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The ever-evolving role of EU Board of Appeals: some personal reflections.

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Life, famously, can be unpredictable. My professional career recently took a different turn and my very enjoyable tenure as Vice Chair of the Board of Appeal (BoA) of the Agency for EU Agency for the Cooperation of Energy Regulators (ACER) was concluded before the end of my mandate. Thus, I have the opportunity to offer some exclusively personal reflections on the three years I spent at the BoA. I hope those can be of interest as questions about the specific status and the constitutional position of these rather peculiar bodies called Boards of Appeals (aka "*Commissions de Recours"*) kept on popping up after the delivery of very significant judgments of the Court of Justice and after the entry into force of the recent reforms amending the EU Courts Statute rules for leave to appeal for BoAs decisions.

EU agencies and their accountability: The BoA of ACER.

In reflecting on the role of BoAs, one of the surprising features for a sort of middle of the road EU law scholar like me, it is the sheer variety and fast evolving nature of the EU agencies. Currently the EU agencies network lists fifty-one EU various bodies with twelve thousand staff located in twenty-four Member Stats. Thirty-one are branded "decentralized agencies".[1] EU decentralized agencies are not of course EU institutions that find their legitimacy in the Treaty but they are established by secondary legislation as to contribute to the proper implementation and delivery of EU policies.[2] The increasing importance and the reasons for such an exponential growth are fully analyzed in academic

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[1] https://agencies-network.europa.eu/index_
[2] Joint statement of the European Parliament, the Council of the EU and the European Commission on decentralised agencies, February 2022,

literature.[3] Thus, I will limit myself to some observations related to the second step in the EU administrative procedure: the mechanism as to review the legality of the EU agencies decisions. Interestingly, the Treaty itself provides for a quasi-constitutional dimension for EU agencies by specifically requiring that their decisions should be fully accountable and inserts their reviewability within the EU cadre of judicial protection. Thus, for instance, paragraph 5 of Article 263 of the TFEU deals specifically with admissibility of actions brought against agency decisions. It provides that *"[A] cts setting up bodies, offices and agencies of the Union may lay down specific conditions and arrangements concerning actions brought by natural or legal persons against acts of these bodies, offices or agencies intended to produce legal effects in relation to them".* Likewise, Article 265 TFEU subjects to the Court of Justice any failure to act ascribed to a EU agency. As to reaffirm the importance of accountability of EU agencies decisions, eleven of the thirty-one of EU agencies are also equipped with a separate independent body in charge of reviewing the agencies decisions. The Board of Appeal of the Agency for EU Agency for the Cooperation of Energy Regulators (ACER) is one of those. The purpose of ACER, located in lovely Ljubljana, is to assist national regulatory authorities *"in exercising, at Union level, the regulatory tasks performed in the Member States, and, where necessary, to coordinate their action and to mediate and settle disagreements between them",* as well as to contribute to high-quality common regulatory and supervisory practices.[4] Thus, the prerogatives of ACER are not those of a EU Energy Regulator but its role is to cooperate and to assist national regulators (and transmission operators –TSOs) in the proper implementation of the wide consultation of EU provisions on the energy market. Still apart form advisory instruments as reports or other market analysis, ACER has the power to step in cases national regulators fail to agree on common rules on several aspects of energy market regulation and to adopt binding decisions or to directly approve or amend previously agreed text (within certain limits!) on various issues from cross-border exchanges, system operations and security —common terms and conditions or methodologies etc. It should be noted that ACER decisions are actually "individual" decisions as they are specifically addressed to each and every one of national regulators and TSOs. It is then hard to escape the conclusion that despite such a formal aspect, the Agency decisions are of general application and regulatory in nature. More on this aspect later. As mentioned, ACER is equipped with a Board of Appeal. The BoA is part of the administrative and management structure of ACER (Administrative Board, the Board of Regulators and the Director) but decides, independently from these other bodies, on appeals against categories of decisions. In terms of composition, there are six members and six alternates that is to say members that can be called to step in for any possible impediment that may prevent one of the members to take on a case. The ACER Regulation rather tersely states that the members shall be elected from among current or former senior staff of the regulatory authorities, competition authorities or other Union or national institutions with relevant experience in the energy sector. In the last round, the net was cast a bit wider and the final set up of the current board was three national experts, two professors of EU law and as chair, a former judge at the General Court of

[3] See inter alia B. RANGONI, & M. THATCHER. '*National de-delegation in multi-level settings: Independent regulatory agencies in Europe. Governance',* 36(1): 81 (2023) published online https://doi.org/10.1111/gove.12722 .

