Quarterly publication • Year II • Special Volume "Quo vadis, Boards of Appeal?" • ISSN 3034-8455

# Quo vadis, Boards of Appeal?

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

EDITED BY JACOPO ALBERTI

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

EDITED BY MASSIMO CONDINANZI AND CHIARA AMALFITANO

# THE *AQUIND* JUDGMENTS AND THEIR IMPACT ON THE WORK OF THE EASA BOARD OF APPEAL

*La giurisprudenza* Aquind *e il suo impatto sull'attività delle commissioni di ricorso di EASA*

*La jurisprudence* Aquind *et son impact sur l'activité de la commission de recours de l'AESA*

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## 1. Introduction

The *Aquind* judgments[1] have raised some debate among Boards of Appeal as to their duties to review Agencies' decisions. In these judgments the Court of Justice of the European Union (CJEU) required the Boards of Appeal[2] to exercise a scrutiny of decisions adopted by the respective Agencies, which goes beyond an examination of manifest errors. In the opinion of the CJEU, Boards of Appeal must conduct a full review of the Agencies' decisions.

What led to this conclusion can, *inter alia*, be summarised as follows: Boards of Appeal are administrative review bodies, internal to the

* Chairman of the EASA Board of Appeal. The views and opinions expressed in this Article are those of the author. They do not purport to reflect the views or opinions of the Agency.

[1] See General Court, November 18th 2020, case T-735/18, *Aquind Ltd* v *ACER,* ECLI:EU:T:2020:542; Court of Justice, March 9th 2023, case C-46/21 P, *ACER* v *Aquind*, EU:C:2023:182.

[2] Namely the Boards of Appeal of ACER, ECHA and EASA.

 ISSN 3034-8455

Agencies, but they enjoy a degree of independence. They are not judicial in nature, although they perform quasi-judicial functions through adversarial proceedings. Being composed of lawyers and technical experts, Boards of Appeal are better placed to dispose of appeals against decisions, which are of technical nature. As the General Court held: "[...] the system of appellate bodies is [...] an appropriate means of protecting the rights of [the parties concerned] in circumstances where [...] the Court has consistently held that review by the EU judicature must be limited to examining whether the exercise of a broad discretion in the assessment of complex scientific, technical and economic facts has been vitiated by a manifest error of appraisal"[3]. In other words, the review carried out by the General Court is not the same as the one carried out by the Boards of Appeal, whose specialisation enables them to carry out an in-depth examination of the challenged decisions. Finally, a full review makes it possible at a later stage for the General Court to carry out the judicial review incumbent upon it.

The importance of some Boards of Appeal has been indirectly reinforced by the introduction of Article 58a into the Statute of the ECJ[4]. According to that Article, the admissibility of appeals brought against decisions of the General Court, concerning decisions adopted by the Boards of Appeal[5], is contingent upon evidence that such an appeal is important to the unity, consistency or development of EU law. This means that Boards of Appeal decisions are in principle only subject to an appeal to the General Court.

This contribution will focus on how the *Aquind* judgments impact the work of the EASA Board of Appeal. It will look at the intensity of reviews of relevant cases adopted so far by the EASA Board of Appeal. It will then address which factors determine the intensity of review. And, finally, it will consider whether the EASA Board of Appeal is sufficiently equipped to discharge its review duties.

## 2. Intensity of review of EASA Board of Appeal decisions

Since its existence, the EASA Board of Appeal has had only seven

[3] General Court, November 18th 2020, case T-735/18, *Aquind Ltd* v *ACER*, *cit.*, para 51.

[4] See 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., as recently amended.

[5] Note that this provision, which originally involved only the appeals decisions from the BoA of EUIPO, CPVO, ECHA, and EASA, has now been extended, in a generalized manner, to all existing Boards, as well as progressively to those of any new institution.

cases, which led to final decisions[6]. This low number of cases does not really come as a surprise. Recital 3 of Commission Regulation (EC) 104/2004 already stated: "it is expected that the number of appeals will be quite limited [...]"[7]. Reasons for this low number of cases could be: (*i*) the broad consensus amongst stakeholders on the regulatory framework in the aviation sector; (*ii*) a possible lack of knowledge of the right to initiate appeal proceedings; and (*iii*) the possible high appeal charges, which are calculated in relation to the turnover of the appellant. However, regardless of this low number of cases, the few cases adopted so far demonstrate a certain tendency towards a more detailed review by the Board of Appeal of the Agency's decisions.

