Article

The Boards of Appeal of European agencies: an overview

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1. INTRODUCTORY REMARKS

The establishment of Boards of Appeal entrusted with the task of reviewing administrative decisions of EU agencies is one of the most interesting recent developments of European administrative law with regard to its system of rights protection. Non-judicial remedies are not an entirely new feature of EU administrative law, since complaints resolution and internal review mechanisms have been largely provided for by legislation over the last two decades. Examples can be found in Regulation 1049/01 in relation to access to documents; in the Staff Regulations with regard to decisions concerning civil servants; in Council Regulation 58/2003 establishing appeals before the Commission against acts of European executive agencies; and in Regulation 1307/06 regulating internal review of environmental decisions.

A relatively new development, however, is the creation of BoAs operating within agencies. Following the institution of the Boards of Appeals of the OHIM, recently re-named EUIPO (Council Reg 207/2009, as amended by Reg 2015/2424), and the Community Plant Variety Office (Council Reg 2100/94), appeal bodies have been set up within the European Chemicals Agency (Council Reg 1907/2006), the European Aviation Safety Agency (Reg 216/2008), the Agency for the Cooperation of Energy Regulators (Reg 713/2009), the European Supervisory Authorities (Regs 1093/2010; 1094/2010; 1095/2010) and the Single Resolution Mechanism for the Banking Union (Reg 806/2014). An Administrative Board of Review has recently been established within the European Central Bank with the task of carrying out an internal review of some of its supervisory activities (Council Reg 1024/2013). In addition to these, independent review commissions operate within some former third pillar agencies (the Joint Supervisory Body of EUROJUST and EUROPOL, set up respectively by Council Decision 2002/187/JHA and Council Decision 2009/371/GAI). Lastly, the establishment of a Board of Appeal (BoA) within the reformed European Agency for Railways has been provided for by Regulation 2016/796, which has recently been approved within the fourth railway package.

The trend, therefore, seems to be growing and can be explained by the increasing empowerment of agencies to carry out important administrative tasks. Most European agencies have been given quasi-regulatory functions and in some cases they also have the power to take binding decisions which might affect individuals; hence, the establishment of BoAs is meant to counterbalance the increasing decision-making powers of European agencies.

From a constitutional point of view, the institution of Boards of Appeal within European agencies is covered by Article 263 (5) TFUE, which allows for the provision of "specific conditions and arrangements" concerning actions brought against bodies, offices and agencies. Although such regulations might introduce limits and conditions to the availability and intensity of remedies, the legislator has so far interpreted the Treaty provision generously and has aimed at increasing rather than limiting the protection of individual rights against administrative agencies.

The structure and functions of BOAs vary according to the sectoral founding regulations. However they share a number of common features and represent an expeditious, accessible, specialised and less expensive instrument of rights protection bearing some resemblance to the non-judicial bodies operating in most common law countries, such as tribunals in the UK.

Given their relative newness within the system of European protection of rights, BoAs raise a number of issues – some of which will be briefly considered in the following paragraphs (for a more comprehensive analysis, see P Chirulli and L De Lucia, "Specialised Adjudication in EU Administrative Law: the Boards of Appeal of EU Agencies" (2015) EL Rev 832-57).

2. MAIN FEATURES OF BOARDS OF APPEAL

Boards of Appeal have a complex and somewhat ambiguous nature. They are independent offices operating within the agencies and hence from a formal point of view they are not courts, although they certainly perform adjudicatory functions through mainly adversarial procedures. The independence of BoAs is strongly affirmed by the founding regulations,

which stipulate that such bodies are not bound to follow the directions or instructions of the agencies.

At the same time, according to an established case law, BoAs are in "continuity in terms of functions" with the agency whose decisions they are called to review. In some cases, they are entrusted with the same decision-making powers as the agency. The relationship between the Board of Appeal and the agency, though, is a complex one and is still in need of clarification and stabilisation.

Although not all BoAs have the same powers – since some of them cannot substitute their own decision for that of the agency but simply confirm or annul the contested decision – they always have full cognisance of the grounds that are submitted by the claimants and they can give the agency directions on how to decide the question again, which means that in principle they can exercise a full merits review of the agencies' decisions.

It is also worth highlighting that BoAs are not entrusted with a general power of review, since appeals are specifically provided for by the legislation only against decisions which have a direct impact on individuals or companies. The fact that only some decisions are open to review through administrative appeals – namely those which are individualised and binding – clarifies that the role of the Boards of Appeal, though broadly aimed at increasing the accountability of agencies, is principally targeted at giving protection to the rights of individuals who are affected by the exercise of adjudicatory functions.

Such decisions are often of a highly specialised nature and entail complex technical evaluations. This explains why most BoAs are composed not only of legal experts, but also of specialists in the areas of activity of the agency. Technical expertise is therefore a prominent feature of BoAs and influences the quality of their decision-making.

The provision of appeals is aimed at protecting the rights of those who are affected by agency decisions, whilst at the same filtering cases and thus relieving the courts of an ever-increasing caseload. That is why appeals – when provided for – have generally to be exhausted before seeking judicial review before the courts.