[4] Article 1 Regulation (EU) 2019/942 of the European Parliament and of the Council of 5 June 2019 establishing a European Union Agency for the Cooperation of Energy Regulators (recast) OJ L 158, 14.6.2019, p. 22–53.

the EU.[5] Article 26 (2) of ACER Regulation introduces a very import guarantee for the Boa Members: "*The members of the Board of Appeal shall be independent in making their decisions. They shall not be bound by any instructions. They shall not perform any other duties in the Agency, in its Administrative Board or in its Board of Regulators.*" Finally, as an indication of the growing importance of the BoA, some numbers on workload may be revealing:[6] the very first BoA (2011 – 2016) decided two appeals only whilst the second BoA (2016-2021) dealt with nineteen appeal. The current BoA (2021-) at half way of its mandate has dealt already with thirteen appeals.

Aquind: Expertise and Docket Control.

Literature and discussion on the BoAs is copious[7] and a special mention should be made for a truly useful empirical project collecting a database of the decisions of all the various BoAs.[8] Thus, the following are very down to earth observations based on my personal experience. The main question concerns of course the kind of review that those bodies are expected to conduct. Rather obviously because of their composition (lawyers – economists – experts in the area) BoAs are supposed to provide an unbiased forum (and they do in my view) where both legal but also technical questions can be fully and thoroughly examined. This is reflected both in terms of submissions of the parties' pleadings, evidence and the very significant reliance of parties on technical consultants or experts during hearings. Our ACER BoA decided therefore to make this feature even more evident, as for any appeal brought against ACER, both a legal and a technical rapporteur was designated as to favour and make the collaboration between the different expertise and experience more productive. Since courts jurisdiction over administrative decisions is usually limited and confined with questions related to manifest errors of appraisal, misuse of powers, or manifest excess of discretion, BoAs can then offer an extra opportunity to dig deeper on complex technical and economic assessments. In terms of the nature of BoAs powers and prerogatives, the reference point is now is the *Aquind* judgment, [9] where the CJEU upholding the General Court, laid down some general pointers and "instructions." In that case - it should be reminded- the applicant challenged precisely a decision of the ACER BoA where the BoA explicitly stated that that its role was limited to review only manifest errors of assessment in the agency decision-making. The BoA argued that ACER as any other administrative agency must enjoy a considerable margin of discretion as to properly exercised its functions thus only limited review could be exercised. The applicant argued that such as stance was contrary to Article 19(5) of Regulation 713/2009 (now repealed) which stated that the ACER BoA

[5] See on this point K. BRADLEY, '*The Court of Justice appeal filter mechanism and effective judicial protection: throwing out the baby with the bathwater?*' *EULive*, July 1, 2024.
[6] These statistics are contained in J.Y. OLLIER and A. PIEBALGS '*The appeal procedure in the application of the eu energy law – experience from ACER's Board of Appeal 2016-2021'*, European University Institute Robert Schuman Centre for Advanced Studies, The Florence School of Regulation, RSC Policy Paper 2023/06.
[7] GI. GRECO, **'***Le commissioni di ricorso nel sistema di giustizia dell'Unione europea***"**, Milan (2020)**,** M. KRAJEWSKI 'R*elative Authority of Judicial and Extra-Judicial Review: EU Courts, Boards of Appeal, Ombudsman*, Oxford, (2023) and J.ALBERTI (ed.), *'Quo Vadis, Boards of Appeal? The Evolution of EU Agencies' Boards of Appeal and the Future of the EU System of Judicial Protection'* in *Rivista del Contenzioso Europeo*, Anno II, Special Issue, 2024.
[8] https://boa.europeanlitigation.eu/.
[9] T-735/18, *Aquind* v *ACER,* EU: T: 2020:542 uphold in C-46/21 P *ACER* v *Aquind* EU: C: 2023:182.