### 2.1 The *Heli-Flight* case

In the *Heli-Flight* case[8], the first decision adopted by the Board of Appeal in 2012, the Board of Appeal's review of the Agency's decision displayed a 'hands-off' approach. This case concerned a decision of the Agency rejecting an application for approval of flight conditions for a particular helicopter. The appellant was the exclusive distributor of this helicopter type in Germany. In support of its application, the appellant referred, *inter alia*, to the fact that the helicopter received a type certificate from the Federal Aviation Administration of the United States of America. The producer of the helicopter applied to EASA for an EU type certificate. In the on-going procedure evaluating that application, EASA voiced safety concerns, namely regarding the hydraulic system of the flight control system, under the standard known as CS-27. In view of these concerns, EASA could not even grant a limited approval of flight conditions for this type of helicopter. The appellant submitted that since the helicopter was in use no technical incidents were reported that casted

[6] See decision of EASA Board of Appeal of 7 September 2023 in case AP/20/2023, *Fly Baghdad Company for Aviation Ltd*; decision of EASA Board of Appeal of 19 December 2022 in case AP/17/2022, *Aviones Piezas y Accesorios (APA) S.L.*; decision of EASA Board of Appeal of 19 April 2018 in case AP/10/2017, *Reiner Stemme Utility Air-Systems GmbH*; decision of 21 November 2014, *Issoire Aviation* in case AP/06/2013; decision of EASA Board of Appeal of 17 January 2014 in case AP/04/2013, *Robinson Helicopter Company*; decision of EASA Board of Appeal of 30 April 2013 in case AP/03/2012, *Stephen Luck*; and decision of EASA Board of Appeal of 17 December 2012 in case AP/01/2012, *Heli-Flight GmbH & Co. KG*. All of these decisions are available on the EASA website and the Common Database on EU Agencies' Boards of Appeal.

[7] Commission Regulation (EC) n. 104/2004 of 22 January 2004, laying down rules on the organization and composition of the Board of Appeal of the European Aviation Safety Agency, in *OJ* L 16, 23.01.2004, p. 20 ff.

[8] See decision of 17 December 2012, *Heli-Flight GmbH & Co. KG*, *cit.*

doubts on the reliability of the hydraulic system and even a failure of the hydraulic system would not entail that the helicopter was not airworthy anymore. The appellant also submitted that the Agency was not sufficiently specific about the faults that it found with the helicopter and it did not give the appellant an opportunity to respond to the Agency's concerns.

The Board of Appeal recalled that when an issue at dispute concerned a complex technical assessment, the Agency enjoyed a margin of appreciation[9]. Based on this approach, the Board of Appeal did not review the technical assessment of the Agency on which the rejection was based. The approach taken rather demonstrates that the Board of Appeal followed a so-called 'manifest error test'. The Board of Appeal stated that the appellant called upon the Board "to decide which opinion is better"[10]. However, the Board of Appeal concluded that it could not see from the elements presented that the Agency was wrong. Finally, the Board of Appeal held that the rejection was sufficiently substantiated, since the Agency identified the device and the standard it had concerns with and it also stated the risk that the device gave rise to[11].

The *Heli-Flight* case was challenged before the General Court[12]. However, the General Court did not take issue with the Board of Appeal's intensity of review in that case. To the contrary, at the time, the General Court endorsed the approach taken by the Board of Appeal and only limited itself to the review whether the Board of Appeal committed a manifest error. In relation to the manifest errors of assessment said to have been made by the Board of Appeal, the General Court reiterated at the outset what powers of review the European Union judicature had over EASA decisions such as the Board of Appeal decision[13]. The General Court held: "since the assessment of whether an aircraft is capable of safe flight constitutes a complex technical assessment, the level of judicial review applicable to it must be the limited review of the European Union judicature [...] What the European Union judicature must review is therefore the existence of any manifest errors of assessment"[14]. As a matter of fact, the 'internal review process' between the Agency and the Board of Appeal was not really an issue in this case. The case was finally

[9] *Ivi* para 63.

[10] *Ivi* para 79.

[11] *Ivi* para 87.

[12] General Court, December 11th 2014, case T-102/13, *Heli-Flight* v *EASA*, ECLI:EU:T:2014:1064.

[13] *Ivi* paras 88 and 89.

[14] *Ivi* para 90.

appealed to the Court of Justice[15], but again, the internal review process was not addressed in the proceedings before the Court of Justice.