In some cases, the appeal triggers an internal reconsideration and only if the agency does not rectify the decision within a short time is it referred to the Board of Appeal (Art 93, Reg 2006/1907).

Moreover, some appeals have an automatic suspensive effect in relation to the contested decision (eg ECHA; Art 91(2), Reg 2006/1907), whilst in some other cases suspension can discretionally be granted by the appellate body or by the agency (respectively, Reg 2010/1093 of ESAs, Art 60(3) and Reg 216/2008 of EASA, Art 44(2)). As will be clarified later on, most Boards of Appeal (namely the EUIPO, CPVO, ECHA, EASA and ACER) also have the important function of having the final word over the agency on the subject-matter which has been submitted to them given that they can substitute the agency's decision, whereas the courts can decide questions purely of legality and annul administrative decisions – with some specific exceptions. So, at least in principle, BoAs perform a more specialised and intense function of review within the overall system of remedies.

From a procedural point of view, an appeal must contain a grounded request of annulment, thus somehow limiting the "devolutive effect" of the appeal. Generally, the Board of Appeal will be required to re-examine the first decision in the light of the pleas and the grounds of appeal submitted by the applicant, exercising, when necessary and if provided for in the sector-specific legislation, the same powers as the agency. Although grounds of review play an important role, points of law can be decided by the BoA without being strictly bound to the parties' arguments.

What is not yet entirely clear – also since it can vary according to the different areas of legislation as well as on the circumstances of the specific case – is whether the appellant may present evidence which was not considered by the initial decision-maker and therefore to what extent the BoA can evaluate the subject-matter in the light of fresh evidence.

In this respect, an important contribution will come from the case law of both Boards of Appeal and European courts.

3. BOARDS OF APPEALS BETWEEN TECHNICAL AND LEGAL RATIONALITY

One of the most important and complex issues raised by the establishment of Boards of Appeal regards the relationship between their legal and technical expertise and thus the quality and degree of the specialised protection of rights they can provide.

In some cases, the founding legislation contains specific provisions as to the composition of BoAs, establishing that a number of legal and non-legal experts shall be appointed. In many cases, the decision regarding the composition of Boards of Appeal will rest on the Management Board of the same agency, whereas in other cases the choice will be left to the President of the Board of Appeal.

Though it may vary according to the single sector-specific legislation, a common feature of BoAs is their specialised composition and their expertise in the agency's field of competence. This is not surprising, since the main source of the agencies' legitimation is their technical expertise, which justifies the decision-making and quasi-regulatory functions they are entrusted with (see Craig, *EU Administrative Law*

(Oxford University Press, 2012) 142).

Yet the existing legal provisions do not clarify to what extent BoAs can review the correctness of the technical-scientific evaluations made by the first decision-maker. This is perhaps the most delicate issue with respect to the decision-making powers conferred on such bodies, which is still rather controversial. Some useful indications come from the case law, which shows how both the legal and technical criteria play an important role within the decision-making instruments, but are not always balanced in the same way.

Several factors will influence the Board's decision-making approach. The grounds submitted by the parties will bind the Board as to the main questions to deal with, but the type of question and the composition of the single specific Board will influence the final outcome.

A Board composed predominantly of legal members will base its scrutiny mainly on legal criteria and will tend to limit its review to the correctness of the procedure followed by the agency in dealing with the subject-matter, rather than tackling specific technical issues and making a binding decision on the merits of the questions which have been submitted to it.

On the other hand, a Board with a prevalence of technical experts will review technical evaluations and give the agency clear indications on how to decide the case again or on what activities should be carried out by the agency after the appeal.

Quite often a blend of legal/technical arguments will be submitted by the parties and consequently the decision made by the BoA will be a mixture of legal and technical findings. For example, in the recent European Chemicals Agency (ECHA) case no A-004-2014, the Board of Appeal reviewed the agency's approach with respect to the choice of certain testing materials. Had none of the members of the Board been technically qualified, it could hardly have delved into a complex evaluation of the technical choices made by the agency. At the same time, the Board dealt with a number of legal and procedural issues with an approach similar to that which a court would have followed; for example, it stated that the appellant could not introduce new pleas during the proceedings, taking advantage of a clarification request coming from the Board of Appeal.

Having technical skills and being able to tackle questions involving specialisation does not mean that the Board will always be keen on making a substitute decision for that of the agency. The case law shows how sometimes BoAs – even when endowed with technical expertise – follow a more deferential approach, thus conducting a review which differs little from that which a court would normally conduct in the same situation (see ECHA case no A-001-2012). This might occur since for technical reasons the matter is best left to the initial decision-maker or because the Board is not willing to deal with the merits of the decision for institutional reasons.

In some cases, even when a full power of substitution might be exercised, it is up to the Board of Appeal to fine-tune the intensity of its review of administrative decisions, according to the circumstances of the case and the specific questions that have been raised. In other cases, however, the founding regulation establishes that the BoA cannot substitute its decision for the contested one, for example when the decision-making body of the agency is an instrument of institutional co-operation between the Member States (as is often the case for decisions taken by the ECHA) or when, for reasons of institutional balance, the decision is better taken by the agency (eg the Board of the ESAs or the SRM).

