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The draft amendments to CJEU's Statute and the future challenges of administrative adjudication in the EU

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1. Introduction

The emergence of quasi-judicial authorities embedded within EU agencies is attracting a growing attention in the legal debate.

The discussion is usually developed either on a sector-based approach[1] (i.e. analysing in depth role, composition, powers, procedures of each Board of Appeal), or a comparative one (i.e. highlighting differences and similarities among them[2] and identifying, also looking to national experiences, their legal

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[1] The most recent and rich example in this regard are the conference proceedings of the workshop held at the University of Trento, 13 April 2016, *L'Amministrazione giustiziale dell'Unione europea*. See B. MARCHETTI (ed.), *Administrative Remedies in the European Union. The Emergence of a Quasi-Judicial Administration*, Turin, 2017. See also, *ex multis*, Banca d'Italia, Quaderni di Ricerca Giuridica della Consulenza Legale, *Judicial review in the Banking Union and in the EU financial architecture*, n. 84, 2018; M. CLARICH, *Il riesame amministrativo delle decisioni della BCE*, in *RIDPC*, 2015, p. 1513 ss.; C. BRESCIA MORRA, *The Administrative and Judicial Review of Decisions of the ECB in the Supervisory Field*, in *Quaderni di Banca d'Italia*, n. 81, 2016.

[2] A. DAMMANN, *Die Beschwerdekammern der Europäischen Agenturen*, Frankfurt am Main, 2004; E. SCHMIDT-ASSMANN, *Rechtsschutz gegen Europäische Agenturen: vor einem neuen Aufbruch?*, in *Privatrecht, Wirtschaftsrecht, Verfassungsrecht: Festschrift für Peter-Christian Müller-Graff zum 70. Geburtstag*, 2015, p. 1322 ss.; C. TOVO, *Le agenzie decentrate dell'Unione europea*, Naples, 2016; M. CHAMON, *EU Agencies. Legal and Political Limits to the Transformation of EU Administration*, Oxford, 2016; J. ALBERTI, *Le agenzie dell'Unione europea*, Milan, 2018; M. SIMONCINI, *Administrative regulation beyond the non-delegation doctrine : a study on EU agencies*, Cumnor Hill, 2019.

roots[3]). Moreover, because of the intense reforms that the EU judicial system has been facing over the last years[4], the studies on EU agencies' Boards of Appeal have recently been linked also with the ones on the future of the EU judicial architecture, bringing in the general discussion on the latter the experiences related to the former[5].

Building on the results collected with the 'classic' approach and bringing a step forward the recent trend of analysing Boards of Appeal in the broader context of the evolving EU judicial system, the present article is devoted to the discussion of the draft amendments to the Protocol n. 3 on the Statute of the Court of Justice of the European Union (hereinafter, CJEU). Even though this proposal is still under negotiations, a general assessment can already be made (or, perhaps, it *should* be made, exactly because of the possibility to further elaborate the draft amendments).

Looking in particular to what is more relevant for the purposes of this study, it should be noted that the proposed reform aims at introducing a filter mechanism according to which an appeal brought before the General Court against a decision taken by a Board of Appeal can subsequently be challenged before the Court of Justice only if it raises an issue that is significant with respect to the unity, consistency or development of EU law.

This proposal can be favourably acknowledged in principle, opening very interesting scenarios for the evolution of the Boards of Appeal and potentially enhancing the efficiency of the EU system of judicial protection. However, making Boards of Appeal bodies whose decisions are potentially able to elude the

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[3] Particularly interesting in this regard is P. CHIRULLI – L. DE LUCIA, *Tutela dei diritti e specializzazione nel diritto amministrativo europeo. Le commissioni di ricorso delle agenzie europee*, in *Riv. it. dir. pubbl. comunit.*, 2015, p. 1305; L. DE LUCIA, *I ricorsi amministrativi nell'Unione europea dopo il Trattato di Lisbona*, in *Rivista trimestrale di diritto pubblico*, 2013, p. 323 ss.; with specific regard to the ESAs Joint Board of Appeal, W. BLAIR, *Board of appeal of the European supervisory authorities*, in *European Business Law Review*, 2013, p. 165. See also A. TÜRK, *Oversight of Administrative Rulemaking: Judicial Review*, in *European Law Journal*, 2013, p. 126 ss.; J. DAVID, *Les recours administratifs contre les actes des agences européennes*, in *Revue Trimestrielle de Droit Européen*, 2016, p. 275 ss. ; M. LAMANDINI, *The Esa's Board of Appeal as a Blueprint for the Quasi-Judicial Review of European Financial Supervision*, in *European Company Law*, 2014, p. 290.