However, regardless of the CJEU's initial approach regarding the intensity of review and the subsequent case-law development, EASA's Board of Appeal developed over time on its own motion a review process, which demonstrates a more detailed scrutiny of the Agency's decisions.

### 2.2 The *Issoire* case

The *Issoire* case, which the Board of Appeal decided in 2014, is an example where the Board already had a 'closer look' at the challenged Agency decision[16]. This case concerned the following facts: in 2013 the appellant lodged an application with the Agency for approval of a major change to this type certificate, to install a propeller with a reduced diameter to improve aircraft performance, and to introduce structural modifications to the propeller to enhance its vibration characteristics. On behalf of EASA, the French Civil Aviation Authority assessed the compliance of the major change with the applicable certification specifications and environmental protection requirements. Subsequently, the Agency issued the major change approval based on the assessment made by the French Civil Aviation Authority. The approval accepted the technical modifications to the propeller but kept the original noise emission values of the unmodified aircraft. The appellant submitted that the noise emission values should have been set at a lower level. The appellant referred in that regard to the values that resulted from a test conducted by a private company. However, in EASA's opinion, the values resulting from that test could not be taken into account, as the procedural rules governing the test were not followed. The subject matter of the appeal was thus whether EASA was right in disregarding the values resulting from the test of the private company.

The Board of Appeal remarked at the outset that the appellant did not provide the Agency or the French Civil Aviation Authority with the necessary documentation, for example a noise test plan, which is necessary to determine the level of involvement of the two authorities in the compliance finding process[17]. Further, the appellant did not inform the Agency or the French Civil Aviation Authority about the date and place for the planned noise tests[18]. Therefore, the authorities could not witness

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[15] Court of Justice, January 28th 2016, case C-61/15 P, *EASA* v *Heli-Flight*, ECLI:EU:C:2016:59.

[16] Decision of 21 November 2014, *Issoire Aviation*, *cit.*

[17] *Ivi* para 42.

[18] *Ivi* para 43.

the tests, as provided for under the relevant regulations. In view of these circumstances, the Board of Appeal concluded that the Agency took, on the basis of the information in its possession, the decision less onerous on the appellant[19]. Thus, it appeared to the Board that not only had the Agency acted within the limits of the applicable provisions but, within those limits, it had also sought to take full consideration of the interests of the appellant, and it has acted in accordance with the principle of proportionality[20].

### 2.3 The *APA* case

Another example of an even more detailed scrutiny of an Agency decision is the *APA* case, which the Board of Appeal decided in 2022[21]. This case concerned an EASA decision, which partially suspended the Design Organisation Approval (DOA) privileges issued to the appellant. The partial suspension was the result of an audit the Agency carried out at the premises of the appellant. The audit was conducted to assess the appellant's compliance with the requirements of the relevant regulations and performed by assessing examples of the appellant's work and interviews with the appellant's staff. Concerning the audit, the appellant submitted that the outcome of the audit be cancelled, as the audit came as a surprise and that it felt discriminated against by having been selected and assessed in the audit.

In order for the Board of Appeal to assess whether the audit was conducted correctly and whether the right conclusions were drawn from that audit, the Board of Appeal requested, on its own motion, full access to the file. Consequently, the Board of Appeal went through all relevant documents to assess, for example, whether the procedure was correctly conducted, whether the questions to the appellant's staff were adequate to test their abilities and whether the correct conclusions were drawn from the replies received. This review did not imply a *de novo* assessment, but a detailed review of the facts and evidence before the Board of Appeal in that case[22]. The Board of Appeal found that the contested decision was proportionate, as it only led to a partial suspension and not to a revocation of the DOA, and that the appellant had various opportunities to be heard before the contested decision was adopted. With regard to the appellant's request to cancel the audit, the Board of Appeal held that the appellant could not claim that the audit came as a surprise, because the appellant

[19] *Ivi* para 45.
[20] *Ivi* para 46.
[21] Decision of 19 December 2022, *Aviones Piezas y Accesorios (APA) S.L.*, *cit.*
[22] *Ivi* paras 67 to 74.

was notified well in advance and the Agency, both before and after the audit, was in regular communication with the appellant concerning the audit. The Board of Appeal did also not share the appellant's unsubstantiated view that it was discriminated against by having been selected and assessed in the audit. On this point, the Board of Appeal found that the entire procedure before, during and after the audit was conducted by the Agency in a transparent, fair and non-discriminatory manner[23].