had the same powers as ACER itself. The General Court and later the Court of Justice agreed: as the BoA was a body composed by both legal and technical experts it must, in principle, conduct *a full review of the agency's decision*. The Court of Justice on appeal made in my view some general remarks that are definitively applicable to all BoAs and not just to the ACER one. First, the Court recognized that the creation of the Boards of Appeals were part of an "overall approach" adopted by the EU legislature "*to provide the EU agencies with review bodies where they have been given decision-making powers on complex technical or scientific issues capable of directly affecting the legal situation of the parties concerned*." Secondly, the BoAs are an appropriate mean of protecting the rights of the parties concerned "*in a context in which, where the authorities of the European Union have a broad discretion, in particular in relation to highly complex scientific and technical facts, to determine the nature and scope of the measures which they adopt*"" vis a vis a review by the courts of the European Union that is instead limited to verifying whether there has been a manifest error of appraisal or a misuse of powers, or whether those authorities have manifestly exceeded the limits of their discretion. Thirdly, as for the BoAs nature, the Court observed that they enjoy certain characteristics: despite been part of the administrative machinery of agencies "*they have a certain independence, perform quasi-judicial functions through adversarial procedures, and are composed of lawyers and technical experts*" In terms of access to a remedy, the right of appeal to these bodies is enjoyed by the addressees of decisions adopted by the agencies, in addition to the natural and legal persons to whom those decisions are of direct and individual concern. Furthermore, they review decisions, having effects on third parties, on which the secondary legislation creating those bodies gives them competence to adjudicate. Fourthly, the BoAs duty is to provide a quick, accessible, specialized and inexpensive mechanism for protecting the rights of the addressees and persons concerned by those decisions. In conclusion, BoAs cannot confine themselves to a limited review of complex technical and economic assessments but they should instead carry out a full review. The rationale of *Aquind* is therefore pretty straightforward: because of the specific composition and expertise, BoAs are there to ensure a full review both in legal and substantive terms of the agency decisions. This is as to ensure the whole efficiency of the EU judicial system that cannot be clogged by further appeals re-litigating complex technical and economic issues that courts had no business with in the first place. Thus, first and foremost a very important function of a BoA is to act as a specialized body (not a court!) whose decisions will likely to alleviate the workload of the EU courts. Such a function is now clearly highlighted in the several reforms introduced in the Statute of the CJEU. In 2019, a new Article 58a was added establishing a filtering mechanism for appeals against decisions of the General Court concerning a decision of an independent BoA of four EU agencies, or independent BoAs set up after May 2019. The very recent reforms widened the scope of this provision.[10] The reformulated Article 58a provides for leave to bring an appeal to allow an appeal to be brought against a General Court decision. The new version would make General Court decisions subject to the leave requirement to all BoAs currently operating, So all bodies that had introduced a Board of Appeal before 1 May 2019, they were not covered by the second paragraph of Article 58a and had previously been omitted from the list in the first paragraph of that article, are now included. To be on the safe side, the open-ended rule of the second paragraph of Article

[10] Regulation (EU, Euratom) 2024/2019 of the European Parliament and of the Council of 11 April 2024 amending Protocol No 3 on the Statute of the Court of Justice of the European Union, OJ L, 2024/2019, 12.8.2024.

58a, whereby any independent boards of appeal established after 1 May 2019 are covered by the procedure, remain unchanged. So it is the third paragraph of Article 58a that provides that leave should be granted only if the case *'raises an issue that is significant with respect to the unity, consistency or development of Union la*w' and the fourth paragraph that provides that the decision to grant or refuse appeal must be reasoned and published. BoAs are thus clearly to become the crucial forum where - whilst appeals to the General Court are always going to be guaranteed on point of law- the true and full exam of agencies decisions is going to take place.

Aquind: the nature of review.

Although the rationale in *Aquind* is clear, its application in practice is a bit more complex. Still in our BoA practice we stated very clearly that our parameters have now been delimited by the *Aquind* case: [11] first as the Court reminded – the BoA essential "procedural" function is to provide "*a quick, accessible, specialised and inexpensive mechanism*". The General Court has recently reiterated such a duty as well.[12] To be fair, already in Recital 34 of the ACER Regulation, it is stated that interested parties should, for reasons of procedural economy, be granted a right of appeal to a BoA and in Recital 3 of the BoA Rules of Organisation and Procedure, it is reiterated that "*the Board of Appeal aims to validate procedural economy through the entire appeal proceedings, in terms of the language of the procedure used, deadlines set, length of written documents and any other elements of the procedure where savings in time or in resources used can be achieved."* Already in the BoA practice many procedural devices were activated, for instance in all cases bar one we dealt with, parties accepted English as the language of the procedure. Further, in the post *Aquind* decisional practice the BoA highlighted how it considered the principle of procedural autonomy as general principle of EU administrative law indissolubly linked with the principles of legal certainty and the sound administration of justice.[13] Thus the need to be *efficient* is a "constitutional" requirement. Nothing-new here. Consistent case law, for instance, establishes that in any proceedings, an action is admissible only in so far as that person has an interest in having the contested measure annulled. Such an interest requires "*that the annulment of that measure must be capable, in itself, of having legal consequences and that the action may therefore, through its outcome, procure an advantage to the party, which brought it. In addition, that interest must be vested and current and is to be assessed as at the date on which the action is brought*".[14] Such an interest needs to persist until the conclusion of the proceedings. If this is not the case, there is no longer any needed to adjudicate on the claim since a further decision would not bring any benefits to the applicant. [15] Furthermore it is a general principle in EU law whereby the effective application of EU law implies taking into account fundamental tenets such as due process, the need to ensure legal certainty, the length of proceedings, the cost of litigation or the potentially frivolous nature of the

