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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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SELECTED CONTEMPORARY QUESTIONS FROM THE ACTIVITIES OF THE ACER BOARD OF APPEAL

Alcune questioni attuali sulla commissione di ricorso di ACER

Questions d'actualité sélectionnées dans le cadre de l'activité de la chambre de recours de l'ACER

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1. Introduction: on importance of practitioners providing elements for discussion, informing the theoretical findings and judicial decision making

The proliferation of high-quality theoretical and scientific literature on the Boards of Appeal in the recent years has been astounding and has brought many important elucidations on the ever-evolving picturesque landscape of the EU Agencies and their BoAs. Those contributions were mainly based on analysing the legal framework and the case law, often comparatively. This is always very informative, but has little appeal and only modest immediate utility for the practice. The practitioners often look for existing, ready-to-use solutions they could apply to their case, and for inspiration (consolation as well, at least occasionally) from their peers. Unfortunately, at the practical level and from a practitioner's perspective, there was no such richness of horizontal analyses of practical aspects of the BoAs to be witnessed, which renders opportunities for exchanges

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between science and practice, as well as among the practitioners, of which our conference today is an excellent and important example, even more important.

The large amount of high-quality in-depth analyses of BoAs from the theoretical point of view and the vast majority of theoretical works accessible at the time of reading of the opinion in *Aquind* were already mentioned by the Advocate General. While it is a very valuable contribution of the Advocates General to conduct comprehensive research into the existing theoretical sources and include those in their opinions, it would be equally beneficial to the quality of the opinions and of the judgments to come if they also consider the facts as they exist in the everyday reality of the different BoAs. Truth be told, there are not many works published by the insiders, leaders or members of the BoAs: where they are, they tend to present and analyse their own BoA against some theoretical framework, falling into the trap of doing what everyone else is doing instead of providing insights into the (sometimes 'dirty') practicalities of work of the BoAs. One rare - and relatively recent – example from 2023 of an inside job is the very complete and detailed analysis by Ollier and Piebalgs of functioning of the ACER BoA[1]. It can only be welcomed that the two former leaders of the BoA have written about their experience and provided insights into the functioning of 'their' BoA.

The paper by Ollier and Piebalgs analyses the design and functioning of the EU Agency for the Cooperation of Energy Regulators' BoA and provides a record of the key issues of substance and procedure it faced over five years (November 2016 to October 2021), from the perspective of the authors as insiders, as former chairman and vice-chairman of this review body. In the middle of their 'term of office' in 2019, the ACER regulation was amended in some important aspects, also with regard to the powers of the BoA.

As also discussed in the literature, there are common features that unite the BoAs in their diversity; yet there are the specificities of each BoA that must be considered in every serious analysis of any given BoA. Some of the ACER BoA's specificities stem from those of "ACER's role in the construction of energy markets and of the place of the decisions it takes in the architecture of the EU energy policy: despite being labelled as 'individual decisions' many of ACER's decisions are of general application and have major impacts on energy markets". Some of these questions (for instance, an individual decision is individual by its name only and is a

[1] J.-Y. OLLIER, A. PIEBALGS, *The appeal procedure in the application of the EU energy law: experience from ACER's Board of Appeal 2016-2021, EUI, RSC, Policy Paper*, 2023/06, Florence School of Regulation. Retrieved from Cadmus, EUI Research Repository.

regulatory act by its substance?) are now being examined by the EU Courts. In addition to these questions, the paper also provides information on the workload of the Board: in the context of the implementation of network codes, the BoA was faced with an increasing number of cases (29 appeals, which were consolidated into 19 decisions). These cases are considered to be complex. As to the time imposed for the decision to be taken, it was extended from 2 to 4 months to enable the BoA "to progressively adjust the depth of its scrutiny to the appropriate level. Outstanding questions remain on the resources allocated to the board and on the clarification of its powers and procedures". While the most recent case law of the Court provided some more clarity on the first question (width and depth of scrutiny) and significant progress can be said to have been achieved, more work needs to be invested in the second question, especially in the part on resources made available to the Board.

The findings and insights of Ollier and Piebalgs are an excellent source of information as to what the situation was before 2021; since then, we've seen many changes implemented (powers of the BoA, deadline; case law), yet some elements remain the same. Or do they really?