### 2.4 The *Fly Baghdad* case

The last case worth mentioning is the latest Board of Appeal decision adopted in 2023 in the *Fly Baghdad* case[24]. This case concerned, *inter alia*, an EASA decision to refuse the appellant's application for a Third Country Operator (TCO) authorisation. The Agency carried out a TCO assessment to determine whether the appellant complied with the applicable requirements of the regulatory framework. The assessment was completed in accordance with an agreed programme and covered quality and safety management, airworthiness, and flight operations. The TCO assessment was primarily based on documentation provided by the appellant, followed by a physical technical consultation meeting. As a result of this assessment, and subsequent correspondence with the appellant, the Agency stated that it could not establish a sufficient level of confidence in the appellant and concluded that further assessment of the application at that stage would not result in the issuance of an authorisation. Consequently, the application for a TCO authorisation was refused. The appellant requested that the Agency either cancelled the TCO application or that it revoked in whole or in part the decision to refuse the application.

The Board of Appeal reviewed the assessment made by the Agency in detail. The Board of Appeal observed in this context that all findings, which were made as the result of the assessment, were well substantiated and documented. However, the Board of Appeal also noted that the appellant did not actually dispute these findings and, on the contrary, the appellant accepted the findings made by the Agency[25].

## 3. The adversarial nature of appeal proceedings

Considering that ultimately the intensity of the review will depend largely on the pleas made by the appellants, it is important to recall the

[23] *Ivi* para 76.
[24] Decision of 7 September 2023, *Fly Baghdad Company for Aviation Ltd.*, *cit.*
[25] *Ivi* para 56.

adversarial nature of the appeal proceedings. How far the review goes will depend on how good the pleas are. If the pleas are well substantiated, and accompanied by good evidence, they would prompt the Board of Appeal to likely go far in its review. Conversely, if the pleas are not well substantiated, then the review may remain at a certain level. Hence, it will be very much a case-by-case assessment and the Board of Appeal will, to a certain extent, be determined by the pleas to assess how far the review should go.

This has also been confirmed by the General Court in *Aquind*, when the Court held: "accordingly, as regards the 'intensity of the review' to be carried out, the review of errors of assessment must be conducted only in relation to the questions raised by the appellant and therefore does not encompass matters falling outside the ambit of the appeal or, by definition, complex economic and technical matters which were not raised in the appeal and which are not covered by the evidence submitted by the appellant"[26]. Consequently, the review will be 'guided' by the pleas made. Having said this, the Board of Appeal would take-up matters of public policy concerns on its own motion, if decisions are, for example, vitiated by errors of a missing competence, serious procedural errors or a lack of reasoning; and the General Court confirmed such an approach[27].

Additionally, the 'manifest error test' notion seems a rather misleading description of the required intensity of review. I would submit that a difference between an 'error of assessment' and a 'manifest error of assessment' cannot be objectively described. For example, the General Court would be reluctant to establish an error and qualify it as 'non-manifest'. Either there is an error or there is none. As we know from the General Court, for example, in State aid or competition cases, the Court can go very far in its assessment and will not necessarily limit itself to 'manifest errors'.

Although, the 'manifest error test' may become a 'convenient escape clause', when confronted with, for example, two different expert opinions of a highly technical nature. However, in such a situation the *Aquind* judgments are not obliging the Boards of Appeal to decide which opinion is the better one. The jurisprudence of the CJEU requires the Boards of Appeal 'only' to review the facts and evidence on which the Agency decision was based and assess whether the Agency has drawn the correct conclusions from these facts and evidence. In other words, the Boards of Appeal are not required to conduct their own inquiry and start a *de novo*

[26] General Court, November 18th 2020, case T-735/18, *Aquind Ltd* v *ACER*, *cit.*, para 81.

[27] See General Court, September 9th 2019, case T-125/17, *BASF* v *ECHA*, ECLI:EU:T:2019:638, para 65.

assessment of the case[28]. By contrast, as the General Court held: "the Board of Appeal is to confine itself to examining whether the arguments put forward by the applicant are such as to demonstrate the existence of an error vitiating the contested decision"[29]. Being confined to the arguments put forward by the appellant does not prevent the Board of Appeal from examining pleas calling into question the findings in that challenged decision and therefore carefully reviewing the facts and evidence on which these findings are based. Again, such an assessment will depend on a case-by-case basis and require the expertise of the Appeal Board members to review complex technical cases, which brings me to my last point, namely how well the Board of Appeal is equipped to discharge its review duties?

