APPEAL BEFORE THE BOARDS OF APPEAL OF DECENTRALISED AGENCIES AS A FORM OF ADMINISTRATIVE REMEDY IN THE EUROPEAN UNION LAW*

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Abstract

This paper discusses the mechanism of appeal before the Boards of Appeal (BoAs) of ten EU decentralised agencies with powers to take decisions intended to produce legal effect *vis-à-vis* third parties in the context of regulating the internal market. After a brief description of the function of administrative remedies in the EU law, the sources of law for this remedy and three aspects of the appeal procedure are discussed. The first aspect is related to the admissibility of the appeal and includes the following issues: 1) jurisdiction of the BoA, i.e. types of agency decisions that can be appealed; 2) active *locus standi* before the BoA; 3) time limits for lodging the appeal; and 4) suspensive effect of the appeal. The second aspect is related to the merits of the appeal, and in this regard the following issues are discussed: 1)

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interlocutory revision in some agencies; 2) mediation, i.e. the possibility of reaching an amicable settlement in the appeal proceedings in some agencies; and 3) examination of the appeal by the BoA and time limits for its final decision. The third aspect is related to the BoA's decision. In this regard, the paper discusses two models of the BoA's action when the appeal is accepted and also takes a brief overview of the possibility of contesting the BoA's decision before the Court. The paper concludes by pointing out the main advantages and disadvantages of the appeals before the BoA.

Keywords: EU decentralised agencies, Boards of Appeal of EU decentralised agencies, functional continuity in EU decentralised agencies, administrative remedies in EU law, interlocutory revision in EU law

INTRODUCTION

Decentralised agencies are a part of the EU public administration (Chamon 2016, 46–51), and some of them have competences in regulating the internal market, where they take decisions that can affect the legal situation of private persons. In order to ensure an effective protection of the rights of private persons against these agencies, it was necessary to establish mechanisms of external and internal control of their decisions. The external control is primarily ensured through the system of judicial remedies and the internal control is achieved through the system of administrative remedies.

Doctrine, especially in continental Europe, identifies three main functions of the administrative remedies. First, they provide a means of legal protection of private persons that is faster, more flexible, and less expensive compared to the judicial remedies. Second, the administration can review its own decisions and conduct a more detailed examination of the case in order to avoid the litigation costs and the negative consequences of being a losing party in the case. Finally, it reduces the workload of the courts, allowing them to deal with more complex issues (Chirulli and De Lucia 2021, 9). For these reasons, since the 1990s, a system of

administrative remedies as an alternative to the courts has been developed in the EU law to resolve disputes between the EU institutions and bodies on the one side and various entities, mainly private persons, on the other. The system consists of two main elements. The first one consists of cross-cutting internal complaints throughout the EU administration in order to protect certain instrumental rights and interests (e.g., access to documents, control over information, cases of maladministration), giving an important role to the European Ombudsman. The second element includes providing for an *ad hoc* administrative appeal with the aim of controlling various acts and final decisions of the EU agencies by establishing Boards of Appeal (BoAs) within them (Marcetti 2017, 3–5).

There are ten decentralised agencies with powers to take decisions intended to produce legal effect *vis-à-vis* third parties in the context of regulating the internal market, all of which have BoAs (Chamon 2014, 328; Marcetti 2017, 6). These are:

- the European Union Intellectual Property Office (EUIPO), previously known as the Office for Harmonization in the Internal Market (OHIM);
- the Community Plant Variety Office (CPVO);
- the European Aviation Safety Agency (EASA);
- the European Chemicals Agency (ECHA);
- the European Union Agency for the Cooperation of Energy Regulators (ACER), previously known as the Agency for the Cooperation of Energy Regulators (ACER);
- the European Union Agency for Railways (ERA), previously known as the European Railway Agency (ERA);
- three European Supervisory Authorities (ESAs), namely the European Banking Authority (EBA), the European Insurance and Occupational Pensions Authority (EIOPA) and the European Securities and Markets Authority (ESMA); and
- The Single Resolution Board (SRB).

Most of these agencies have just one BoA, the ESAs have one Joint BoA, and the OHIM/EUIPO and CPVO each have several BoAs.

SOURCES OF LAW FOR THE APPEAL

There are three categories of the sources of law for the appeal before the BoAs that will be discussed in this section. These are: 1) primary law; 2) secondary law; and 3) other sources of law.

