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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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EU AGENCIES' BOARDS OF APPEAL AND THE FUTURE OF THE EU SYSTEM OF JUDICIAL PROTECTION. A PERSPECTIVE FROM THE EUROPEAN PARLIAMENT

Le commissioni di ricorso delle agenzie europee e il futuro del sistema di tutela giurisdizionale dell'Unione europea. Uno sguardo dal Parlamento europeo

Le chambres de recours des agences européennes et l'avenir du système de protection judiciaire de l'Union européenne. Une perspective du Parlement européen

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1. The institutional and constitutional context surrounding the Boards of Appeal and the European Parliament

First, let me say a few words about the institutional context, as seen from the perspective of the European Parliament.

If one would need to settle on a single word, I would propose to consider the keyword 'control'. Control in the political sense, control over policy making and, finally but most importantly, control in the judicial sense.

Let us imagine the context in a graphic way: let us picture a U-shaped chart or graph, that is a shape which has two horns. In this picture the two horns represent political control, on one side, and judicial control on the

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other side. On the top of the first horn, we find the European Parliament and on the other horn we find the Court of Justice of the European Union. In between, on various degrees of this U-shaped graph, we find a colourful variety of political, policy and judicial control mechanisms, and I think that is where the Boards of Appeal are situated somewhere, having a hybrid nature, that combines both policy-control and quasi-judicial control. Namely that Boards have an extremely complex review task, which consists in re-assessing decisions by the Agencies, on the one hand, in a quasi-judicial manner, but also, on the other hand, in a manner which consists of reviewing of complex technical issues that is more reminiscent of policy-making or at least substantive control of policy-making. Indeed, as it has been recalled on several occasions, according to the *Aquind* doctrine[1], Boards of Appeal are not necessarily established only to confine themselves to a limited review of complex technical and economic assessments. Unlike the EU judicature, Boards of Appeal may also have jurisdiction, by way of a review of expediency, to annul or replace the decisions of an Agency solely on the basis of technical and economic considerations.

Thus, from the institutional perspective of the European Parliament, it is easy to understand where does the common denominator lie between the European Parliament and Boards of Appeal: it consists, in substance, in both entities exercising control over the executive branch.

The control functions of the European Parliament are important, albeit sometimes forgotten, since we are mainly perceived as the co-legislator. However, the Treaties are quite rich in references to parliamentary control at the European level.

Article 14(1) of the Treaty on European Union (TEU) stipulates that European Parliament shall "jointly with Council, exercise legislative and budgetary functions". This is the part which is most quoted and well know. However, the text goes on to say that the European Parliament shall also "exercise functions of *political control* […] as laid down in the Treaties (emphasis added)". Thus, in the very first provision in the TEU concerning Parliament, the legislative and control functions are mentioned on the same footing. This general control function is then manifest in various specific provisions scattered throughout the Treaties. For example, Article 17(8) TEU: "the Commission, as a body, shall be responsible to the European Parliament [which] may vote on a motion of censure of the Commission".

Or take Article 290(2) of the Treaty on the Functioning of the

[1] See General Court, November 18th 2020, case T-735/18, *Aquind Ltd.* v *ACER*, ECLI:EU:T:2020:542, para 52 and 56.

European Union (TFEU) on delegated acts. In that context, it is foreseen that legislative acts shall explicitly lay down the conditions to which delegation is subject; and these conditions may allow the European Parliament (or the Council), to decide to revoke the delegation to the Commission. The conditions of the delegation may also foresee that the delegated act may enter into force only if no objection has been expressed by the European Parliament (or the Council) within a period set by the legislative act. This is also an example of political control or control over policy-making.