## 4. How well equipped is the Board of Appeal to discharge its review duties?

In the *Aquind* judgments the Court of Justice confirmed the General Court's conclusion that the EU legislature intended to provide the Boards of Appeal with the necessary expertise to allow them to carry out assessments of complex technical and economic facts[30]. The Court of Justice therefore held that the composition of the Boards of Appeal meets the requirements necessary to enable them to conduct a full review of decisions[31].

Further, the Court of Justice also endorsed the General Court's conclusion that the fact that the members of some Boards of Appeal, unlike those of other Boards of Appeal, are employed part time (with only nominal remuneration) and not full time, cannot affect the intensity of the review, which they are required to conduct[32].

The EASA Board of Appeal consists of one legally qualified member, who is the chairperson, and two technically qualified members, with three alternates to replace them in their absence. The chairperson, the other members and their alternates are appointed by the Agency's Management Board from a list of qualified candidates established by the European Commission. The technically qualified members and their alternates must

[28] *Ivi* paras 59, 112 and 119. However, the General Court draws a distinction between the ECHA Board of Appeal and the EUIPO Board of Appeal, the later which is required to carry out a *de novo* assessment (para 94 ff.).

[29] *Ivi* paras 60, 65, 86, 103 and 134. See also case General Court, September 20th 2019, case T-755/17, *Germany* v *ECHA*, ECLI:EU:T:2019:647, paras 60, 87 and 93.

[30] Court of Justice, March 9th 2023, case C-46/21 P, *ACER* v *Aquind*, ECLI:EU:C:2023:182, *cit.*, para 64.

[31] *Ivi* para 63.

[32] *Ivi* para 70.

have a university degree or an equivalent qualification and must have substantial professional experience in the field of certification, in one or more technical disciplines, such as, for example: (*i*) flight/performance; (*ii*) structure; (*iii*) hydro-mechanical systems; (*iv*) rotor/transmission systems; (*v*) electrical/lightning; (*vi*) avionics/software; (*vii*) power plant installation/fuel systems; (*viii*) cabin safety/environmental systems; (*ix*) noise/emissions; and (*x*) continued airworthiness/airworthiness directives as applied to various products, their parts and appliances[33].

These are only some examples and, bearing in mind the growing spectrum of tasks the Agency is entrusted with, the review of these different technical disciplines will be challenging for only two technically qualified members on the Board of Appeal. It is also regrettable that the chairperson is not entrusted with the power to select for each case the best-qualified technical members out of the 'pool' of members and alternates to ensure the best composition of the Board to hear a case. In this context, inspiration can be drawn from the Board of Appeal of the Community Plant Variety Office (CPVO), where the chairperson can select for each case the other members and their respective alternates from a list of qualified members[34]. Creating a greater flexibility in the composition of the Board of Appeal would also have the side-effect that the alternates would be more involved in the actual work of the Board. In addition, it is also not explicitly foreseen that for complex cases the Board could be extended by two more members. Again, this is, for example, possible for the Board of Appeal of the CPVO[35].

The members of the EASA Board of Appeal work on a part-time basis, and they are getting paid per case. The remuneration per case is based on an Agency's Management Board decision dating back to 2006 and foresees a daily rate of EUR 400 for members and EUR 500 for the chairperson and rapporteur of the case, with a maximum remuneration per case of ten days. In order to continue to attract the most qualified experts, a revision of the current daily rates should be envisaged. Further, the remuneration ceiling may pose problems in highly complex cases, when ten days are actually quite quickly consumed, bearing in mind the different stages and length of the proceedings, which may involve the organisation and conduct of oral hearings.

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[33] Article 2(2) and the Annex to Commission Regulation (EC) n. 104/2004 of 22 January 2004, *cit.*

[34] Article 46(2) of Council Regulation (EC) n. 2100/94 of 27 July 1994 on Community plant variety rights, in *OJ* L 227, 01.09.1994, p. 1 ff.

[35] *Ivi* Article 46(3).

## 5. Conclusion

The jurisprudence of the CJEU on the intensity of reviews of Boards of Appeal is putting a 'high burden' on the experts serving on these Boards. Whether the EASA Board of Appeal is sufficiently equipped for discharging its review duties, in order to live up to the requirements set by the CJEU, will remain a constant challenge, given the spectrum of expertise required and the fact that only two experts serve on the Board. So far, the EASA Board of Appeal has developed over the years a more detailed review of the Agency's decisions. However, the intensity of the review in each of these cases was ultimately determined by the quality of the appellants' pleas. The EASA Board of Appeal is mindful of its review duties and will endeavour to continue complying with them in future cases.