rapporteur by the chairperson, taking into consideration the need to ensure a balanced distribution of workload between members³². The rapporteur is closely involved in the management of the appeal procedure in that case and makes proposals to the other members as to any procedural steps to be carried out and prepares a draft of the final decision.

Each appeal case is also assigned to a legal advisor and a scientific advisor by the registrar. The advisors serve as a bridge between the Board of Appeal and the registry in each case. Both advisors support and advise the rapporteur for the case and the other members in any manner necessary.

³¹ For a more developed analysis of the case-law of the Board of Appeal, see A. FASEY, L. BOLZONELLO, *Administrative precedent and the application of the REACH Regulation - The Board of Appeal of the European Chemicals Agency at ten years*, in ICRL, 2019, p. 120 ff.

³² Art. 4 of the Rules of Procedure. The chairperson can also fulfil that function. In practice, the cases are generally divided in three equal portions, except where it is necessary to consider the complexity of certain types of cases, such as those related to substance evaluation.

In general, any decision that the Board of Appeal adopts during the appeal proceedings, such as an intervention decision, needs to be adopted by the three members taking part in that appeal case. However, in limited circumstances, where the Board of Appeal needs to adopt a procedural measure supporting the advancement of an appeal proceedings (e.g., extension of time limits, requesting observations from the parties), in case of absence of one member, the other two present members can decide on that measure.

In addition, under the REACH Regulation and the Rules of Procedure, the chairperson is also competent to adopt certain decisions on his or her own (decisions on the admissibility of an appeal, confidentiality requests, requests for extension of the defence and decisions to close an appeal following the withdrawal of an appeal).

After the hearing in each case – or, if there is no hearing, after the end of the written part of the procedure – the three members of the Board of Appeal deciding in that case meet to deliberate, that is to say to determine the outcome and content of the final decision. The legal and the scientific advisor who are assigned to that case are usually also invited to attend the deliberations.

Following the deliberations, the rapporteur, supported by the legal advisor and the scientific advisor, prepares a draft decision in accordance with the outcome decided collegially. The rapporteur shares this draft decision with the other two members, who provide written comments.

The remainder of the procedure is not firmly structured. The process of drafting, discussion and commenting continues until all members are satisfied with the decision (unanimity) or until it becomes clear that a vote is necessary (majority voting).

If a vote is necessary, the rapporteur votes first and the chairperson votes last, unless the rapporteur is also the chairperson who then votes last³³. Abstentions are not permitted³⁴. In line with practice of the EU Courts, dissenting votes or separate opinions, or even the fact that a vote took place, are not recorded in the decision nor made public by any other means. These elements are covered by the secrecy of deliberations. There is only one decision, the one adopted collegially by the Board of Appeal.

3. Standard of review

As it was the first time the Court of Justice was asked to rule on the standard of review applied by an EU Agency's Board of Appeal, the

³³ See Art. 20, first subparagraph of the Rules of Procedure.

³⁴ See Art. 19 and Art. 20 of the Rules of Procedure.

judgment delivered on 9 March 2023 in the *Aquind* case had a great impact and had been abundantly commented. The outcome was eagerly awaited in Helsinki by the ECHA legal community, not because it was going to address a new question, but because the Court of Justice was indirectly invited to confirm or overturn the position already taken by the General Court almost three years before as regards the Board of Appeal of ECHA. In other terms, the fate of the ECHA's appeal body was to be sealed in a case concerning the ACER's appeal body³⁵.

3.1. Prelude in Helsinki

In two important cases³⁶, the General Court was invited already in 2019 to draw the perimeter of the power of review of the Board of Appeal of ECHA. Does the Board of Appeal's review power involve an entire re-examination of the scientific assessments underlying the decision of the Agency that is challenged, in the light of the most relevant data and, where appropriate, data which become apparent during the appeal proceedings, as claimed by *BASF Grenzach* in the first case? On the contrary, taking a diametrically opposite view, is the Board of Appeal solely competent to review aspects other than the substantive assessments, namely in particular potential breaches of the Rules of Procedure, as argued by Germany in the second case? What are, in essence, the scope and intensity of the review that the Board of Appeal is required to carry out of ECHA decisions?

Both the *de novo* evaluation advocated by *BASF Grenzach* and the minimalist approach championed by Germany have been rejected by the General Court in the judgments delivered on 20 September 2019, which confirmed and validated the practice followed since several years by the Board of Appeal of ECHA.