2. After *Aquind* as before *Aquind*: the nature and quality of administrative review remain the same?

The first question of quite some importance to our (predecessor) BoA as the protagonist in the court procedures relating to the *Aquind* line of cases[2] - but inevitably also to the current BoA and more widely to all the BoAs -, is whether anything has changed with the delivery of the Court's *Aquind* judgment in spring 2023 compared to 'pre-*Aquind*' situation? Surprisingly or not, I am 'obliged' to say nothing has changed, as there was no need to change anything. Everything is still the same. Summing up the official position: nothing has changed in the substance of review because the previous BoA's and today's BoA standard of review have always been the same - full review then and now, to put it simply. We are still doing the complete, intense and deep scrutiny as our predecessors of the previous BoA did before *Aquind*. Such is the line of defence that ACER advanced before the General Court and the Court of Justice in the cases that are closed or still ongoing: in spite of mentions in the decisions of the BoA of application of limited review (review limited to manifest errors of appreciation, MEA), in practice the BoA has done the full, complete review; in any case, a review that went far beyond the mere review of

[2] *Aquind* case itself (currently an action for damages before the General Court), as well as cases in which the questions of (administrative) review are being discussed.

MEA. *Falsa nominatio non nocet*, and the substance is more important than the form.

This line of defence was somehow tenable until the first judgements of the General Court in spring 2023 that endorsed it, stating that what is done matters more than what is described to have been done, but received a serious blow by the same court less than half a year later, after delivery of the *Aquind* judgement, when the General Court annulled the BoA's decision by an order, declaring the appeal manifestly well-founded[3].

There were changes planned and done, however, in anticipation of *Aquind* and well before it (prepared in 2019, implemented in 2021). How can we otherwise explain the call for expression of interest for applications for the new members of the new BoA that finally 'took office' on October 2021 that expressly mentions the need for a more in-depth review?[4] It would seem that the Commission estimated that a 'more full' review will be needed and that the MEA standard would have to be abandoned and upgraded, so that this new board would need to be equipped with different profiles of experts, concretely its legal expertise reinforced. This is what happened in the end, in order to ensure conditions in which complete review of all the aspects of the decision can effectively be performed. The Court based it reasoning in *Aquind* on this element as well.

In practice, what happens today is that we not only have a relatively high number of cases (i.e. compared to ECHA BoA with whom the Court compares ACER BoA and establishes there is no need for discernment, at least not at the level of principles), but also commensurately lower resources, as I intend to illustrate later. For the current BoA, 18 cases per year is a high number of cases, given the fact that the experience of the current BoA shows that we are able to deal with six cases per year at the most; even here, the respect of the four-month deadline poses problems.

In addition to the regular work on review of decisions, the BoA would like to gain and retain the (relative) mastery of both the procedure and the substance of decisions from the adoption of our decision until the very end - sometimes the bitter end - of those procedures. Thus, in addition to the relatively high number of cases, we also are getting involved in participating in the defence of the cases before the General Court and the Court of Justice, which was not the situation before. We are trying to do that by being included in the workflow of the court cases and by participating in the oral hearings. We believe this part of our work to be

[3] General Court, September 6th 2023, case T-212/20, *Gaz-System S.A.* v *ACER*, ECLI:EU:T:2023:525.

[4] The fact that the composition of the BoA changed does not mean everything needed to be changed as it is difficult to predict in which directions the appeals will go, but it indicates a shift of focus on the side of the Commission.

an essential part of the quality control process. To date, none of actions against our decisions has reached the stage of the oral hearing. Without surprise, one can observe a certain meandering in argumentation of the cases at different periods and before different courts.

However, this attempts at mastering the quality of the decisions all along is opening new fronts for the BoA, demanding additional investment (work): we don't have the resources to do everything that we think we would need to do to do everything that needs to be done. Simplifying: our ambition flies much higher than our resources can follow.

3. The unused potential of the *Aquind* judgement

This brings me to the *Aquind* judgement. Turning first to the judgement of the General Court from 18 November 2020, it was a very positive surprise to see the GC exemplary pedagogic in its reasoning, defining the scope of review, defining the intensity of review, also saying - which was also the case in Austrian power grid and some other cases before - that if the BoA does not conduct the full review and as the General Court will only do the limited review, there will be no full review of the Agency decision at all[5]. Unfortunately, not all the points from the General Court judgment were taken on board by the Advocate General and by the Court, at least not *expressis verbis*.

Future problems were almost certain to emerge once the opinion of the Advocate General was read. Yes, there are similarities between the BoA of ECHA and the BoA of ACER, but there are also differences; some of the differences are so important that they should have prevented the Court from reaching the conclusions it reached.