[4] *Ex multis*, C. AMALFITANO – M. CONDINANZI (eds.), *La Corte di Giustizia dell'Unione Europea oltre i trattati: la riforma organizzativa e processuale del triennio 2012-2015*, Milan, 2018; A. ALEMANNO – L. PECH, *Thinking justice outside the docket: A critical assessment of the reform of the EU'S court system*, in *Common Market Law Review*, 2017, p. 129 et seq.; C. CURTI GIALDINO, *Il raddoppio dei giudici del Tribunale dell'Unione: valutazioni di merito e di legittimità costituzionale europea*, in *Federalismi.it*, n.8/2015, p. 1; M. DERLÉN – J. LINDHOLM (eds.), *The Court of Justice of the European Union: Multidisciplinary Perspectives*, Oxford, 2018.

[5] *Ex multis*, A. W. H. MEIJ, *Courts in Transition: Administration of Justice and how to Organize It*, in *Common Market Law Review*, 2013, p. 6 ss.; F. DEHOUSSE, *The Reform of the EU Courts. The Need of a Management Approach*, in *Egmont Paper 53*, 2011, p. 21, F. DEHOUSSE, *The Reform of the EU Courts (II). Abandoning the Management Approach by Doubling the General Court*, in *Egmont Paper 83*, 2016; J. ALBERTI, *Verso un sistema giurisdizionale "a specializzazione decentrata"? Brevi note sulla specializzazione del sapere giudiziario dell'Unione all'indomani della riforma del Tribunale*, in *Il Diritto dell'Unione europea*, 2018, p. 23.

scrutiny by the Court of Justice seems to be a turning point in the experience of EU administrative adjudication that should be carefully evaluated.

With the proposed reform, Boards of Appeal might well evolve from a detached form of administrative review into a first instance judicial model of scrutiny, much more integrated into the EU system of judicial protection than the actual paradigm. Their decision will be brought to the attention of the Court of Justice only on the basis of the will of one of the parties, since no mechanism of 'public enforcement' such as the art. 256(2) TFEU review procedure is envisaged. Moreover, looking to the judicial statistics, it stands out quite clearly that currently there is no need (in terms of workload at the Court of Justice) of a filter mechanism in fields other than trademarks and designs. This notwithstanding, the reform proposal is drafted in general terms, thus giving the impression that the EU legislator is laying the legal and political basis for an evolution of the Boards of Appeal. Finally, the fact that the original wording of the draft amendments defines Boards of Appeal as '*independent* administrative bodies' sounds as a further confirmation that the reform currently under negotiations might well be able to revolutionise the role and the very nature of the Boards of Appeal. As it is well known, Boards are far from being independent judges, because according to an established case-law 'there is continuity in terms of their functions' between the Boards and the agency within which they have been established[6].

Therefore, this study aims at highlighting the importance of the proposed reform for the EU system of administrative review, which is something that is rarely discussed by those who look at the broader picture of the evolution of the EU system of judicial protection. In particular, it assesses the possible impact of the proposed reform both for the Boards of Appeal (in terms of amendments in the procedures that will have to be followed, composition, independence, jurisdiction) and for the EU judicial system in general (in terms of workload reduction for the Court of Justice, possible specialization at the General Court, judgments' quality).

2. The status quo: the peculiar 'functional continuity' of each Board of Appeal with its agency

Before entering into the analysis of the draft amendments to the CJEU Statute, it may be worth discussing the current status of the Boards of Appeal.

[6] Court of First Instance, 8 July 1999, case T-163/98, *The Procter & Gamble Company v. OHIM (Baby Dry)*, ECLI:EU:T:1999:145, at para. 38.

Their hybrid nature has been extensively debated, as well as their peculiar role of adjudication[7] and the concept of '*continuité fonctionnelle*' stated by the General Court in *Baby Dry*[8].

Therefore, a more analytical approach is followed here, presenting a bird's-eye overview on some key-elements of their peculiar institutional position. The intrinsic limits of every schematic categorization can be compensated, in the present field of research, by the rich debate already published on this point and by the added value of having at hand a detailed outlook on some crucial elements of the Boards' institutional position, which are also used in the current negotiations to identify the bodies to which the new filtering provision will apply.