Primary law

In the period before the entry into force of the Treaty of Lisbon (ToL), there was a lacuna in primary law regarding this type of administrative remedy. After the entry into force of the ToL, Art. 263(5) of the Treaty on the Functioning of the European Union (TFEU) provided that acts setting up the EU agencies may lay down specific conditions and arrangements concerning actions by private persons against acts of the agencies intended to produce legal effects *vis-à-vis* them. These provisions enable the differentiation of the way in which the rights of private persons are protected in their relation with the agencies and are therefore considered as a treaty basis for the consolidation and generalisation of the BoA model (Morais and Feteira 2018, 61; Chirulli and De Lucia 2021, 106; Muzi 2022, 222). These provisions provide an additional layer of administrative protection in primary law with respect to agency decisions that precedes judicial review. However, since they leave the EU legislator with wide discretion in the design of administrative review bodies and procedures, the system of administrative remedies is not structured as a coherent system, but rather as an instrument adapted to specific sectors in which the EU agencies have technical expertise (Simoncini 2018, 158).

Moreover, the Court has established in its case law that the principle of good administration applies to the BoAs, placing this principle within the framework of the provisions of Art. 41(1) of the Charter of Fundamental Rights (CFR). The Court reached this conclusion gradually in the cases concerning the actions for annulment of decisions of the OHIM and CPVO BoAs. First, the Court held that the OHIM is obliged to exercise its powers in accordance with general principles of EU law, such as the right to good administration (*Agencja Wydawnicza Technopol sp. z o.o. v OHIM*, C-51/10 P, para. 73; Hanf 2022, 78). In this context, the Court has implicitly held that the principle of good administration also applied to the OHIM BoAs and included in particular the obligation of the BoAs to examine the facts carefully (*Apple and Pear Australia Ltd and Star Fruits Diffusion v OHIM*, T-378/13, para. 44; Lynch and

Colbourn 2015, 656–657). In the cases involving the CPVO BoAs, the Court has been more explicit in making connection with the provisions of Art. 41(1), determining three aspects thereof. First, the BoAs are bound by the principle of good administration in their actions. Second, the Court pointed out that the principle of good administration was embodied in the provisions of Art. 41(1), thus identifying the principle of good administration with the content of these provisions. Finally, the application of Art. 41(1) implies the obligation of the BoAs to carefully and impartially examine all factual and legal elements that are relevant in a given case (*Aurora Srl v CPVO*, T-140/15, paras 46, 74, 77; Ritleng 2022, 312–313). These views have been confirmed by the Court in the subsequent case law (*Mema GmbH LG v CPVO*, T-177/16, para. 38; Ritleng 2022, 312).

Secondary law

There are two groups of sources of secondary law for this remedy. The founding regulations of the agencies and other acts specifying their powers constitute the first group. These acts regulate the establishment of the BoAs, their jurisdiction, and the basic rules of the appeal procedure. The BoAs' Rules of Procedure (RoPs) adopted in the form of the Commission implementing and delegated acts in the cases of the OHIM/EUIPO, CPVO, ECHA and ERA constitute the second group of secondary law sources (Chirulli and De Lucia 2021, 109).

Other sources of law

Five groups of other sources of law can be distinguished. The RoPs adopted by the BoAs themselves in the EASA, ACER, ESAs and SRB constitute the first group (Chirulli and De Lucia 2021, 109; Chamon and Fromage 2022, 10).

Legally binding acts adopted by the agencies constitute the second group. For example, the EUIPO may adopt general acts applicable to procedures before its bodies, including the appeal procedure. In cases where the EUIPO adopts such acts, they may be referred to before the Court (*Green Effort Ltd v EUIPO*, C-282/18 P, paras 31–39; Hanf 2022, 64).

Court case law constitutes the third group. The BoAs often refer to the Court case law in their decisions. In doing so, they accept to be guided in their practice by the rulings of the Court as well as by the Court's

intention to ensure the overall coherence of the system (Chirulli and De Lucia 2021, 147–148; Tovo 2022, 46–47; Volpato and Mullier 2022, 94).

BoA's case law constitutes the fourth group of sources. When it comes to the EUIPO, the reference to the BoAs' previous case law is binding in the following cases: 1) when the Grand Board has previously issued a decision, because its decisions are binding to the BoAs, except in cases where the Court has overruled its findings; and 2) when the parties refer to previous decisions of the BoAs in the appeal proceedings (*EUIPO v Puma SE*, C-564/16 P, paras 60–66; Marchisio 2020, 900; Hanf 2022, 76). In addition, the EUIPO BoAs refer to their previous case law when there is no Court case law on a particular issue (Hanf 2022, 76). The ECHA and ACER BoAs were also found to refer to their previous case law (Tovo 2022, 46–47; Volpato and Mullier 2022, 94).

Soft law measures constitute the fifth group and they include various instructions and guidelines adopted by the agencies and their BoAs that establish or further regulate certain procedural rules (Marchisio 2020, 899; Chirulli and De Lucia 2021, 152).

ADMISSIBILITY OF THE APPEAL

The following issues merit discussion as regards the admissibility of the appeal: 1) jurisdiction of the BoAs, i.e. types of agency decisions that can be appealed; 2) active *locus standi* before the BoAs; 3) time limits for lodging the appeal; and 4) suspensive effect of the appeal.