What are the (most striking) differences between the two BoAs, compared by the Court and then leading to a set of generalised conclusions? We've have just heard from the Chair of the ECHA BoA that there are some important differences when ACER BoA is compared to ECHA BoA: the first not at all irrelevant difference is that compared to our peers at ECHA, we have a significant deficit of 100% of permanent members (our net result is -3 permanent members, compared to ECHA, because we have none - none of our members is a permanent member), and we have -1,5 person in the registry compared to ECHA as we only have 0,5 person in the registry: these two differences alone - they did not seem to matter much to the Advocate General and the Court - make a world of difference to us.

[5] What happens in cases where there is no BoA, e.g. with regard to decisions of EMA, EFSA or others – does the General Court perform the full review? Perhaps this is just a rhetorical question.

At the level of principles, however, we do agree with the statements of principle the Court made. In general, and in itself, the decision of the Court is well-balanced and well-rounded. We do agree that, for instance, the standard of review must be the same for all the bodies. But there are principles and there is reality and sometimes – as in the case at hand - reality does not willingly conform to principles.

From the point of view of the unexplored potential of the *Aquind* judgement, we are happy to use the arguments from this judgement in the future negotiations with our Agency: "you see, it's decided black on white that the standard of review (i.e. in the sense of quality of work) must be the same for all the BoAs. So maybe you should consider giving us the same resources or at least similar resources as to our peers, or at least the resources that make it possible for our Board to fulfil our functions approximately adequately?". This was attempted before *Aquind*. With *Aquind*, the new approach is irrevocably confirmed, but it seems that everyone has already recovered from the relative surprise it created and has gone back to business as usual. The response to the initial shock was that there need to be serious changes introduced in the functioning of the BoAs, but it then appeared that life can indeed go on as before. After and with *Aquind*, we have additional arguments to try again. Of course, we are not afraid of facing the practical limits of the applicability of the judgments of the Court on the terrain.

Even if one may not be completely satisfied with how the Court treats the factual situations, not discerning them sufficiently, it brings important messages to the legislators and the policy makers. It defines the essentials of the administrative review and it generalises them for all the boards of appeal. The feasibility of the review is beyond grasp of the Court, it is a kind of *de minimis non curat praetor* for it. This necessarily leads to the question of how to ensure the conditions in which the findings of the Court will not only be wishful thinking, but will become reality.

It seems that EUIPO and ECHA are in the category of their own. Yet, ECHA is used as a basis for comparison with ACER (and could probably be used for any other Board of Appeal). We do not maintain that every Board of Appeal should be structured, organised, equipped and functioning in the same way as ECHA Board of Appeal. However, we do maintain there should be - in order to be able to comply with the *Aquind* judgement of the Court - a minimum standard met for each and every BoA. The implementing elements of this minimum standard could be different for different BoAs, but it seems that at least one person (and not two times half a person or any other combination of the FTE) in the registry and at least one member, by no means necessarily Chair or Vice-chair, should be permanently available to the BoA. 'Permanently available'

here means that these two minimal personnel resources would dedicate their time and energy to not only day to day work on cases, together with other members of the Board of Appeal, but also to maybe even more important tasks of developmental nature, ensuring continuity and independence in real fact. These two full timers would be the minimal viable solution that could provide a sufficient basis for a work of a decent quality.

4. Where is it all going to?

Back to the beginning, to the question in the title of this conference "*Quo vadis, Boards of Appeal?*". The Biblical response was ominous and tragic – *"I am going to Rome to be crucified again"*. The ACER Board of Appeal didn't go to Rome, it went to Luxembourg, and luckily enough it was not for crucifixion, it was for clarification. So, with *Aquind*, it now all stands clarified and decided. But even before *Aquind*, it was all clear at least to those colleagues who believed that the significant 'detour' that first appeared in the GC judgements in CPVO cases[6], where the BoAs were qualified as the 'quasi-judicial bodies' and their tasks in relation to the "complex botanical assessments" qualified as MEA[7], was a hick-up in the case law. In this regard, one can also note the change of language in the *Aquind* judgment: the Court doesn't use the expressions 'quasi-judicial body' anymore, it uses the terms 'bodies performing quasi-judicial functions'. What will it take to use the word 'administrative'? It may well be that that change of language is also the change of perspective or approach, meaning that we can now all go back to basics. In sum, we kept dealing with an illusionary problem we wouldn't have had had it not been opened by the judgment of the General Court: the CPVO was described as a 'quasi-judicial body', with *Aquind* 'developed back' in administrative bodies performing certain 'quasi-judicial functions' – from the wrong start to the wrong track and back on the starting position? All while hoping this time we will fail again, but better?