Even when the BoAs cannot substitute their own decisions for that of the agency, but can only remit the case to the agency for reconsideration, they can give directions for the actions to follow, which are binding for the agency. This is a power which the courts are never entrusted with, since they can only review the legality of administrative decisions, but cannot issue directions to EU institutions and agencies, which, according to Article 266 TFUE, shall take the necessary measures to comply with the judgment of the courts (see Case T-192/12, *PAN Europe v Commission* EU:T:2014:152).

When the Board is mainly composed of legal members, its approach will be more similar to that of a court and will privilege the review of the correctness of the administrative process, in the light of the general and sectoral principles relevant to the case. In such cases, the roles of the Boards of Appeal and of the courts will come very close to overlapping. In this case, the pursuit of both remedies might result in a duplication of the same type of review.

On the whole, the experience of BoAs shows that the protection of rights towards European agencies is stronger than towards other institutions. This enhanced protection of rights, which results in a less stable regime of agency decisions, might well be provided for in order to balance the increasing empowerment of agencies with a broader regime of administrative remedies so as to support and integrate their weaker democratic legitimation. That is why it is important for BoAs to maintain their specialised character and keep differentiating their decision-making approach, striking the right balance between a thorough review of technical decisions and respect for the institutional balance within the agencies.

4. BOARDS OF APPEAL AND THE PROTECTION OF RIGHTS

One of the central issues worth briefly addressing here concerns the position of Boards of Appeal within the overall system of rights protection, with regard to the role of appeals in relation to other administrative remedies but also to their

relationship with judicial review. If compared with other non-judicial remedies, such as internal review mechanisms, appeals are certainly more structured for a number of reasons.

First, most of them have a more defined adjudicative character, clearly aimed at protecting private parties, whereas internal reviews sometimes can serve also an implementation/bureaucratic purpose.

Second, before a Board of Appeal, the appellant is given full guarantees that his/her case will be treated with the utmost attention and specialisation and that all the grounds of review, including those dealing with issues of merits and technical questions, will be thoroughly examined. The BoA, despite being an office of the agency, has an independent position and therefore can ensure a more impartial decision than that which could be obtained through an internal review. Moreover, although appeal procedures are more informal and expeditious than judicial review proceedings, full rights of representation and of defence, and an analytically reasoned decision, are guaranteed to the appellant.

In conclusion, appeals seem to be mainly directed at giving protection to private parties. It is the private parties who decide to appeal, and the decision to challenge the Board's decision before the courts is only open to private parties. While the applicant can ask for a thorough review of the first decision-maker activities, and then challenge an unfavourable appeal decision before the European Courts, the agency (which at times is not even a party within the appeals procedure: see EUIPO) cannot autonomously seek a judicial review of a decision which upholds an appeal due to its "functional continuity" with the Board of Appeal, which does not give it standing to challenge its unfavourable decisions.

This is quite peculiar, given that from another point of view BoAs play an important part in defining their own role and in orienting the agencies' future activities, as well as shaping the rights being protected. For example, in case 2013-008, the Board of Appeal of the European Supervisory Authorities reviewed a decision in which the European Banking Authority had decided not to start an own-initiative investigation on the basis of a complaint received by a company about some irregularities allegedly regarding the governors of the Estonian branch of a Finnish bank. The EBA argued that in this specific case no breach of European Union law emerged and that the alleged irregularities should be contested before the national supervisory authorities. On appeal, the Board had to deal with procedural and substantive questions, since the EBA had argued that the appeal was inadmissible on the grounds that there was no reviewable act and the appellant did not have a direct and individual concern. It had therefore claimed that the appeal was unfounded.

The Board found the claim admissible and well-founded, thus requiring the Authority to decide again on the matter, but the EBA refused once again to start an investigation motivating its decision on the lack of substantive grounds. The company appealed the decision before the Board of Appeal. This time the BoA confirmed that the appeal was admissible but, after a careful consideration of the agencies' arguments in the light of the soft-law rules relevant to the case, it concluded that the EBA had rightly refused to open an investigation and that it had correctly exercised its discretion.

The BoA decision was subsequently overturned by the General Court (EU:T:2015:608, currently under appeal before the European Court of Justice), which declared that the Board of Appeal had wrongly presumed its competence in the matter, since, according to the relevant legislation and to the ECJ case law regarding own-initiative administrative procedures, the EBA was under no obligation to initiate the investigation. Therefore, the complainant was not entitled to challenge the agency's decision since he lacked direct and individual concern.

The case is an interesting example of how BoAs are increasingly becoming involved in defining both the remit of the agencies' duties and their own power of review, as well as contributing to the development of EU administrative law. At the same time it shows how central the role of the European courts is in helping to find the right balance between an effective protection of rights and the preservation of the autonomy of the agencies.

In conclusion, Boards of Appeal have become a significant feature of the European administrative system of protection of rights and they will certainly continue to deserve scholarly attention in the future.

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