Jurisdiction of the BoAs

The subject of an appeal to the BoA can be: 1) an agency decision in the context of regulating the market, 2) an agency decision on the request for access to documents; and 3) failure to act by the agency.

When it comes to determining the BoAs' jurisdiction in relation to the agency decisions in the context of regulating the market, an appeal is admissible only with respect to certain final individual decisions that have a legal effect *vis-à-vis* third parties. There are two models to define the BoAs' jurisdiction. According to the first model, applied in the OHIM/EUIPO, the jurisdiction is defined *ratione personae*, which means that it depends on which body of the agency issued the decision (OHIM 40/94, Art. 57(1); OHIM 6/2002, Art. 55(1); OHIM 207/2009, Art. 58(1); EUIPO 2017/1001, Art. 66(1); Chamon 2016, 341). According to the

second model, applied in the other agencies, the jurisdiction of the BoA is defined *ratione materiae*, which means that it depends on the legal basis of the decision (CPVO 2100/94, Art. 67(1); EASA 1592/2002, Art. 31(2); EASA 216/2008, Art. 40(2); EASA 2018/1139, Art. 105(2); ECHA 1907/2006, Art. 91(1); ACER 713/2009, Art. 19(1); ACER 2019/942, Art. 28(1); EBA 1093/2010, Art. 60(1); EIOPA 1094/2010, Art. 60(1); ESMA 1095/2010; Art. 60(1); SRB 806/2014, Art. 85(3); ERA 2016/796, Art. 58(1)). In this model, the BoAs do not have general jurisdiction, that is, they do not review all agency decisions that produce legal effects *vis-à-vis* third parties, but only those that are issued in accordance with the legal basis established in the founding regulations or in other acts of secondary law that regulate the scope of the agencies' activities. In other words, if the decision does not have one of those legal bases, it cannot be appealed, but can only be contested before the Court (Chamon and Fromage 2022, 14). Accordingly, acts of general application and soft law measures cannot be appealed (Simoncini 2018, 160–161). Appeals against acts that are not final but, for example, constitute a preliminary decision, are also considered inadmissible (*Polyelectrolyte Producers Group GEIE [PPG] and SNF SAS v ECHA*, T-1/10, para. 40; Magiera and Weiß 2014, 519; Chirulli and De Lucia 2021, 119–120; Ritleng 2022, 300).

However, in the context of some decisions, there are difficulties in determining the jurisdiction of the BoAs. The scope of jurisdiction of the ESAs and SRB BoAs is not precisely defined. The founding regulations of the ESAs refer to other acts of secondary law that entrust the agencies with specific tasks. The consequence of this reference is a nominally broad jurisdiction of the BoA, but without a clear definition of the decisions that can be appealed. Clarification is therefore left to the Court case law (Blair and Chang 2018, 24; Chamon and Fromage 2022, 14). As for the SRB, although the founding regulation provides an exhaustive and conclusive list of those decisions, the specific articles referenced are often very extensive and complex, sometimes requiring interpretation in order to determine exactly which decision can be appealed (Skauradszun 2018, 129–132). On the other hand, the SRB issues certain crisis management decisions having legal effect that the BoA cannot review. Most of these decisions, if not all, probably cannot even be the subject of an action for annulment because of the Court's strict requirement of direct interest (Herinckx 2017, 85, 107–108).

Some agencies take individual decisions that are out of the BoAs' jurisdiction. Sometimes, multiple decisions with legal effect *vis-à-vis*

third parties are issued as a part of the same procedure, some of which can be appealed and some of which cannot. In the ECHA, for example, an appeal on the merits of the active substance registration is admissible, but a decision setting registration fee for this procedure is out of the BoA's jurisdiction (*Calestep, SL v ECHA*, T-89/13, paras 16–22; Chirulli and De Lucia 2021, 119).

In the ACER, despite being called individual decisions, many acts represent measures of general application. Each of these decisions is formally addressed to a specific person. However, 'this formalism does not reflect the fact that many of the decisions issued [by] ACER are general and impersonal decisions, which have or are likely to have a direct effect on an entire category of operators or on all market participants' (Ollier and Piebalgs 2023, 11). Due to the application of a restrictive jurisprudence regarding the admissibility of actions before the Court on direct and individual interest and the fiction that the ACER does not adopt regulatory acts, the appeals are often rejected as inadmissible if appellants cannot prove the individual interest. This also happens in cases when some decisions can be considered as regulatory acts, i.e. appellants can prove the direct interest and competent authorities in Member States (MS) have no discretionary powers regarding the implementation, which is why these decisions are directly applied and change the legal position of the appellants (Ollier and Piebalgs 2023, 22).

