

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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THE SCRUTINY PERFORMED BY
THE ERA BOARD OF APPEAL:
SOME GENERAL AND OPERATIONAL REMARKS,
WAITING FOR A SETTLED PRACTICE

*Lo scrutinio effettuato dalla commissione di ricorso di ERA:
alcune considerazioni generali e operative, in attesa di una prassi consolidata*

*Le contrôle effectué par la chambre de recours d'ERA:
quelques considérations générales et opérationnelles, en attendant une pratique
consolidée*

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1. Introduction

ERA's Board of Appeal (BoA) has entered into function in June 2019, in the framework of the application of the 4th Railway Package¹, entrusting the Agency with the delivery of Vehicle Authorisations, Single

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¹ The so-called 4th Railway Package is a comprehensive legal strategy, built up by six different acts with the goal of empowering and completing the European railways system. It comprises two 'pillars': a technical one, which mainly aims at boosting the competitiveness of European railways and vehicles and their administration, and a market one, which pursues the gradual opening of this sector's market shares and activities. The technical pillar includes, among others, Regulation (EU) n. 2016/796 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Railways, in *OJ L 138*, 26.05.2016, p. 1 ff., which is ERA's establishing Regulation. Further information about the 4th Railway Package can be found within the European Commission's overview on its adoption, available at this link: https://transport.ec.europa.eu/transport-modes/rail/railway-packages/fourth-railway-package-2016_en.

Safety Certificates and European Rail Traffic Management System (ERTMS) approval files. The Rules of Procedure of the ERA's Board of Appeal have been adopted shortly after by the Commission, in its implementing activity over the aforementioned legislation². Given the scant number of cases brought so far before the ERA's BoA, this intervention will be limited to general and institutional remarks over this BoA and on its potential future evolution: still, such an inquiry seems necessary in the view of both the complete overview on all Boards of Appeal and the tracing of some peculiar evolutionary scenarios that might include (but not be limited to) the railways system.

2. Competences and functioning

As a general assumption, it must be kept in mind that, while the Board of Appeal is part of the administrative structure of the Agency, it still issues its findings independently.

After a decision has been taken by the Agency, the applicant may request for a review of the decision at the level of the Executive Director. If not satisfied, the applicant may bring an appeal before the Board of Appeal³. Any natural or legal person may also appeal against a decision that is of direct and individual concern to them, even though the decision is addressed to another person⁴. Appeals have to be lodged within two months of the notification of the decision to the person concerned or failure to act⁵. If the appellant is not the addressee of the decision, the appeal has to be lodged within two months of the day on which the decision became known to the appellant. The time-limit for the issuing of the BoA findings is three months in case of an appeal and one month for decisions following an arbitration request.

² See 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.

³ As anticipated in the text, decisions that can be appealed are mainly relating to authorisations, certificates releases and approval procedures, as stated in Art. 58 of ERA's establishing Regulation, (Regulation (EU) 2016/796 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Railways and repealing Regulation (EC) No 881/2004, in *OJ L* 138, 26.5.2016, p. 1-43.) The scope of application the BoA has been entrusted with is then confined (coherently with every other similar body) to decisions producing binding legal effects.

⁴ See Art. 60 of ERA's establishing Regulation.

⁵ The BoAs ability to state over 'failures to act' can, indeed, be considered as a *unicum* within the Agencies' panorama, which are usually limited to annulment-style appeals. See Article 58(1) of ERA's establishing Regulation for the related provision.

The Board of Appeal looks both procedural and operational aspects of the Agency's decisions⁶. It issues findings and if the appeal is founded it remits the case to the Agency (specifically, to its Executive Director) which takes a final decision with a statement of reasons. Decisions taken on the basis of the findings of the Board of Appeal may be appealed before the General Court of the European Union.