The scope of the review

As regards the scope of review, the General Court first underlined that the procedure before the Board of Appeal of ECHA has an adversarial nature. Its subject is determined by the pleas put forward by the appellant in the context of the action before that Board. In the examination of the merits of such an action, that Board confines itself therefore to an examination of whether the pleas put forward by the

³⁵ In particular in view of the many comparisons made before the General Court and the Court of Justice between ACER and ECHA.

³⁶ General Court, September 20th 2018, case T-125/17, *BASF Grenzach v ECHA*, ECLI:EU:T:2019:638 and General Court, September 20th 2018, case T-755/17, *Federal Republic of Germany v ECHA*, ECLI:EU:T:2019:647.

appellant are capable of demonstrating that the decision contested before it is vitiated by an error, and the pleas which must be raised of its own motion³⁷.

An action before the Board of Appeal against an ECHA decision may only seek to examine whether the evidence submitted by the appellant is capable of showing that that decision is vitiated by error. Therefore, in the context of such an action, the appellant may not confine itself to claiming that the result of the assessment on which that decision is based should have been different, but it must put forward arguments to show the existence of errors vitiating the scientific assessment on which the decision in question is based.

However, the Board of Appeal's competence to examine pleas seeking to demonstrate the existence of substantive errors vitiating an ECHA decision cannot be limited to the mere examination of procedural errors.

The members of the Board of Appeal are appointed on the basis of the experience and expertise they possess in the field of chemical safety, natural sciences or regulatory and judicial procedures. In accordance with the Rules of Procedure and the Regulation on Qualifications, at least one member is to be legally qualified and at least one member is to be technically qualified. The latter is to hold a university degree and to have substantial professional experience in the scientific fields that are relevant to assess the technical elements of the decisions actioned before the Board of Appeal. The Board of Appeal thus has the necessary expertise at its disposal to carry out itself assessments of scientific evidence. Its expertise seeks to ensure that a balanced assessment of both legal and technical aspects can be carried out.

A restrictive approach – as the one advocated by Germany before the General Court – would have the result that the Board of Appeal of ECHA could not fully perform its function, which is to limit litigation before the EU Courts, whilst guaranteeing a right to an effective remedy. As is apparent from the reform of the Statute of the Court of Justice³⁸, the introduction of rules concerning the admission of appeals in cases which have already been considered twice is based on the consideration that, in cases concerning decisions of the Board of Appeal of the ECHA, it is

³⁷ See, for an example of a public policy plea raised by the Board of Appeal of ECHA of its own motion: decision of ECHA Board of Appeal of 28 February 2023 in case A-013-2021, *Gruber Chem GmbH, Germany v ECHA*.

³⁸ Recital 4 of Regulation n. 2019/629 of the European Parliament and of the Council of 17 April 2019 amending Protocol n° 3 on the Statute of the Court of Justice of the European Union, in *OJ L 111*, 25.04.2019, p. 1 ff.

possible for them to be considered twice, namely initially by that Board and, subsequently, by the Court.

An approach in accordance with which the Board of Appeal would not be competent to examine pleas which seek to demonstrate the existence of substantive errors vitiating an ECHA decision would not be capable of ensuring an effective remedy for the purposes of Art. 47(1) of the Charter of Fundamental Rights of the European Union.

Where there is a right of appeal before the Board of Appeal, the EU Courts could only rule on an action for annulment of the decision of that Board. The initial decision of the Agency is not at issue before the EU Courts. An action for annulment of a Board of Appeal decision relates therefore to the lawfulness of such a decision. If adopted, the minimalist approach would have seriously affected the relevance of the right to appeal before the General Court.

Firstly, it would not be possible, before the General Court, to validly criticise the Board of Appeal for failing to examine pleas, the examination of which would lay outside its competence. Secondly, even assuming that the ECHA decision would be vitiated by a substantive error, such an error would not be capable of calling into question the lawfulness of the decision of the Board of Appeal at issue.

The intensity of the review

As regards the intensity of the review carried out by the Board of Appeal, the General Court first noted that the review carried out by the EU Courts is indeed limited where it involves the assessment of highly complex scientific and technical facts. Regarding such assessments, the EU Courts are limited to reviewing whether they are vitiated by a manifest error, a misuse of powers or whether the author of the decision clearly exceeded the limits of its discretion³⁹.

The General Court held that that case-law does not apply to the review carried out by the Board of Appeal of ECHA. From the qualifications that the REACH Regulation and its implementing rules require from the members of the Board of Appeal, it must be deduced that the legislature intended to provide that Board with the necessary expertise to allow it to itself carry out assessments of highly complex scientific facts.