When the agency begins to take decisions that were not provided for in the founding regulation but in a later act of secondary law, the question arises as to whether its BoA has jurisdiction for them. The ECHA BoA declared its jurisdiction for some of these decisions, but not for the others. There have also been cases where both the ECHA BoA and the Court have declined jurisdiction. Due to the uncertainty regarding the jurisdiction of the ECHA BoA, there was a risk that it would assert its jurisdiction only after the time limit for lodging an action before the Court had expired. For this reason, in some cases, the appeal to the BoA and the action before the Court were launched in parallel (*Lysoform Dr. Hans Rosemann GmbH and Others v ECHA*, T-543/15; Mullier and Cana 2018, 107–108).

Against this background, a significant number of BoAs' decisions deals with the question of whether the specific decision can be appealed at all (Chirulli and De Lucia 2021, 120), and most of the appeals before the CPVO, ESAs and SRB BoAs were rejected as inadmissible (Lamandini and Ramos Muñoz 2020, 128–131, 134; Chamon and Fromage 2022, 17–18; Muzi 2022, 235).

The ESAs and SRB BoAs also have jurisdiction for appeals against agency decisions on access to documents (EBA 1093/2010, Art. 72(3); EIOPA 1094/2010, Art. 72(3); ESMA 1095/2010; Art. 72(3); SRB 806/2014, Art. 90(3); Chamon and Fromage 2022, 14). Similarly, the ECHA BoA decides on access to documents prepared for the purpose of specific appeal proceedings that are in the possession of the BoA (Bronckers and Van Gerven 2009, 1838). The ERA and ACER BoAs have jurisdiction in the cases of failure to act by the agency (ERA 2016/796, Art. 63; ACER 2019/942, Art. 29; Chirulli and De Lucia 2021, 121; Tovo 2022, 40). This is an exception to the general rule that decisions regarding access to documents and failure to act are contested directly before the Court.

Active locus standi

Two models regarding the active *locus standi* are applied. The first model, applied in the OHIM/EUIPO, implies that any party to the proceedings before an agency body that is adversely affected by its decision may appeal. Any other party to the proceedings has the right to participate in the appeal proceedings (OHIM 40/94, Art. 58; OHIM 6/2002, Art. 56; OHIM 207/2009, Art. 59; EUIPO 2017/1001, Art. 67). The second model, applied in the remaining agencies, implies that private persons have the right to appeal against a decision addressed to them, as well as against a decision which is of direct and individual concern to them, even though it was addressed to another person (CPVO 2100/94, Art. 68; EASA 1592/2002, Art. 36; EASA 216/2008, Art. 45; EASA 2018/1139, Art. 109; ECHA 1907/2006, Art. 92(1); ACER 713/2009, Art. 19(1); ACER 2019/942, Art. 28(1); EBA 1093/2010, Art. 60(1); EIOPA 1094/2010, Art. 60(1); ESMA 1095/2010, Art. 60(1); SRB 806/2014, Art. 85(3); ERA 2016/796, Art. 59(1)). The main difference between these two models is that the first one allows an appeal only to the parties to the proceedings that led to the adoption of the contested decision, while the second model allows it even to the persons that were not parties to those proceedings if the decision affects them (Chamon 2016, 341–342; Simoncini and Verissimo 2022, 118–119). The principle of limiting the right to appeal is consistent not only with the objectives of the respective remedies but also with the requirements of active *locus standi* before the Court, where there is not much room for actions on behalf of general interests (Chirulli and De Lucia 2021, 116). The decisions of the BoAs clearly refer to the Court case law on the issue of *locus standi* (Tovo 2022, 46; Volpato and Mullier 2022, 88).

Although the right to appeal is generally limited to the addressees of the decision or to the persons individually and directly affected by the decision, which generally means private persons, the MS competent authorities also have the right to appeal in some cases. The MS regulatory authorities have the right to appeal against certain decisions of the ACER, the MS supervisory authorities against decisions of the ESAs, and the MS resolution authorities against decisions of the SRB (ACER 713/2009, Art. 19(1); ACER 2019/942, Art. 28(1); EBA 1093/2010, Art. 60(1); EIOPA 1094/2010, Art. 60(1); ESMA 1095/2010, Art. 60(1); SRB 806/2014, Art. 85(3); Skauradszun 2018, 133–134; Chirulli and De Lucia 2021, 116).

Time limits for lodging the appeal

When it comes to the time limits for lodging an appeal and the related starting points, two types of starting points and three time limits can be distinguished based on the founding regulations. The first type of starting point is the date on which the person received the decision (applied in the CPVO, ECHA and SRB) or the date on which the person was notified of the decision (applied in the OHIM/EUIPO, EASA, ERA, ACER and ESAs). The second one refers to the date on which the person became aware of the decision (applied in the OHIM/EUIPO, EASA, ECHA, SRB and ERA) or the date on which the agency published the decision (applied in the CPVO, ACER and ESAs). The time limits for lodging an appeal can be six weeks (SRB), two months (EUIPO, CPVO, EASA, ACER, ERA) and three months (ECHA, ESAs) from the starting point (OHIM 40/94, Art. 59; OHIM 6/2002, Art. 57; OHIM 207/2009, Art. 60; EUIPO 2017/1001, Art. 68; CPVO 2100/94, Art. 69; EASA 1592/2002, Art. 37; EASA 216/2008, Art. 46; EASA 2018/1139, Art. 110; ECHA 1907/2006, Art. 92(2); ACER 713/2009, Art. 19(2); ACER 2019/942, Art. 28(2); EBA 1093/2010, Art. 60(2); EIOPA 1094/2010, Art. 60(2); ESMA 1095/2010, Art. 60(2); SRB 806/2014, Art. 85(3); ERA 2016/796, Art. 59(2)).