In the following table, the main elements of the concept of 'independence' have been declined with regard to each Board; therefore, it summarizes the Boards of Appeal's functional/institutional independence (which, as it will be further discussed below, is the distinguishing element chosen by the European Parliament to identify the Boards whose decision could be filtered), the personal independence of their members and the financial independence of the Boards as such. Moreover, attention is given also to the peculiar power of substitution that certain Boards bear and the procedures of appointment and removal of their members, which constitute an interesting testing ground of their independence.

The adjudicatory procedures of each Board fall outside the scope of the following table. On this point, it has to be highlighted that, according to a common understanding among legal scholars[9] and an established case law of the General Court (which, not differently with what happened with regard to the concept of '*continuité fonctionnelle*', has been endorsed by the Court of Justice, yet only implicitly)[10], Boards of Appeal should not respect the principle of fair hearing, since they are not judicial authorities but

[7] See above at footnote 1, 2, 3.

[8] Court of First Instance, 8 July 1999, case T-163/98, *Baby Dry*, cit., at para. 38. For a recent confirmation, see General Court, 6 October 2017, case T-386/16, *Falegnameria Universo v. EUIPO*, ECLI:EU:T:2017:706, at para. 29. The Court of Justice has never clearly mentioned this principle, even though it has nevertheless implicitly endorsed it. The only mention lies in the Opinion of AG SHARPSTON, 26 October 2006, case C-29/05 P, *OHIM v. Kaul GmbH*, ECLI:EU:C:2006:671, at para. 25-35.

[9] M. NAVIN-JONES, *A Legal Review of EU Boards of Appeal in Particular the European Chemicals Agency Board of Appeal*, in *European Public Law*, 2015, p. 144; L. BOLZONELLO, *Independent Administrative Review Within the Structure of Remedies Under the Treaties: the Case of the Board of Appeal of the European Chemicals Agency*, *ibidem*, 2016, p. 571; M. CHAMON, *EU Agencies. Legal and Political Limits to the Transformation of EU Administration*, cit., p. 339.

[10] Court of First Instance, case T-63/01, 12 December 2002, *The Procter & Gamble Company v. OHIM*, ECLI:EU:T:2002:317, at para. 23; the appeal has been rejected by Court of Justice in the case C-107/03 P, yet without developing the issue of fair trial. See also Court of First Instance, case T-298/10, 8 March 2012, *Gross v. OHIM*, ECLI:EU:T:2012:113, at para. 105 (not appealed). Indirectly, Court of First Instance, case T-242/02, 13 July 2005, *The Sunrider Corp.*, ECLI:EU:T:2005:284, at para. 51 (not appealed) dismissed the argument that EUIPO Boards should respect Art. 6 ECHR, linking the Boards' activity to Art. 41 of the Charter on the right to a good administration.

administrative offices of review laying in functional continuity with the agency. This has been stated with regard to the Boards[11] of EUIPO, but it can be extended by analogy also to the other bodies, with the only exception of that of SRB[12]. Even though Boards' procedures have overall received positive assessments, this is something that should be borne in mind in light of the proposed reform and its possible consequences.

Moreover, it is worth noting – the issue will be discussed further below – that the need to measure the Boards' independence is given by the proposed reform, both for the purposes of identifying its field of application and of discussing whether and to what extent the potential lack of scrutiny by the Court of Justice could be balanced by an enhancement of the Boards' independence.

However, independence has never been a goal *as such* for the Boards and thus a gap thereof cannot be deemed as necessarily negative. They have not been established for being judicial bodies, and therefore as independent as the latter, but for being internal offices with the aim of adjudicating over technical decisions adopted by autonomous bodies such as EU agencies. Thus, no Board enjoys (and has been established to enjoy) the level of independence of the Luxembourg judges (i.e. also that of the Boards' competitors[13], namely the specialized courts established pursuant to Art. 257 TFUE).