Last but not least, Article 226 TFEU foresees that in the course of its duties, the European Parliament may, at the request of a quarter of its component members, set up a temporary Committee of Inquiry to investigate, without prejudice to the powers conferred by the Treaties on other institutions or bodies, alleged contraventions or maladministration in the implementation of Union law, except where the alleged facts are being examined before a court and while the case is still subject to legal proceedings. This latter exclusion, *expressis verbis*, by the Treaty of parallel investigation with legal proceedings puts the committees of inquiry rather on the political control side of our U-shaped graph. The inter-institutional decision laying down detailed provisions on the exercise of the European Parliament's right of inquiry, that is the decision of the European Parliament, the Council and the Commission of 19 April 1995 on the detailed provisions governing the exercise of the European Parliament's right of inquiry[2], specifies in its Article 2(3) that a temporary committee of inquiry may not investigate matters at issue before a national or Union court of law until such time as the legal proceedings have been completed. Within a period of two months either of publication in accordance with paragraph 1 or of the Commission being informed of an allegation made before a temporary committee of inquiry of a contravention of Union law by a Member State, the Commission may notify the European Parliament that a matter to be examined by a temporary committee of inquiry is the subject of a pre-litigation procedure; in such cases the temporary committee of inquiry shall take all necessary steps to enable the Commission fully to exercise the powers conferred on it by the Treaties. Again, the exclusion of overlaps with (quasi-)judicial proceedings assimilates the parliamentary committees of inquiry rather to instruments of political control.

Thus, the common catchword is 'control': the similarity of vocation between the European Parliament and Boards of Appeal can be found

[2] Decision n. 95/167/EC, Euratom, ECSC of the European Parliament, the Council and the Commission of 19 April 1995 in the detailed provisions governing the exercise of the European Parliament's right of inquiry, in *OJ* L 113, 19.05.1995, p. 2 ff.

within the parameters of this very complex and colourful system of various control mechanisms, at the Union level, over the exercise of executive functions, which represent a great variety of political, policy quasi-judicial and judicial control mechanisms over the executive.

Let me bring up some recent examples of European Parliament legislative amendments put forward in recent years.

The joint report of the Committee on Legal Affairs (JURI) and the Committee on Economic and Monetary Affairs (ECON) of 5 April 2023 concerning the Anti-Money Laundering Authority (AMLA)[3]: apart from the anecdotic observation that it proposes to change the name from Administrative Board of Review to Board of Appeal, it leaves practically untouched the competences and the scope of review of the BoA. Where it proposes to introduce new substantive rules is a new Article 62a which relates to actions before the Court of Justice[4].

The report of the Committee on Industry, Research and Energy (ITRE) on the proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) n. 1227/2011 and Regulation (EU) n. 2019/942 to improve the Union's protection against market manipulation in the wholesale energy market does not touch in any meaningful way competences of the ACER BoA either[5].

The JURI Committee report on the proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) n. 6/2002 on Community designs and repealing Commission Regulation (EC) n. 2246/2002 introduces an inoffensive amendment (AM 26) which concerns a purely procedural issue[6].

These recent examples demonstrate a lack of controversy as far as the European Parliament is concerned when it comes to the reform of the

[3] Report on the Proposal for a Regulation of the European Parliament and of the Council establishing the Authority for Anti-Money Laundering and Countering the Financing of Terrorism and amending Regulations (EU) 1093/2010, (EU) 1094/2010, (EU) 1095/2010 (COM(2021)0421 – C9-0340/2021 – 2021/0240(COD)).

[4] Since the grounds of review are enumerated in primary law, it is somewhat difficult to situate the proposal's introduction of new grounds, such as 'incorrect decision'.

[5] Apart from an innocent reference in Article 4a(5) that in case of a withdrawal decision, the Agency shall indicate the right to appeal the decision before the Agency's Board of Appeal and to have the decision reviewed by the Court of Justice in accordance with Articles 28 and 29 of Regulation (EU) 2019/942.