[11] See most recently the BoA Decisions in case A-001-2021 *PSE v ACER* and A-004-2022 *Fingrid v Acer.*
[12]T-212/20, *Gaz-System v ACER,* ECLI: EU: T: 2023:525.
[13] BoA Decision in case A-002-2022 *Uniper v ACER,* relying on judgment of the Court of 15 November 2018, *Estonia* v *Commission*, C-334/17 P, EU: C: 2018:914, paragraph 51.
[14] See e.g., C-33/14 P *Mory and Others* v *Commission*, EU: C: 2015:609, paragraphs 55 and 56, and C-544/17 P BPC *Lux 2 and Others* v *Commission*, EU: C: 2018:880, paragraphs 28 and 29
[15] See T-86/10 *British Sugar v Commission,* JO C113 of 1.5.2010.paragraphs 27-33.

claim.[16]

The real conundrum is, however, how to reconcile the duty to be quick and efficient with the duty to provide –at the same time- a full and complete review. Once again *Aquind* comes to help. The Court has been very much criticised for being too sweeping. For instance, at para 59 the Court curtly defines the BoAs as '*administrative revision bodies*', which perform '*quasi-judicial*' functions. Indeed pretty short definition but not so difficult to apply in practice. On the one side, BoAs such as the ACER BoA do have their own rules of procedures that resemble very much court proceedings with parties submissions, possibility of intervening, oral hearings if required and so on. On the other side, the BoA is not and should not be considered as a court, and why it should be considered so? In line with more advanced views on the wider remit of administrative law, it is clear to me that the nature of review that the BoA is exercising is to ensure that parties rights are protected by ensuring that the agencies are complying "*with the panoply of the right to good administration"*.[17]As the Court case law makes it very clear the right of good administration comprises procedural guarantees as well as substantive ones. Thus, for instance Article 41 of the Charter requires that any substantive or procedural provisions adopted either by a EU agency or by any other EU bodies need to respect the principles of fairness, impartiality and timeliness. Further Article 41(2) of the Charter of Fundamental Rights also enshrines the right of every person to be heard before any kind of detrimental decision affecting him/her is taken.[18] The various emanations of the right of good administration are therefore to be granted to both natural and legal persons when they have an interest involved in a certain type of proceedings; in particular, they should be guaranteed to those applicants whose economic position is going to be affected by a contested administrative decision.[19] Thus, a full review in my view means a full and throughout assesment and evaluation of the arguments presented both in terms of procedure and substance within the parameters set by the Court in *Aquind* and the general EU constitutional cadre. Many concerns have been expressed that still "the administrative" dimension coupled now with the introduction of a filtering mechanism can undermine the full protection of individual rights as protected by Article 47 of the Charter. For the reasons expressed above I do not think this is the case but as to elaborate further: first of all the Court itself reiterated how Article 41 of the Charter is really tailored as to impose binding obligations an all EU institutions [20] and it is an instruments truly aimed as to ensure proper functioning of the EU machinery and at the same time protection of individual rights.[21] Moreover, in terms of judicial protection, the gurantees as provided by Article 47 Charter do not cease to exist after a BoA decision. Parties do have of course the right to challenge such a before the Courts of the European Union pursuant to the fourth paragraph of Article 263 TFEU or, in the case of an inadmissibility of a complaint, the decision may be challenged directly before the Courts of the European Union. And, to move away from the ACER BoA, the Court has always been alert to

[16] See by analogy C-312/93, *Peterbroeck v Belgian State* EU: C: 1995:437; C-99/00, *Criminal proceedings against Kenny Roland Lyckeskog* ECLI: EU: C: 2002:329; C-260/11, *Edwards and Pallikaropoulos*) ECLI: EU: C: 2013:221

[17] BoA Decision A-002-2022*, cit. above*, paragraph 25.

[18] C-564/16 P, *EUIPO v Puma*, EU: C: 2018:509, paragraph 61

[19]T-260/94, *Air Inter v Commission,* ECLI: EU: T: 1997:89, paragraph 63)

[20] C- 66/22 *Infrastructures de Portugal SA, Futrifer Indústrias Ferroviárias SA, v Toscca – Equipamentos em Madeira Lda*, ECLI: EU: C: 2023:1016, paragraph 86.