Suspensive effect of the appeal

There are two models regarding the suspensive effect of the appeal. According to the first model, applied in the OHIM/EUIPO, CPVO and ECHA, the appeal has automatic suspensive effect (OHIM 40/94, Art. 57(1); OHIM 6/2002, Art. 55(1); OHIM 207/2009, Art. 58(1); EUIPO

2017/1001, Art. 66(1); CPVO 2100/94, Art. 67(2); ECHA 1907/2006, Art. 91(2)). In this respect, there are two exceptions in the CPVO. The first one is related to the fact that the CPVO BoAs can decide that the appeal does not have suspensive effect if they consider that circumstances so require. Another exception is that appeals against decisions on the granting of a compulsory exploitation right and of a non-exclusive exploitation right do not have suspensive effect (CPVO, 2100/94, Art. 29, 67(2)–(3), 100(2); Chirulli and De Lucia 2021, 122). According to the second model, applied in the EASA, ACER, ESAs, SRB and ERA, the appeal does not have automatic suspensive effect and it is decided thereon depending on the circumstances. Decision on the suspensive effect is taken by the BoAs in the ACER, ESAs and SRB, and by the agency in the EASA and ERA (ACER 713/2009, Art. 19(3); ACER 2019/942, Art. 28(3); EBA 1093/2010, Art. 60(3); EIOPA 1094/2010, Art. 60(3); ESMA 1095/2010, Art. 60(3); SRB 806/2014, Art. 85(6); EASA 1592/2002, Art. 35(2); EASA 216/2008, Art. 44(2); EASA 2018/1139, Art. 108(2); ERA 2016/796, Art. 58(2); Magiera and Weiß 2014, 519–520; Chirulli and De Lucia 2021, 122–123).

THE MERITS OF THE APPEAL

In this section the following issues are discussed: 1) interlocutory revision in the OHIM/EUIPO, CPVO, EASA, ECHA and ERA; 2) mediation, i.e. the possibility of reaching an amicable settlement in the appeal proceedings in the OHIM/EUIPO and ECHA; and 3) examination of the appeal by the BoAs and time limits for their final decision.

Interlocutory revision

By its very nature, an appeal is a devolutive remedy, i.e. it is decided by another body that is usually hierarchically higher than the body that issued the contested decision (Dragos and Marrani, 2014, 549). The same applies to the appeals before all BoAs. However, in the OHIM/EUIPO, CPVO, EASA, ECHA and ERA, there is a possibility of the interlocutory revision, i.e. the agency body that issues the contested decision decides on the appeal. In such cases, if the agency body considers the appeal admissible and well founded, it rectifies the decision (OHIM 40/94, Art. 60(1); OHIM 6/2002, Art. 58(1); OHIM 207/2009, Art. 61(1); EUIPO 2017/1001, Art. 69(1); CPVO 2100/94, Art. 70(1); EASA 1592/2002, Art.

38(1); EASA 216/2008, Art. 47(1); EASA 2018/1139, Art. 111(1); ECHA 1907/2006, Art. 93(1); ERA 2016/796, Art. 60(1); Magiera and Weiß 2014, 521; Chirulli and De Lucia 2021, 123). The time limit for rectifying the decision is one month in all agencies, except the EASA (OHIM 40/94, Art. 60(2); OHIM 6/2002, Art. 58(1); OHIM 207/2009, Art. 61(2); EUIPO 2017/1001, Art. 69(1); CPVO 2100/94, Art. 70(2); ECHA 1907/2006, Art. 93(1); ERA 2016/796, Art. 60(2)). In the case of EASA, the previous founding regulation provided for a period of one month, but the new founding regulation, in force since September 2018, provides for a period of two months (EASA 1592/2002, Art. 38(2): EASA 216/2008, Art. 47(2); EASA 2018/1139, Art. 111(2)). If the agency does not rectify its decision within the set time limit, the appeal is forwarded to the BoA. In the OHIM/EUIPO, CPVO and ECHA the appeal is immediately forwarded to the BoA (OHIM 40/94, Art. 60(2); OHIM 6/2002, Art. 58(1); OHIM 207/2009, Art. 61(1); EUIPO 2017/1001, Art. 69(1); CPVO 2100/94, Art. 70(2); ECHA 1907/2006, Art. 93(1)), while in the EASA and ERA the suspensive effect of the appeal is decided upon first (EASA 1592/2002, Art. 38(2): EASA 216/2008, Art. 47(2); EASA 2018/1139, Art. 111(2); ERA 2016/796, Art. 60(2)).