[6] According to AM 26 of the Report on the Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) 6/2002 on Community designs and repealing Commission Regulation (EC) 2246/2002 (COM(2022)0666 - C9-0394/2022 - 2022/0391(COD)), "the Commission is empowered to adopt delegated acts in accordance with Article 109a to supplement this Regulation by specifying the formal content of the notice of appeal and the proceedings for lodging and examining an appeal".

judicial architecture related to the Boards of Appeal.

2. Some specific input of the European Parliament into the legislative process concerning the issue of transparency of judicial (and quasi-judicial) proceedings

Coming to the second point, it will be the specific input of the European Parliament into the legislative procedure on the recent amendment of the Statute of the Court of Justice[7], that has been approved this year, on 19 March.

Now, if we have a look at the report drawn up by the European Parliament during the legislative procedure, what we can see is that actually the European Parliament did not touch the issue of Boards of Appeal and the judicial architecture related to Boards of Appeal. So, I would say 80% or perhaps 90% of the amendments in Committee was related to the preliminary reference issue. The rest deals with various topics that relate for example to transparency (see in more detail below), public consultation (Article 63a new)[8], or reporting obligations by the Court (see for example Article 4a(2))[9]. This shows that members of Parliament and more specifically members of the JURI Committee seem to have been more interested in the issue of preliminary references than transparency, let alone Boards of Appeal, and maybe it is a verification of my theory that I have just tried to present. If there was not much to add to the initiative of the Court from the point of view of the Parliament that is because the same Parliament acknowledges the control functions of the Boards of Appeal, it sees, as it were, the synergy with Parliament's own functions of political control. So perhaps instead of a lack of interest, I would say this shows rather a lack of controversy, a lack of any perceived institutional 'competition' or 'rivalry' with Boards of Appeal as far as the European Parliament is concerned when it comes to the reform of the judicial architecture related to the Boards of Appeal and a tacit endorsement of the synergy with those entities in the field of political control of the executive.

Allow me to present shortly the report adopted in the JURI

[7] Statute of the Court of Justice: amendment of Protocol No 3 (2022/0906 (COD)), rapporteur: Ilana Cicurel. Committee report tabled for plenary (A9-0278/2023); decision by Parliament on 27 February 2024 (T9-0086/2024).

[8] According to Article 63a "Any amendment of this Statute at the request of the Court of Justice shall be subject to a public consultation of two months being carried out prior to the adoption of the legislative request by the Court of Justice".

[9] According to Article 4a(2) "No later than [three years after the entry into force of this amending Regulation], the Court shall present a report to the European Parliament, the Council and the Commission on the implementation of this reform".

Committee on 27 September 2023, on the draft Regulation of Parliament and Council amending Protocol (N° 3) on the Statute of the Court of Justice of the European Union[10]. In the JURI Committee, there were 51 amendments presented and the draft report was adopted in September and this text, as I said, mainly dealt with the issue of preliminary rulings and issues linked to that, for example provisions on the obligation of the Court to present a report to the European Parliament, the Council and the Commission on the implementation of this reform, and concentrating on the number of preliminary rulings examined by the General Court, the number and nature of the requests for preliminary ruling that were not transmitted to the General Court, the average length of time spent on dealing with requests for preliminary rulings, or — more close to our subject matter today — the number and nature of the cases that were subject to the initial admission mechanism for appeals[11].

But there was an issue which I would specifically like to highlight. I will put it forward for further debate, because now we are talking about future and about the greater context. Maybe that's an issue worth reflecting upon and perhaps a new angle to the discussion could be the question of transparency of the Court procedures. Indeed, there was an amendment presented by a member of the European Parliament which dealt with the access to documents in court proceedings and this amendment was actually adopted in the JURI Committee.