[21]C-604/12, *N.*, EU: C: 2014:302, paragraphs 49 and 50, and C-219/20 *Bezirkshauptmannschaft Hartberg-Fürstenfeld (Limitation period)*, EU: C: 2022:89, paragraph 37.

possible limitations of judicial redress against other BoAs decisions. In cases where the rules of specific BoAs did not provide for any forms of judicial redress the Court was ready to deploy all the effective judicial protection tools. [22]

As to avoid painting an excessively rosy picture, there are of course lingering problems and persisting concerns. In terms of practicalities, ensuring an efficient but comprehensive review of an agency decisions means also to have enough resources (and in my experience the BoA registry performs true miracles in its sparse composition). These are not secondary aspects as, for instance, the ACER Regulation requires that the BoA shall decide upon the appeal within four months of the lodging of the appeal, which is a rather short deadline for the extremely complex cases we were dealing with. On more substantive issues, access to BoAs is still proving to be a controversial. On this point I need to tread lightly as this question is indeed *sub iudice*[23] but one of the most discussed decisions adopted during my mandate were the *RWE and UNIPER* decisions on whether privates parties had standing to bring proceedings against ACER.[24] According to Article 28(1) of the ACER Regulation 2019/94 appeals may be brought by any natural or legal person to whom (i) such decision is addressed or (ii) "*is of direct and individual concern*". ACER decisions are addressed to national authorities and European Transmission System Operators (TSOs). Thus private applicants need to satisfy the standing criteria of direct and individual concern, not some of the most straightforward tests in EU law. Without getting into many details, the BoA in the *RWE and UNIPER* decisions found that although the applicants had to be considered as directly concerned they could not prove that they were individually concerned as individual concern requires unique attributes or circumstances distinguishing a person. Economic impact alone was insufficient. The contested agency decision applied objectively to all operators, so the appellants were not individually concerned.[25] Still the BoA felt necessary – in my view in compliance with the *Aquind* indications – to address a further questions: whether agencies decisions should be in truth considered as a regulatory act. Formally, as mentioned above, an ACER decision is an *individual* decision addressed to national regulatory agencies and TSOs. However, as the Court case law provides for,[26] an agency decision is by its nature a regulatory act due to its general application, objective and non-legislative nature. Of course such a finding has an important implication as under Article 263(4) TFEU criteria, the appeals would be admissible as they were against a regulatory act of direct concern without implementing measures. It was not the role of the BoA to question the legality of the ACER Regulation, a primary source, and a task that is assigned exclusively to EU Courts.[27] Still these cases may offer some points for reflections on whether a different approach may better reflect the evolution of EU law, particularly the case law on delegated powers of agencies and the sophistication of the current EU administrative system.

A short conclusion and heartfelt thanks.

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[22] C-14/19 P SATCEN */ KF* EU: C: 2020:492 and T-2/23 *Romagnoli Fratelli / CPVO* EU: T: 2024:247.
[23] Case T-96/23, *UNIPER v ACER*, pending.
[24] See A-002- 2022 *RWE v ACER* and A-003-2022 *Uniper v ACER*. See M. CHAMON "*Scolding the EU legislator for right measure*", *EULive* February 7, 2023 and in general in C.BURELLI, '*Private Locus Standing before the BoAs',* in J.ALBERTI, '*Quo Vadis Board of Appeals?*' cit. above, p.15.
[25] See *e.g.* C-33/14 P, *Mory a. O.* v *Commission,* EU: C: 2015:609, paragraph 93.
[26] C-583/11 P, *Inuit Tapiriit Kanatami v. Council*, EU: C:2013:625, 389, paragaphs. 50 to 60.
[27] T-684/19, *MEKH v Commission*, EU:T: 2022:138, paragraphs. 50.

As it has been noted one of the most pressing problems in defining the role of that the sheer variety of BoAs and their different remits of their prerogatives undermine coherence.[28] Hopefully the considerations above might shed some light at least on the *modus operandi* of one of them. I cannot however conclude this short piece without taking this opportunity to express my very sincere thanks to all other BoAs members, and the Registry. I truly learned a lot from all of you.

[28] O. STEFAN, '*Quasi-judicial review in EU agencies: opportunities and challenges*', *EULive* November 8 2023 and M.PREK, '*Selected contemporary questions from the activities of the ACER Board of Appeal'* in J.ALBERTI, '*Quo Vadis Board of Appeals?*' cit. above, p. 230.