Mediation

In the OHIM/EUIPO and ECHA, there is a possibility of mediation, i.e. reaching an amicable settlement of disputes between the parties in the appeal proceedings.

When it comes to the OHIM/EUIPO, mediation exists only in the appeal proceedings *inter partes*, which means that the agency itself is not a party to the mediation. Mediation was introduced in 2011 by the decision of the Presidium of the BoAs, and in March 2016 a special Centre for Mediation was established to ensure mediation in the appeal proceedings, as well as in other *inter partes* proceedings before the agency. In order to reach a settlement agreement, the parties to the proceedings submit a joint request for the initiation of the mediation procedure to the Centre. The initiation of the mediation procedure suspends the appeal proceedings. A mediator is selected by the agreement of the parties from the list established by the agency, and that may not be a person who has previously participated in the appeal proceedings. There are three possible outcomes of the mediation procedure. The first outcome is a settlement agreement, and in that case the appeal proceedings end. The second

outcome is the termination of the mediation proceedings at the request of one of the parties, while the third outcome is the termination of the proceedings when the mediator determines that the parties were unable to reach an agreement. In both cases where the mediation proceedings end without a settlement agreement, the appeal proceedings continues, and the mediator shall not be entitled to participate in it (OHIM 207/2009, Art. 137a as amended by OHIM 2015/2424, Art. 1(119); EUIPO 2017/1001, Art. 170; Marcetti 2017, 13; Chirulli and De Lucia 2021, 124).

In the ECHA, the mediation procedure was introduced by the amendments to the BoA's RoP, in force since June 2016. According to the provisions of the RoP, the BoA's Chairperson may send a proposal for an amicable settlement to the appellant and the agency, which means that the agency is a party to the mediation procedure, unlike the mediation in the OHIM/EUIPO. If both parties accept the proposal, the Chairperson appoints one of the BoA's members to act as a mediator. As with the OHIM/EUIPO, three mediation outcomes are possible. If the mediation proceedings end without the settlement agreement being reached, the case is referred back to the BoA (ECHA BoA 771/2008, Art. 1a, as amended by ECHA BoA 2016/823, Art. 1, Annex; Mullier and Cana 2018, 109–110). The provisions of the BoA's RoP do not specify whether a proposal to reach the amicable settlement is made in all cases or it is a discretionary right of the Chairperson (Chirulli and De Lucia 2021, 124).

Examination of the appeal

Although the proceedings before the BoAs are highly diversified among agencies (Chamon 2016, 346; Chirulli and De Lucia 2021, 127–128), the major elements are essentially the same. If the appeal is admissible, the BoAs examine whether it is well founded. During the examination of the appeal, the BoA invites the parties to raise objections to other parties' submissions or to its procedural decisions as often as necessary.

The time limits for the final decision of the BoA are set by the provisions of the founding regulations in case of the ACER, ESAs, SRB and ERA, while the time limits in the CPVO are set by the BoA's RoPs (Chirulli and De Lucia 2021, 127).

In the ACER, ESAs, SRB and ERA, the time limits for the final decision start from the date of lodging the appeal. As for the specific time limits, different solutions are applied. In the ACER, the time limit under the provisions of the previous founding regulation was two months,

while according to the provisions of the new founding regulation, in force since July 2019, it is four months (ACER 713/2009, Art. 19(2); ACER 2019/942, Art. 28(2)). In the ERA, the time limit is three months (ERA 2016/796, Art. 62(1)). In the ESAs, the time limit was originally two months, and after the amendments to the founding regulation, in force since February 2020, the time limit is three months (EBA 1093/2010, Art. 60(2) as amended by ESAs 2019/2175, Art. 1(50); EIOPA 1094/2010, Art. 60(2) as amended by ESAs 2019/2175, Art. 2(50); ESMA 1095/2010, Art. 60(2) as amended by ESAs 2019/2175, Art. 3(51)). The originally established time limit of two months in the ESAs did not seem long enough, so in order to avoid the risk of violating the right to due process, the BoA's RoP stipulates that the time limit for the decision starts when the BoA's President notifies the parties when he considers the evidence to be complete (ESAs BoA 2020, Art. 20(1); Lamandini 2014, 292). Time limit is the shortest in the SRB – one month (SRB 806/2014, Art. 85(4)). However, in the BoA's RoP it is made clear that the time limit starts after the conclusion of the preliminary investigation and the oral phase of the proceedings (SRB BoA 2017, Art. 20; Herinckx 2017, 86). In the CPVO, the time limit for the BoA decision is three months from the conclusion of the hearing, but it is not specified how long the hearing lasts (CPVO BoA 1239/95, Art. 52(1); CPVO BoA 874/2009, Art. 52(1)).