So, in the report of the JURI Committee there is this amendment and it's quite far reaching — I have to say. I will first quote recital (2b), which by its very nature is prone to contain some 'poetry':

> "*In this context, and as the Court of Justice is increasingly required to rule on matters of a constitutional nature and related to human rights and the Charter of fundamental rights of the European Union (CFREU),* the transparency and openness of the judicial process *should be strengthened. To that end, the Statute should be modified to ensure that* all *documents deposited with the Registrar by the parties or by any third party in connection with an application* are accessible to the public *upon request. This would be in line with the principle of open decision-making. Transparency increases accountability and builds trust in the Union and in Union law. In preliminary ruling proceedings in particular, giving access to case-files will enable other national judges to better assess the necessity of referring additional references and thus reduce the overall workload on the Court of Justice. Such access should be granted in accordance with the arrangements and*

[10] References: A9-0278/2023, 2022_0906(COD)), rapporteur: Ilana Cicurel.
[11] See Article 4a and notably point f).

exceptions set out in the Statute, in order to preserve the calm and dignity of judicial deliberations and ensure that the public interest and fundamental rights, such as those laid down in Article 16 TFEU and Article 8 of the CFREU which provide for the protection of personal data, Article 7 of the CFREU which protects the right to private and family life and communications and Article 339 TFEU which requires the institutions to respect professional secrecy, are protected" (emphasis added).

Solemn language apart, it is to be observed, that the objective of the proposal was to strengthen transparency of the judicial process. To reach that aim, it is proposed that all documents deposited with the Court's registry be accessible to not only persons who can demonstrate a legitimate interest, but to the public in general. The only condition is that a request should be made in that regard.

Interestingly, the recital refers to the principle of open decision making. This clearly ties in with Article 15(1) TFEU, according to which the Union institutions, bodies, offices and Agencies shall conduct their work as *openly* as possible, in order to promote good governance and ensure the participation of civil society. While the Treaties contain several provisions on the openness of institutions, traditionally the Court has been seen as an institution which carries out its functions more remotely from the public eye, in order to — as the recital continues by pointing out — preserve the calm and dignity of judicial deliberations and ensure the exercise of rights ensured in the CFREU. Finally, it is interesting to observe that the justification for this proposed paradigm shift when it comes to transparency of EU court proceedings is the fact that the Court is increasingly required to rule on matters of a constitutional nature and related to human rights and the CFREU. Transparency builds trust — this is how one could summarise the overall logic.

Enacting terms mirror this logic and read as follows:

"*Article -1*

The following Article is inserted in the Statute:

'Article 20a

Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right to access, upon request, documents of the Court in accordance with arrangements set out in the Rules of Procedure.

The President shall refuse access to a document, either of his or her own motion or at the request of a party or any other person concerned, where disclosure would undermine protection of the public interest, or the privacy or the integrity of an individual.

The President shall also refuse access to a document where disclosure

would undermine the protection of commercial interests or the Court's decision-making process, unless there is an overriding public interest in disclosure'.'".

So that was the position of the Legal Affairs Committee.

It is well worth having a discussion to assess the merits of the proposal and the pros and cons. And this discussion, I think, leads easily to a discussion on the overall philosophy of the EU judicial system and the future of the EU's judicial system, for example the issue of the respective roles of the General Court and the Court of Justice, which seem to be progressively polarizing towards a supreme (administrative) court, as for the former, and a constitutional court, as for the latter. When thinking about future and perspectives, one has the privilege to think a little bit outside of the box. At this is a legitimate question when it comes to the perspectives of our judicial system in the EU: at what level should be define transparency? To be noted: the JURI report does not specifically speak about preliminary ruling procedures, but it would cover all procedures, including, I guess, procedures related to previous procedures with the Boards of Appeal and legal challenges against decisions by Boards of Appeal, with all the delicate and sensitive details such complex assessments entail.