BoA	**Degree of autonomy**					
	Power of substitution	*Functional Independence*	*Personal Independence*	*Financial Independence*	*Appointment*	*Removal*
EUIPO European Union Intellectual Property Office *OJ*	Yes *Art. 71*	'they shall not be bound by any instructions. […] They shall not be examiners or members of the Opposition Divisions, the Department in	Only Protocol No. 7 (no full immunity pursuant to	Financed by the Agency	*Members:* MB. *President & chairperson:* Council, on MB proposal, following an open and transparent	*Cause:* serious grounds *Procedure:* CJ on application by the appointing institution *Art. 166(1)*

[11] Plural is needed when talking about EUIPO's Boards, since this agency is the only one that has more than one Board, and namely five. Theoretically, according to Art. 55 of its establishing Regulation also ERA could do so. However, from the minutes of the 41st Meeting of ERA Management Board (in particular, see point 8, p. 19 et seq.) it stands out that ERA decided (after several debates) to have only one Board of Appeal.

[12] See whereas No. 121 of SRB establishing regulation, according to which "This Regulation respects […] the right to an effective remedy and to a fair trial and the right of defence, and should be implemented in accordance with those rights and principles".

[13] The extent to which Boards of Appeal and specialized courts could be seen as 'rivals' is discussed in J. ALBERTI, *Verso un sistema giurisdizionale a "specializzazione decentrata"?*, in *Il diritto dell'Unione europea*, 2018, p. 23, in particular at p. 34 et seq.

BoA	Degree of autonomy					
	Power of substitution	*Functional Independence*	*Personal Independence*	*Financial Independence*	*Appointment*	*Removal*
2017 L154/1		charge of the Register or Cancellation Division' *Art. 166(7,9)*	art. 3 CJEU Statute)		selection procedure *Art. 166(5)(1)*	
CPVO Community Plant Variety Office *OJ 1994 L227/1 (as amended)*	Yes *Art. 72*	'they shall not be bound by any instructions' *Art. 47(3)*	Only Protocol No. 7 (no full immunity pursuant to art. 3 CJEU Statute)	Financed by the Agency	*Members:* President on MB proposal *President:* Council on COM proposal and MB opinion *Art. 47(2)(1)*	*Cause:* serious grounds *Procedure:* CJ on COM application and MB opinion *Art. 47(5)*
EASA European Aviation Safety Agency *OJ 2018 L212/1*	No *Art. 113*	'they shall be independent. In making their decisions they shall neither seek nor take instructions from any government or from any other body. They shall not perform any other duties within the Agency' *Art. 106(3,4)*	Only Protocol No. 7 (no full immunity pursuant to art. 3 CJEU Statute)	Financed by the Agency	MB from a list composed by COM *Art. 106(1)*	*Cause:* serious grounds *Procedure:* COM (MB opinion) *Art. 106(5)*
ECHA European Chemicals Agency *OJ 2006 L396/1 (as amended)*	Yes *Art. 93(3)*	'they shall be independent. In making their decisions they shall not be bound by any instructions. They may not perform any other duties in the Agency' *Art. 90(2,3)*	Only Protocol No. 7 (no full immunity pursuant to art. 3 CJEU Statute)	Financed by the Agency	MB from a list composed by COM following a call for expressions of interest *Art. 89(3)*	*Cause:* serious grounds *Procedure:* COM (MB opinion) *Art. 90(4)*
ACER Agency for the Cooperation of Energy Regulators *OJ 2009 L211/1 (as amended)*	Yes *Art. 19(5)*	'They shall not be bound by any instructions. They shall not perform any other duties in the Agency' *Art. 19(3)*	Only Protocol No. 7 (no full immunity pursuant to art. 3 CJEU Statute)	Financed by the Agency	MB on COM proposal, following a public call for expression of interest. NAs consulted *Art. 19(2)*	*Cause:* serious misconduct *Procedure:* MB (NAs consulted). *Art. 19(3)*
ESAs	No					

BoA	Degree of autonomy					
	Power of substitution	*Functional Independence*	*Personal Independence*	*Financial Independence*	*Appointment*	*Removal*
European Supervisory Authorities *OJ 2010 L331/12 (as amended. Reference are made to EBA regulation)*	*Art. 60(5)*	'They shall not be bound by any instructions. They shall not perform any other duties in relation to the Agency' *Art. 59(1)*	Only Protocol No. 7 (no full immunity pursuant to art. 3 CJEU Statute)	Financed by the Agency	MB from a short-list proposed by COM, following a public call for expressions of interest and after consultation of the NAs *Art. 58(3)*	*Cause:* serious misconduct *Procedure:* MB (NAs consulted). *Art. 58(5)*
SRB Single Resolution Board *OJ 2014 L225/1*	No *Art. 85(8)*	'They shall not be bound by any instructions' *Art. 85(2)*	Only Protocol No. 7 (no full immunity pursuant to art. 3 CJEU Statute)	Financed by the Agency BUT 'The Appeal Panel shall have sufficient resources' *Art. 85(2)*	MB following a public call for expressions of interest *Art. 85(2)*	Not foreseen (neither in RoP)
ERA European Railway Agency *OJ 2016 L138/1*	No *Art. 62(3)*	'They may not perform any other duties within the Agency. In their deliberations and decisions they shall not be bound by any instructions' *Art. 56(2)*	Only Protocol No. 7 (no full immunity pursuant to art. 3 CJEU Statute)	Financed by the Agency	MB on a list proposed by COM following an open selection procedure *Art. 55(3)*	*Cause:* serious grounds *Procedure:* MB *Art. 56(2)*