A peculiarity, compared with other Agencies' Boards of Appeal, is that the ERA's one deals both with appeal and arbitration cases. Arbitration requests are submitted to the Board of Appeal by the National Safety Authorities before a decision on authorisations, certificates or approvals is taken. In cases of disagreement of the Agency with National Safety Authorities on negative assessment of authorisation and certification as well as ERTMS track-side and vehicles approval. The Agency and the partners (National Safety Authorities, Industry) cooperate with a view to reaching a mutually acceptable assessment. If there is no agreement, then they may bring the matter to the Board of Appeal for arbitration. Where the BoA agrees with the Agency, the Agency takes a decision without delay. Where the BoA agrees with the negative assessment of the National Safety Authorities, the Agency issues an authorisation with an area of use excluding the parts of the network which received a negative assessment.

3. Composition and current setup

The Board of Appeal consists of a chairperson and two to five members. Each member has a vote and, in case of tie, the chair holds the casting vote.

The members of the Board of Appeal are appointed by the Management Board of the Agency, from a list of qualified experts drawn up by the Commission following an open and transparent selection procedure. They are appointed for four years renewable once. The BoA members do not belong to the Agency personnel and thus they are reimbursed on the basis of the time they spend working on cases. A system

⁶ Indeed, the BoAs scrutiny over the Agency's decisions is closely linked to the CJEU's case law on this matter, which has been so far developed in three milestone cases, notably case General Court, December 11th 2014, case T-102/13, *Heli-Flight v EASA*, ECLI:EU:T:2014:1064; General Court, September 20th 2019, case T-125/17, *BASF Grenzsch v ECHA*, ECLI:EU:T:2019:638 and General Court, November 18th 2020, case T-735/18, *Aquind v ACER*, ECLI:EU:T:2020:542. This case law entrusts the Boards of Appeal with an intense control, devoted to review the whole legality of their Agencies' decisions so that the General Court is then able to restrict its own scrutiny to the search for manifest errors. The legal consequences of this case law, notably referring to the *Aquind* case, are more deeply analysed in the devoted part of this *Volume*.

has been introduced to monitor the attribution of days of work of its members, the planning and number of meetings, hearings and deliberations related to cases, as well as other meetings and reports to the Management Board regularly.

The chairperson's role is to preside over the appeal and arbitration proceedings and ensure the quality and consistency of decisions by a Board of Appeal. The chairperson also designates a rapporteur among the members of the Board for each proceeding. The rapporteur carries out a preliminary examination of the appeal and present the results of that examination to the other members. As a consequence of this presentation and of the relating discussions, the rapporteur prepares a draft of the findings of the Board of Appeal.

Currently the composition is of one chairperson, two members and three alternates. It is important to highlight that a full gender balance has been achieved and that a combination of appropriate legal, procedural and technical competences is ensured, which allows for a fair and independent conduct of the proceedings. Members of the Board of Appeal may not take part in any appeal or arbitration proceedings if they have any personal interest in the proceedings, if they have previously been involved as representatives of one of the parties to the proceedings, or if they participated in the taking of the decision appealed against. Specific rules on the management of conflict of interests adopted by the Management Board of the Agency apply for members of the Board of Appeal. The BoA set up guidelines on the assessment of interests in relation to each appeal proceedings to ensure proper evaluation before they are entrusted with a case.

Finally, the BoA is supported by a registrar to whom the appeals and arbitration requests are submitted. The registrar is a member of the Agency staff and is directly appointed by the Board of Appeal.

4. Working methods and cases

The BoA may request opinions from national experts, seeking for clarifications on national legislation or other aspects of a case, during the initial examination of the procedure under appeal. For that purpose, a list of possible experts to be invoked during appeal or arbitration proceedings has been constituted by the BoA⁷.

⁷ However, it is worth recalling that another source of qualified national experts for this purpose could be found within the list of individuals, set out by the European Commission, in order to provide potential candidates to the role of BoAs members. Moreover, contact points in each Member State have been made available, to which the BoA can address requests for expertise assistance, if deemed necessary.