Now, whether to give full access and full transparency to such procedures, it is a very weighty question. I think this is also a question of legal culture, in the end. For example, when one watches court room drama from the United States, one can immediately grasp that that is a completely different legal culture, because there everything is transparent and everything is on the table – for better or worse. On a less anecdotic note, for example, in the context of Brexit a few years ago, I really enjoyed following the broadcasting from the Supreme Court in the case *R (Miller)* v *Secretary of State for Exiting the European Union*[12]. Tediously long, but very exciting questioning, incredibly sophisticated legal argumentation ... one could really watch live a whole legal culture in action. So that is certainly an undeniable positive effect of full transparency to allow the interested public to get in touch on a daily basis with the legal culture and traditions of a country and thus the legal culture to penetrate into society, which is a

[12] The judgment stated that the question for the Court's decision involved the constitutional law of the United Kingdom: it was whether the Crown's executive government is entitled to use the Crown's prerogative powers to give notice under Article 50 for the United Kingdom to cease to be a member of the European Union. The Court held that the Government had no power to trigger notification under Article 50 of the TEU, because it would remove a series of rights created by Acts of Parliament. The principle of parliamentary sovereignty required that only Parliament could take away those rights.

key to its legitimacy and longevity.

Nevertheless, on the other hand one can be faced with very technical issues, which do not represent any tangible interest to the public. And we all know that in reality transparency *does not automatically* lead to better quality of debates or deliberation, nor does it automatically lead to greater interest or engagement by the public.

During the inter-institutional negotiations of the legislative file, the latter argument found supporters in the Council. In the end, the negotiated compromise text kept the original idea[13], but focused more on a specific type of legal actions in Union law.

Recital (4) contains now the reference to the principle of transparency and the justification to the corresponding enacting term, Article 23, new subparagraph five[14].

In Article 23 on preliminary ruling procedure, new paragraph after fourth paragraph is inserted:

> "*Statements of case or written observations submitted by an interested person pursuant to this Article shall be published on the Court's website within reasonable time after the closing of the case, unless that person raises objections to the publication of its own written submissions*".

We can observe thus, the provision went through important changes during the legislative process and its scope became substantially narrower. Notably, in the final text, transparency requirements cover only the preliminary ruling procedure and no other forms of procedure, which are more adversarial in their nature.

Indeed, preliminary rulings can be more assimilated to constitutional adjudication, where the game is more of a positive sum game and where the parties don't argue a case from an adversarial logic, but rather all assist

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[13] European Parliament legislative resolution of 27 February 2024 on the draft Regulation of the European Parliament and of the Council amending Protocol No 3 on the Statute of the Court of Justice of the European Union (07307/2022 – C9-0405/2022 – 2022/0906(COD) — T9-0086/2024).

[14] According to Recital (4) "In this context, and as the Court of Justice is increasingly required, in preliminary ruling cases, to rule on matters of a constitutional nature or related to human rights and the Charter of Fundamental Rights of the European Union (CFREU), the transparency and openness of the judicial process should be strengthened. To that end, and without prejudice to Regulation (EC) No 1049/2001 of the European Parliament and of the Council, the Statute should be amended in order to provide that the statements of case or written observations submitted by an interested person referred to in Article 23 of the Statute should be published on the website of the Court of Justice of the European Union within a reasonable time after the closing of the case, unless that person raises objections to the publication of that person's own written submissions, in which case it will be mentioned on the same website that such an objection has been raised. Such a publication will increase accountability and build trust in the Union as well as in Union law".

the Court of Justice with input allowing it to have a full picture before handing down a ruling that would assist the national judge in ruling on the underlying case. Indeed, in this context, there is usually less confrontation than in an adversarial procedure which reveals a "cooperative relationship wherein the critical sense of identity results not from one body being national and the other transnational, but from their sense of both belonging to the judicial branch […] reinforcing their ability to uphold the law"[15]. Moreover, there's a possibility to block publication if the author of the pleading in question simply objects. Thus, the final version contains a strong safeguard to the parties' interests, while covering a narrower scope.

In essence, in the final text negotiated with the Council, the transparency requirement is more restrictive and it only relates to preliminary rulings.

[15] See J. WEILER, *The Constitution of Europe – Do the New Clothes Have an Emperor?*, Cambridge, 1999, p. 124.