Keys:
CJ: Court of Justice
COM: European Commission
MB: Management Board, i.e. the plenary board that has the power to manage the agency, regardless the different name with which this body is called in some establishing regulations.
NAs: National Authorities; the reference should be intended as to the collective body they compose (which takes different name in each agency).
RoP: Rules of Procedure

Table n. 1 – An overview on BoAs' independence

In general terms, it has to be highlighted that there is no Board of Appeal that can be clearly deemed as being fully independent, or actually even much more independent than the others: some perform better on certain elements, some on others. For instance, EUIPO's Boards are certainly the most developed and autonomous experience; however, at least from a purely normative analysis, all the other Boards have

their members appointed through a procedure that involves more actors than only the Management Board. Of course, this is somehow counterbalanced by the more complex procedure set forth for the appointment of EUIPO Boards' President and chairpersons. This, however, is an argument that seems to further demonstrate the difficulty in ranking Boards on the basis of the degree of independence they enjoy.

There are indeed some elements on which Boards of Appeal are quite different one from the other.

First and foremost, one may think – together with the already mentioned procedures for members' appointment – to those for the removal of Boards' members.

It bears noting that these procedures are always based on not-well-defined 'serious grounds' or 'serious misconducts'; even though these circumstances can be linked to conflict of interests and to the same issues that could bring to recusal o self-recusal, they are fully distinct from the latter, being autonomous procedures through which other public authorities (and, therefor, not the parties in the proceedings) can remove Boards' members.

Only in the case of SRB the possibility of such a removal is not regulated. Thence, it seems interesting to evaluate whether and to what extent one could argue that SRB Appeal Board's members cannot be removed for serious misconduct, in absence of a clear regulation thereof. Leaving aside this peculiar example, EUIPO and CPVO Boards are by far the bodies most strongly geared towards the defence of members' independence, involving in the procedure of removal not only other EU 'political' institutions (Council and Commission), but also and foremost the Court of Justice. EASA and ECHA involve in such a decision, which is fundamental for the independence of the same Board of Appeal, an 'external' authority as the European Commission. In all the other cases, it is up to the Management Board of the agency to decide whether the member of the Board of Appeal should be removed. Sometimes the Management Board has to hear the opinion of the national authorities, which however cannot be deemed as being fully 'external' authorities, since they are part of the agency. *Ça va sans dire* that in all those latter cases the independence of the Board seems remarkably undermined.

Furthermore, other differences are related to the so-called power of 'substitution', i.e. the possibility to exercise any power within the competence of the agency and thence to amend the substance of the latter's decision, substituting the Board's evaluation of the matter with that of the agency. The Boards of EUIPO, CPVO, EASA, ECHA, ACER have this power, while those of the ESAs, SRB and ERA do not.

Even though such a prerogative does not mean, as such, that a Board is more or less independent from the agency, it is clear that it reveals a closer relationship between the former and the latter. Such a power implies that the Board is (a potentially independent, but still) part of the administration that adopts the

challenged act, because it has the power to fully amend it. When these acts are, as it is the case for EU agencies, highly technical, being part of the same administration may well imply to belong to the same scientific/professional community, possibly detached from the general legal one, with obvious consequences on the possibility to be captured by the controlled entity.

It seems worth highlighting that this power is deeply different from the one of the Luxembourg judges. Leaving aside the highly debated issues related to the intensity of the CJEU scrutiny over technical acts[14], only with regard to penalties (and under the circumstances provided for by Art. 261 TFEU) the CJEU has such an unlimited jurisdiction. This means that only in relation to the definition of the amount of penalties, and not more[15], the CJEU has the power to amend the challenged act setting a fine that 'is not a new fine different in law from that which the Commission imposed in its decision'[16]. In all the other cases, Luxembourg judges do not have the power to amend the challenged act.