The provisions of the OHIM/EUIPO BoAs' RoPs only mention a reasonable period for issuing a decision (OHIM BoA 216/96, Art. 12; OHIM BoA 2017/1430, Art. 39; EUIPO BoA 2018/625, Art. 39). On the other hand, the time limits for the EASA and ECHA BoAs are not specified. In the absence of precise provisions, a reasonable time limit for the decision shall be determined on the basis of settled Court case law (Ritleng 2022, 314–315) 'in relation to the particular circumstances of each case and, in particular, the background to the case, the various procedural stages followed, the complexity of the case and its importance for the various parties involved' (*Aristoteleio Panepistimio Thessalonikis v Commission*, T-196/01, para. 230).

DECISION ON THE APPEAL

After the examination of the appeal within the set time limit, the BoA can reject the appeal as unfounded or accept it as well founded. If the appeal is well founded, there are two models that the BoA can follow. The first model provides that the BoA may remit the case to the agency

body that issued the appealed decision, whereby the body is bound by the *ratio decidendi* of the BoA. This model is applied in all agencies (Ritleng 2022, 302). According to the second model, the BoA can use the powers of the body that issued the appealed decision, which means that the BoA can change that decision or issue a new one. This model is applied in the OHIM/EUIPO, CPVO and ECHA (OHIM 40/94, Art. 62(1)–(2); OHIM 6/2002, Art. 60(1)–(2); OHIM 207/2009, Art. 64(1)–(2); EUIPO 2017/1001, Art. 71(1)–(2); CPVO 2100/94, Art. 72; ECHA 1907/2006, Art. 93(3); Magiera and Weiß 2014, 519–520). It was also applied in the EASA until September 2018 (EASA 1592/2002, Art. 40; EASA 216/2008, Art. 49; Simoncini and Verissimo 2022, 110), as well as in the ACER until July 2019 (ACER 713/2009, Art. 19(5); Tovo 2022, 45). The BoAs that can apply both models have discretionary powers to decide which model to follow and their practice varies (Hanf 2022, 75).

The BoA's power to substitute the contested decision by its own is referred to in the Court case law as *functional continuity* between the agency and its BoA. The functional continuity is first proclaimed in relation to the OHIM/EUIPO (*Procter & Gamble v OHIM [Baby-Dry]*, T-163/98, paras 36–44; *Procter & Gamble v OHIM [Soap bar shape]*, T-63/01, para. 21; *Henkel KGaA v OHIM [Kleencare]*, T-308/01, paras 24–32; Chirulli and De Lucia 2021, 128–130; Alberti 2022, 247, 251; Ritleng 2022, 301–302). In subsequent case law it was extended to the CPVO, EASA, ECHA and ACER (*Mema GmbH LG v CPVO*, T-177/16, paras 40–42; *Heli-Flight GmbH & Co. KG v EASA*, T-102/13, para. 27; *BASF Grenzach GmbH v ECHA*, T-125/17, para. 55; *Aquind Ltd v ACER*, T-735/18, para. 32; Alberti 2022, 247–248). The question of whether and to what extent the principle of functional continuity still applies to the EASA and ACER BoAs due to the abolishment of their powers to substitute agency decisions remains open and will be left to the discretion of the Court in some future cases (Alberti 2022, 248).

The decision of the BoA is final and can be subject to the action for annulment before the Court. In the period before the entry into force of the ToL, this was provided for only by the provisions of the founding regulations of the agencies, as there was no treaty basis for the Court's jurisdiction to review the legal acts of the agencies. A strict interpretation of Art. 173/230 of the Treaty on the Economic Community meant that the jurisdiction of the Court was related only to the acts of the institutions, thus excluding the acts of the agencies, i.e. decisions of their BoAs (Craig 2010, 95). After the entry into force of the ToL, the lacuna in the

primary law was filled, so that the Court now has jurisdiction for actions for annulment that private persons may lodge against agency acts having legal effect *vis-à-vis* them, which includes the BoAs' decisions (TFEU 2016, Art. 263(1), (4); Schima 2019, 1802).

CONCLUDING REMARKS – ADVANTAGES AND DISADVANTAGES OF THE APPEAL

The main advantage of the appeal to the BoA as an administrative remedy is that it acts as an effective filter for access to the Court and is appropriate from the point of view of the need for early dispute resolution. The available data show that the number of admissible appeals is not large, that in many cases the agency is changing its decision or the appellant is withdrawing the appeal and that actions for annulment are lodged against a relatively small number of BoAs' decisions. This indicates that appeals generally serve as an efficient filter for access to the Court and that there is a wide acceptance of the outcomes of the appeals in the economic contexts in which the agencies operate (Chirulli and De Lucia 2021, 146–147). The appeals before the BoAs provide an attractive remedy to market participants because they can review complex technical decisions in greater detail in comparison to the Courts which would have to rely on the expertise of the administration (Chamon 2014, 329). Additionally, the administrative review may contribute to subsequent judicial review. When a dispute ends up in the Court, the core issues have already been clarified thanks to the BoAs' expertise, which facilitates Court proceedings (Blair and Chang 2018, 27–28; Simoncini 2018, 159–160).