Therefore, the review, by the Board of Appeal, of scientific assessments in an ECHA decision is not limited to verifying the existence

³⁹ See Court of Justice, July 21st 2011, case C-15/10, *Etimine SA v Secretary of State for Work and Pensions*, ECLI:EU:C:2011:504, para 60 and the case-law cited thereof.

of manifest errors⁴⁰. On the contrary, in that regard, by relying on the legal and scientific competences of its members, that Board must examine whether the arguments put forward by the applicant are capable of demonstrating that the considerations on which that decision of the ECHA is based are vitiated by error.

3.2. Consecration in Ljubljana

In the *Aquind* case, the EU Courts have not been asked to rule again on the scope of the power of review of the Board of Appeal of ACER. It seems that it is now accepted that the EU Agencies' appeal bodies do have jurisdiction to assess whether substantive errors have been committed by their respective Agencies and are not limited to review alleged procedural flaws. Only the intensity of review was at issue in this landmark case.

Before the General Court, *Aquind*, the applicant, argued that the Board of Appeal of ACER limited its review, when examining its appeal against the initial decision of the Agency, to manifest errors of assessment. It was indeed clear from the proceedings that the Board of Appeal of ACER asserted that the intensity of its review of complex economic and technical assessments was the same as the intensity of the EU judiciary's limited judicial review of the same assessments. *Aquind* submitted that such limited review constituted an infringement of the Regulation establishing ACER⁴¹.

It is important to note that to uphold the appeal and conclude that the Board of Appeal of ACER must go beyond the assessment of manifest errors of assessment, the General Court repeatedly referred to the system put in place by the REACH Regulation. According to the General Court, as it is the case for the Board of Appeal of ECHA, the composition of the Board of Appeal of ACER, through the presence of current or former

⁴⁰ It is worth mentioning that in the context of the classification of chemical substances, a recent judgment of the General Court has been appealed by France on the ground that the General Court exceeded the limits of judicial review by going beyond an assessment of manifest error and by substituting its own assessment for that of the Committee for Risk Assessment of the European Chemicals Agency. See case C-71/23 P, an appeal brought against a judgment of the General Court, November 11th 2022, joint cases T-279/20, T-283/20 and T-288/20, *CWS Powder Coatings v Commission*, ECLI:EU:T:2022:725.

⁴¹ See Art. 19(5) of Regulation (EC) n. 713/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity, in *OJ L* 211, 14.08.2009, p. 1 ff. This Regulation has been replaced by 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, in *OJ L* 158, 14.06.2019, p. 22 ff.

senior staff of the national regulatory authorities, competition authorities or other national or Union institutions with relevant experience in the energy sector, proves that the EU legislature intended to provide that board with the necessary expertise to allow it itself to carry out assessments of complex technical and economic facts relating to energy.

In addition, as it is the case for the Board of Appeal of ECHA, the fact that the EU legislature has expressly stated that the Board of Appeal of ACER is to enjoy the same powers as those available to ACER itself clearly confirms that it intended to confer on that Board the task of reviewing the decisions of the Agency with an intensity which cannot be confined to that of a limited review. According to the General Court, it would be contrary to the very nature of appellate bodies within Agencies for those bodies to conduct the limited review reserved to the Courts of the European Union.

The arguments by which ACER has tried to differentiate itself for the Board of Appeal of ECHA have all been rejected by the General Court. In particular, the General Court held that the fact that the members of the Board of Appeal of ECHA, unlike the members of the Board of Appeal of ACER, are employed full-time, has no bearing on the intensity of their review. Likewise, the General Court was unconvinced by the fact that, unlike the Board of Appeal of ECHA, which is not subject to any obligation concerning the maximum length of proceedings, the Board of Appeal of ACER is required to examine appeals within a short period of time⁴².

In its judgment in appeal, the Court of Justice confirmed the approach taken by the General Court and insisted once again on the composition of the Board of Appeal of ACER, which meets the requirements necessary to enable it to conduct a full review of decisions adopted by the Agency.

If the members of the Board of Appeal must have prior experience in the energy sector, this is because they have or should have the technical knowledge necessary to enable them to conduct a detailed examination of appeals. In this respect, the Court of Justice confirmed the appropriateness of the comparison made between the Board of Appeal of ACER and the Board of Appeal of ECHA. Their compositions and powers are of the same kind, and they both have the necessary expertise to enable them to carry out assessments of complex scientific, technical, and economic facts.

⁴² It was two months from the filing of the appeal in the 2009 version of the Regulation. It is now four months (Art. 28(2) of Regulation (EU) n. 2019/942, *cit.*).