Now that the discussion can sadly (at least for some) only focus on what the 'quasi-judicial functions' are, the good news is that there are many

[6] The Schräder line of cases (General Court, September 18th 2012, joined cases T-133/08, T-134/08, T-177/08 and T-242/09, *Schräder* v *OCVV*, ECLI:EU:T:2012:430, paras 137 and 190), a Lemon symphony that turned really sour, but also provided for some refreshment of discussion both in theory as well as in practice, comparing or even wanting to assimilate the BoAs as the essentially administrative review bodies with or to the judicial bodies. Those attempts were a significant waste of energy. See also Court of Justice, May 21st 2015, case C-546/12 P, *Schräder* v *UCVV*, ECLI:EU:C:2015:332.

[7] General Court, 19th November 2008, case T-187/06, *Schräder* v *UCVV*, ECLI:EU:T:2008:511.

unexplored questions of administrative review of the BoAs as administrative review bodies that can usefully be analysed. Is it now time to more clearly separate the two reviews, judicial and administrative, and to concentrate on how to improve the administrative review?

5. New old questions to be examined

a. The right to good administration - and to a good administrative review

One of the questions that could be explored after the end of discussion on the 'quasi judicialness' of the BoAs is the need/obligation for the BoAs to follow blindly the case law of the courts that is essentially developed by the courts and for the courts as it relates to judicial review. Is there room for manoeuvre for the BoAs to detach themselves from the mental slavery and become slightly more creative, respecting the needs of the areas of law covered by their respective Agencies and, above all, the appellants and other stakeholders, and the need for administrative review to be properly conducted (before it can be submitted to judicial review)? Maybe to go as far as to explore the limits of the 'review of expediency'[8]? Or to set a very different approach for administrative review, departing from the one carved in stone for the judicial review, including the rules and practices on admissibility – in other words, to move from rigidities of the judicial review towards more flexible, substantive respect of rights and interests of participants? The right to good administration has many unexplored facets, especially when considering the 'unity in diversity', one of the essential characteristics of the landscape of Agencies and their appeal bodies today.

b. An inspiration post- Aquind: what changes are possible with the role of the Advocate General at the General Court?

As mentioned, on reading the opinion of the Advocate General in *Aquind*, we were tempted to do the same as the ECB did in the case *Banka Slovenije* of 2021[9], in which the ECB asked the Court for reopening of the oral part of the procedure to comment on the Advocate General's findings.

[8] Another concept that did not find much attention in the case law of the courts, at least not with regard to the judicial review. It may be different in the context of administrative review. Should it be different?

[9] Court of Justice, September 13th 2002, case C-45/21, *Banka Slovenije,* ECLI:EU:C:2022:670, p. 38 ff.

By document lodged at the Court registry on 10 May 2022, the ECB requested that the oral part of the procedure be reopened. The ECB disagreed with the Advocate General's opinion. It argued in particular that that opinion relies on a broad interpretation of the concept of "public sector obligations"' within the meaning of Art. 1(1)(b)(ii) of Regulation (EC) n. 3603/1993, which has significant consequences for the general organisation of economic and monetary policy, and that the parties did not have the opportunity to comment on that point at the hearing. While the substance giving rise to the request has nothing to do with ACER's area of competence, the request procedurally as an attempt to 'correct' certain developments in the opinion of the Advocate General may be worth examining – despite the negative outcome of the request for the ECB before the Court[10]. This unexplored avenue is worth exploring as the BoAs will mainly be involved in the procedures before the General Court, where the practice of appointing the Advocates General will be new (the possibility exists for quite some time now) and will also be shaped by practice – that practice will need to be developed. Traditionally, the General Court manages to make plausible connections of facts and law (that's what it was established for, to examine factually and legally complex cases); the use of possibility to appoint the Advocates General and hopefully to also be able to hope for an occasional reopening of the oral part of the procedure could contribute to the thorough examination of all the relevant facts and applying the law to them.

In any case, this is an interesting approach that may need to be revisited and modified in the sense that parties may submit observations to the General Court concerning the Advocate General's opinion, to submit additional observations and maybe offer a practitioner's view so that the judgment to come would be evidence-based, respectful of and true to the facts and not only literature-inspired[11].