The Board has set up internal processes to ensure fairness and efficiency in the proceedings. These include guidelines and forms directed to appellants, both for arbitration requests and for submitting appeals. The robustness and accuracy of these processes and guidelines have been tested regularly with fictitious cases which served also as training to the BoA members.

The current lack of a high number of cases in front of the Board needs to also be evaluated in light of some internal practices of the Agency. As a matter of fact, the latter has identified, as a key goal in its Single Programming Document⁸, to generate no appeals against its decisions. This results in potential disagreements between the Agency and individuals being sorted through negotiations, without launching an appeal. Several times a year, the BoA is then informed about the number of negative decisions files that might lead to appeal, as well as the number of reviews against decisions. Some other aspects have also been recently analysed. First, the number of rejected applications, already in front of the administrative organs of the Agency, is very low and varies from 1 to 3 % depending on the type of application submitted by individuals. This high level of ‘satisfaction’ granted to applicant is probably facilitated by the circumstance that, for each application, ERA organizes a close exchange of information and opinions with applicants during the assessment process, enhancing cooperation and thus reducing the chance of rejection. Second, the Agency has put in place an internal process of legal review of the soundness of ‘negative’ decisions, as well as a strong internal Quality Assessment review. Finally, there is a strong resistance, innate to the sector of railways operators, to initiate procedures that could delay the commissioning of capital-intensive equipment for several months.

All of this being said, as of April 2024 the BoA received two appeal cases on vehicle authorisations and conformity-to-type applications, both of which originated from applications that were rejected by the Agency⁹. In both cases, the BoA concluded that the grounds of the two appeals (submitted in 2021) were founded and, consequently, the Executive Director modified the contested decisions. These two cases already contributed to highlight some delicate points within the operations of the Agency and the BoA. On the one side, from a substantial point of view, they revealed contradictions in the Technical Specifications for Interoperability (TSI). The TSI define the technical and operational

⁸ See ERA Single Programming Document for 2023-2025, available at this link: https://www.era.europa.eu/system/files/2022-12/SPD%202023-2025_ERA.pdf.

⁹ See decision of ERA Board of Appeal of 5 October 2021 in case EACLI EU-ERABA-2021-001, *Siemens Mobility GmbH v ERA* and decision of 5 October 2021 in case EACLI EU-ERABA-2021-002, *Siemens Mobility GmbH v ERA*.

standards which must be met by each subsystem in order to meet the essential requirements and ensure the interoperability of the railway system in the European Union¹⁰. On the other side, from a procedural point of view, despite the fact that the findings for both cases were issued within the time-limits, it was made obvious that these constraints are currently quite short, as well as the time limits for arbitration decisions. This has been identified as a major risk due to the limited capacity of the BoA, which does not possess expertise on every topic that may be at issue in an appeal or an arbitration procedure. Even appointing external experts is not a conclusive solution to this matter, as it is a time-consuming measure, given that it requires time to identify the most suitable experts, check their availability within specific time frames, contracting them, and granting them sufficient time to prepare an opinion. In such a situation, it may not be possible to meet the deadlines¹¹. Furthermore, the need to ensure translations in all the procedural languages involved in the case inevitably has an impact on the time-limits, as appeals may be submitted in any of the 24 EU official languages. In a comparative perspective, it is to be highlighted that ERA is the only one of the EU Agencies to have such short time limits for appeals and arbitration, a situation which may suggest some modifications by the EU legislator to ensure coherence among the BoAs and to allow ERA's Board to effectively carry out its mandate.

¹⁰ These requirements are set out, together with the conditions to ensure compliance to them, within Directive (EU) n. 2016/797 of the European Parliament and of the Council of 11 May 2016 on the interoperability of the rail system within the European Union, in *OJ L* 138, 26.05.2016, p. 44 ff.

¹¹ In the two aforementioned cases, the fact that one of the members of the Board was an expert on the subject made it possible to identify the contradictions and to suggest modifications that were introduced during the revision of the Technical Specifications for Interoperability.