There are two main disadvantages of the remedy, both of which are related to the jurisdiction of the BoAs. First, certain decisions, e.g. implementing acts containing technical standards or soft law measures, having a significant impact on the subsequent agency decisions and decisions of the MS competent authorities or complementing the (formally) Commission's regulatory decisions, cannot be appealed although they may change the legal situation of private persons (Chirulli and De Lucia 2021, 153–154). Second, the jurisdiction of the BoA is not clearly established. In the absence of an adequate administrative remedy, in order to obtain effective protection of their rights, private persons must turn to the Court, where they have to prove that an agency decision is a regulatory act that affects them directly, which is almost impossible regarding certain types of agency decisions.

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ЖАЛБА ПРЕД ОДБОРИМА ЗА ЖАЛБЕ ДЕЦЕНТРАЛИЗОВАНИХ АГЕНЦИЈА КАО ОБЛИК ПРАВНОГ ЛЕКА У УПРАВНОМ ПОСТУПКУ У ПРАВУ ЕВРОПСКЕ УНИЈЕ

Резиме

У овом раду се, као облик правног лека у управном поступку у праву Европске уније (ЕУ), разматра механизам жалби пред одборима за жалбе (ОЖ) десет децентрализованих агенција које доносе одлуке са правним дејством на трећа лица у контексту регулације унутрашњег тржишта. На почетку рада су укратко представљене функције правних лекова у управном поступку у праву ЕУ. Након тога су представљени извори права за жалбу пред ОЖ, и то: 1) извори примарног права – чл. 263. ст. 5. Уговора о функционисању ЕУ и чл. 41. ст. 1. Повеље о основним правима ЕУ; 2) извори секундарног права – оснивачки и други акти којима се уређује деловање агенција и пословници ОЖ који се усвајају у форми имплементационих и делегираних аката Комисије; и 3) остали извори права који обухватају пословнике које усвајају сами ОЖ, правнообавезујуће акте које доносе агенције, праксу Суда ЕУ, праксу ОЖ и акте тзв. меког права.

Главни део рада посвећен је питањима која су разматрана у оквиру три аспекта жалбеног поступка. Први подразумева допуштеност жалбе, а у склопу тога су разматрани: 1) надлежност ОЖ, тј. врсте одлука које могу да буду предмет жалбе, при чему је фокус на правнообавезујућим одлукама агенција

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у контексту регулације тржишта; 2) активни *locus standi* пред ОЖ; 3) рокови за изјављивање жалбе; и 4) суспензивно дејство жалбе. Други аспект се односи на основаност жалбе, а у склопу тога су разматрани: 1) ремонстративна природа жалбе у агенцијама *OHIM/EUIPO*, *CPVO*, *EASA*, *ECHA* и *ERA*; 2) медијација тј. могућност постизања пријатељског решења између страна у жалбеном поступку у агенцијама *OHIM/EUIPO* и *ECHA*; и 3) разматрање жалбе пред ОЖ и рокови за доношење одлуке о жалби. Трећи аспект се односи на одлуку ОЖ, при чему је фокус на два модела поступања ОЖ када је жалба основана. Први модел, примењен у свим агенцијама, подразумева да ОЖ може да упути предмет надлежном органу агенције на даље одлучивање, при чему је он везан правним тумачењем ОЖ. Други модел, примењен у агенцијама *OHIM/EUIPO*, *CPVO* и *ECHA*, подразумева да ОЖ може да користи надлежности органа чија одлука је предмет жалбе, што значи да може да измени ту одлуку или доносе нову. Након тога је укратко представљена могућност оспоравања одлуке ОЖ пред Судом ЕУ.

На крају је дат осврт на главне предности и недостатке жалбе пред ОЖ као правног лека. Главну предност представља то што овај лек служи као ефикасан филтер за приступ Суду ЕУ и адекватно средство у сврху раног решавања спорова. С друге стране, главни недостатак се односи на чињеницу да у вези са одређеним одлукама које могу да промене правни положај лица не постоји право жалбе или надлежност ОЖ није јасно утврђена.

Кључне речи: децентрализоване агенције ЕУ, одбори за жалбе децентрализованих агенција ЕУ, функционални континуитет у децентрализованим агенцијама ЕУ, правни лекови у управном поступку у праву ЕУ, ремонстративна жалба у праву ЕУ.