The avenue that may be useful to explore in the future therefore is to develop further what was proposed by the ECB in C-45/21, however at the level of the General Court, with the specificities this entails.

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[10] In the given circumstances, the Court considered it was not necessary to order that the oral part of the procedure be reopened (p. 43), as it should be borne in mind that the and the Rules of Procedure make no provision for parties to submit observations in response to the Advocate General's Opinion (p. 41); the Court may at any time, after hearing the Advocate General, order the reopening of the oral part of the procedure, in particular if it considers that it lacks sufficient information (p. 42), and it had at its disposal, at the end of the written part of the procedure and the hearing before it, all the information necessary to give a ruling.

[11] This could be an option to use before the General Court and its newly clarified and developed system regarding the functions of the Advocates General at that Court.

The facts that there is the new filtering mechanism adopted and that the General Court deals with technically (factually) complex cases (*Aquind* probably was such a case), as well as the possibility for the General Court and its Advocates Generals to develop their own approach may provide some fertile ground for a more fact-friendly (fact-aware, factfulness-based) approach to cases in the future.

c. Filtering mechanism from the amended Article 58a of the Statute

We don't think that adding BoA on the list of the Article 58a will have an important impact on how we work and especially not on the number of cases. With regard to the latter, there will probably be less work for the ACER BoA as all the questions will be solved at the level of the General Court and there will be no need to participate in the proceedings before the Court. This is even more so if we consider going back to the original functions or the original intention of establishment of BoA, which is to engage in the administrative review.

d. What is admissible? A final point, currently under discussion

In line with the question on the possibility of developing specific rules for the administrative review instead of blindly applying the rules developed for and by judicial bodies, we should mention that there are two cases underway in which the question of admissibility of appeals against the decisions of the Agency are being discussed: what to do where the founding regulation of the Agency is different (more restrictive) than the TFEU is on admissibility to judicial review?

According to the Notices published in the OJ about the cases, the actions for annulment criticise the BoA for having declared their appeals inadmissible: the Applicant before the General Court claims the BoA failed to recognise that the contested decision is not only of direct but also of individual concern to the Applicant, and that the Applicant was entitled to appeal under Art. 28(1) of Regulation (EU) n. 2019/942 (first plea); the Applicant also claims that the BoA failed to recognise that a party may also bring an appeal under Art. 28(1) of Regulation (EU) n. 2019/942 where the contested measure is a regulatory act which – as in the present case – is of direct concern to the party bringing the appeal and does not entail implementing measures (even when labelled 'individual decision' by the ACER Regulation).

These are purely legal questions and those cases seem to be important not only to ACER's BoA. The more general question that started to

become quite important in *Unión de Pequeños Agricultores UPA*[12] and *Jégo-Quéré*[13] at the turn of millennium was revived after the entry into force of the Treaty of Lisbon (*Inuits* and the cases that followed and follow), and especially because of the importance of the energy transition: how broad an access to the administrative and to the judicial review do the BoAs and the courts want/need to give? Maybe this is a good opportunity to provide for more administrative (and later on, judicial) protection, especially with regard to the recent developments in some areas of law (climate and energy)[14].

6. Conclusion: not all that glitters is gold

The importance given to the BoA in the recent years because of their declared quasi-judicial nature was a very positive development, even if for wrong reasons: it has made both the theory and the practice aware of the existence and importance of the existence and nature of (quasi-judicial or administrative?) review at the level of Agencies.

Assuming almost everything is clear with regard to the nature, scope and intensity (in one word: quality) of judicial review, we should now recentre our attention to the administrative review. Based on discussions so far, even if not always in the right framework, there are now opportunities for the BoAs to be examined in their natural environment, the one of administrative review, and to observe - even better, assist and enable - them in their mission of developing (improving) the quality of their review. If in these discussions new opportunities are discovered and used to protect the interests of participants faster and better, the discussions will not be futile.

[12] Court of Justice, July 25th 2022, case C-50/00 P, *Unión de Pequeños Agricultores* v *Council*, ECLI:EU:C:2002:462.

[13] Court of Justice, April 1st 2004, case C-263/02 P, *Commission* v *Jégo-Quéré*, ECLI:EU:C:2004:210.

[14] The somewhat innovative approach taken in *Corneli* is not the best example, except of the point that there is room for improvement.