Even if the Court of Justice was not invited to rule on this subject in the *Aquind* case, full review, or detailed examination of an appeal, should not be confused with a complete re-examination of the file. The procedure before the Board of Appeal, both in ACER and in ECHA, remains of an adversarial nature, based on the pleas and arguments put forward by those who challenge the decisions of the Agency. Similarly, it must be made clear that, for the Board of Appeal of ECHA, a full review does not, and cannot, lead the Board of Appeal to substitute its own scientific opinion for the opinion on the basis of which the Agency took its decision. The Board of Appeal is asked to assess alleged errors of assessment and is not in search of a pure, abstract and absolute scientific truth, provided that such a truth would be anything other than a myth. In other terms, the Board of Appeal often underlines that the mere existence of a diverging scientific opinion is not, in itself, sufficient for the purposes of demonstrating the existence of an error vitiating a decision adopted by ECHA⁴³.

3.3. Remaining issues

The *Aquind* rulings were read, in Helsinki, with great satisfaction, and with relief. Everything that has been decided in the two judgments of September 2019 is now confirmed and set in stone. The very nature of the task conferred on EU Agencies' appeal bodies is to delve deep into the technical intricacies of the decisions brought before them.

This firm and definitive conclusion does not, however, prevent from wondering whether those appeal bodies have the actual means to carry out this heavy task effectively.

The EU Courts based their analysis on the instruments currently in force and on the intentions clearly expressed by the EU legislature, which provide EU Agencies with review bodies where they have been given decision-making powers on complex technical or scientific issues capable of directly affecting the legal situation of the parties concerned. Those internal review bodies have a certain independence, perform quasi-judicial functions through adversarial procedures, and are composed of lawyers and technical experts. This means that the Boards of Appeal are better able to dispose of appeals against decisions which often have a strong technical component. They are therefore enabled to conduct a full review of the decisions subject to appeal.

⁴³ This approach has been endorsed by the judgement of the General Court of September 20th 2019 in case T-125/17, *BAStF Grenzschub v ECHA*, *cit.*, para 458.

However, if they are legally and institutionally designed to conduct such an intensive review, are the EU Agencies' appeal bodies able, concretely, to fulfil this function?

Independence and efficiency are not only abstract principles; they are also parameters which must guide the daily action of any Board of Appeal. Several appeal bodies have already highlighted the existence of practical problems in the accomplishment of their missions. Their concerns must be addressed, not by new legislation, but by practical measures.

First, and foremost, appeal bodies need to get the necessary support from their respective Agencies. In Helsinki, the Board of Appeal of ECHA appears to be in a rather enviable situation in this respect. The three full-time members are part of the staff of the Agency, and they benefit from the required support of a registry which is exclusively working for them. This allows the Board of Appeal to fully commit its time to deciding on appeals. The legal, technical and scientific expertise is present not only in the Board of Appeal itself, but also in the registry. Conducting a full review of the decisions challenged before the Board of Appeal is part of the basic features of the daily work of those.

Members and registry staff also benefit from information and training activities provided within ECHA. They are constantly connected to the Agency activities, and can thus update their knowledge and experience, provided that they strictly remain outside all the decision-making processes put in place by the Agency. In practice, drawing such a line of demarcation does not raise any significant difficulty that could not be dealt with. Frictions cannot be always avoided, but experience shows that constant progress has been made, and that the permanent nature of the Board of Appeal of ECHA has considerably helped it to establish its legitimacy and reputation.

Non-permanent appeal bodies are in a less comfortable position. The high level of expertise required to become a member of such an appeal body is not mirrored by the existence, within the Agency concerned, of a permanent support structure with an equivalent level of expertise. If there is a registry, it is often under resourced. The non-permanent appeal bodies lack an autonomous relay, within the Agency, that would be entirely dedicated to their activities.

This explains the frustration felt by some members of non-permanent appeal bodies: while they fully acknowledge the importance of their tasks, as defined by the legislation and the EU Courts, and understand the need to intensify their review on the decisions brought before them, they can only regret, at the same time, that they lack some basic support, notably in terms of time and staff.

Independent appeal bodies, within the EU Agencies, vested with the crucial task of performing a full review of the decisions challenged before them, are today firmly attached to the EU system of legal remedies. But this legal and institutional reality must now become a tangible reality. The Court of Justice itself underlined that whatever the types of organisations chosen (permanent or not), or the procedural rules imposed (with or without deadlines to deliver), all appeal bodies must be able to carry out a full review. There is still a long way to go to make this difficult mission accessible to all appeal bodies within the EU Agencies.