However, there are also some elements that are very similar in each Board.

Literally speaking, the words chosen in each establishing regulation for stating the Boards of Appeal's functional independence are absolutely similar. For every Board, it is stated that its members 'shall not be bound by any instructions'. EASA's establishing regulation further specifies the actors that shall abstain from giving those instructions, mentioning also national governments, but this does not seem to considerably enhance EASA Board's independence.

Far more relevant is that, from the Table above, it clearly stands out that only in some cases the EU legislator has set forth some principles for avoiding (or minimising) the risk of 'revolving doors', i.e. the fact that Boards' members are selected among civil servants that have previously worked within the same agency and that potentially could come back to the same position after the end of their office as Board's member. While Boards of Appeal have performed well so far, this is an issue that should not be underestimated, as also highlighted in the Joint Declaration on decentralised agencies[17].

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[14] See, *ex multis* and in relation to EU agencies in particular, E. VOS, *The European Court of Justice in the face of scientific uncertainty and complexity*, in M. DAWSON – B. D. WITTE – E. MUIR (eds.), *Judicial activism at the European Court of Justice*, Cheltenham, 2013, p. 142.

[15] The case law on this point seems indeed to reveal a very strict approach by the Court of Justice, which is not keen in extending this power to sectors different from penalties: see Court of Justice, case C-603/13 P, 21 January 2016, *Galp et al. v Commission*, ECLI:EU:C:2016:38, in particular at para. 69-79.

[16] Court of First Instance, case T-275/94, 14 July 1995, *Groupement des Cartes Bancaires "CB" v Commission*, ECLI:EU:T:1995:141, at para. 65.

[17] See the not very recent, but very interesting analysis made in the Analytical Fiche No. 10, *Boards of Appeal*, made by the Commission for the negotiations of the Joint Statement of July 2012 on decentralised agencies, available at http://europa.eu/about-eu/agencies/overhaul/index_it.htm. For further reflections, see also the above mentioned Joint Statement, ivi, at para. 21.

Further similarities among Boards of Appeal come from the (limited) personal independence of the members of each Board. In all cases, members are protected only by Protocol No. 7 on privilege and immunities; the 'reinforced' provision set forth by Art. 3 of CJEU Statute for the Luxembourg judges cannot be applied to Boards' members. As well known, according to this latter provision CJEU judges enjoy – in addition to the functional immunity provided for by Protocol No. 7 – a full immunity from legal proceedings, both in civil and criminal matters[18]. This creates a rift between the Boards of Appeal and the CJEU in terms of independence, which should be borne in mind.

Furthermore, also from the financial perspective all the Boards of Appeal seems to face a very similar situation of (limited) independence. In all cases, Boards do not have their own budget, being part of the one of the agency itself (that, it should be recalled, is the subject that the Boards have to control). Only the Board of SRB seems to mark a difference in this regard, since the agency's establishing regulation clearly states that 'the Appeal Panel shall have sufficient resources'[19]. Therefore, in the case of SRB there is a clear legal basis in the agency's establishing regulation to challenge the unlikely but not impossible decision of the agency to sensibly cut the Board's financial resources. While also the CJEU has its budget authorized by (some of) the institutions that it controls, the plurality of actors concerned and their internal composition seems to demonstrate that the Boards' situation is far less devoted to protect independence than the one of the CJEU.

3. A brief contextualisation of the proposed reform: its genesis

After having outlined the Boards of Appeal, it is possible to analyse and evaluate the proposed reform.

First of all, it has to be highlighted that the draft amendments discussed in the present study are only the last chapter of a broad series of innovations that the CJEU has been facing over the last years. After the *refonte* of the Rules of Procedure of the Court of Justice in 2012[20] and those of the General Court in 2015[21], in 2016 has entered into force the main reform of the General Court[22], which has already brought

[18] See on this issue M. CONDINANZI, *Il tribunale di primo grado e la giurisdizione comunitaria*, Milan, 1996, in particular at p. 128 and at footnote 43.

[19] Art. 85 (2) SRB regulation.

[20] Rules of Procedure of the Court of Justice of 25 September 2012 (OJ 2012, L 265), as lastly amended on 19 July 2016 (OJ 2016, L 217/69).

[21] Rules of Procedure of the General Court of 4 March 2015 (OJ 2015, L 105/1), as lastly amended on 11 July 2018 (OJ 2018, L 240/68)

[22] Regulation (EU, Euratom) No. 2015/2422 of the European Parliament and of the Council of 16 December 2015 (OJ 2015 L 341/14) and Regulation (EU, Euratom) No. 2016/1192 of the European Parliament and of the Council of 6 July 2016 (OJ 2016, L 200/137).

to the incorporation of the Civil Service Tribunal within the General Court and which is leading towards a gradual doubling of the judges of the same Court (the last appointments, which will bring the members of the General Court up to 2 per Member State, are scheduled for 2019).

On March 26th 2018, the Court of Justice sent to the Council its request for the amendment of its own Statute, pursuant to Art. 281 TFEU[23].

Focusing on what mainly concerns the present study[24], this request had a twofold intention. On the one hand, it aimed at rearranging the jurisdiction over infringement proceedings, in particular making the General Court the first instance jurisdiction over this action. On the other hand, it was intended to establish what has already been referred to as the 'filter mechanism', i.e. a procedure whereby the Court of Justice will first determine whether the appeals brought against decision originally taken by Boards of Appeal are allowed to proceed.

In particular, the Court of Justice proposed the insert in its Statute of an Article 58a, which states (emphasis added):

Where the seising of an ***independent administrative body is a prerequisite of an action being brought before the General Court****, an appeal brought against the decision of the General Court shall not proceed unless the Court of Justice first decides that it should be allowed to do so.*

An appeal shall be allowed to proceed, in accordance with the detailed rules set out in the Rules of Procedure, where it raises, wholly or in part, an issue that is significant with respect to the unity, consistency or development of EU law.

Where the appeal is not allowed to proceed, the reasons for the decision not to allow it to proceed shall be stated.

As it clearly stands out, the proposed filter echoes, without fully coping, the review procedure currently envisaged by Art. 256(2) TFEU. There are, indeed, important differences.

First and foremost, the proposed filter will be based on the parties' initiative, and not on that of the First Advocate General[25]. Furthermore, the requirements of the two procedures are slightly different.

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[23] The proposal can be found attached to the working document of the Council n. 7586/18 of 28 March 2018.

[24] For a broader overview of the draft amendments, see M. CONDINANZI, *Corte di giustizia e Tribunale dell'Unione europea: storia e prospettive di una 'tribolata' ripartizione di competenze*, in *Federalismi.it*, Special Issue n. 3/2018; F. FILPO, *La riforma della ripartizione di competenze nel contenzioso dell'Unione europea*, *ibidem*; C. AMALFITANO, *La recente proposta di riforma dello Statuto della Corte di giustizia dell'Unione europea: molti dubbi e alcuni possibili emendamenti*, *ibidem*; R. ADAM, *La recente proposta della Corte di trasferire i ricorsi per inadempimento al Tribunale dell'Unione*, *ibidem*; S. FIORENTINO, *Corte di giustizia e Tribunale dell'Unione europea: prospettive di modifica del riparto di competenze*, *ibidem*; A. CAIOLA, *La procedura legislativa per la nuova riforma dello Statuto della Corte di giustizia dell'Unione europea*, *ibidem*.

[25] The point will be discussed in depth below, at § 8.

The review procedure has to be applied when there is a 'serious risk of the unity or consistency of Union law being affected'. The one recently proposed has a partly different formulation, stating that the appeal before the Court of Justice should be admitted when there is an 'issue that is significant with respect to the unity, consistency or development of Union law'. Therefore, the scrutiny of the Court of Justice over (General Court's judgements delivered over appeal of) Boards' decisions should take place more often than in the case of specialized courts. Indeed, the litigation arising from Boards' decision should be admitted before the Court of Justice when there is an 'issue' at stake, and not a 'risk'; moreover, this issue should be simply 'significant' (and not 'serious'); furthermore, the reasons that can be invoked for the admission should not be only the unity or consistency of EU law, but also its development.

With an opinion adopted on July 11th 2018[26], the Commission expressed its doubts in relation to the first 'pillar' of the request of amendments, i.e. the rearrangement of the jurisdiction over infringement proceedings (except for some minor issues which cannot be discussed here in detail). In the view of the Commission, such an evolution should be discussed together with the report on the operation of the General Court to be submitted by the Court of Justice by the end of 2020[27]. All the while, the Commission supported in principle the introduction of the initial admission of certain appeals by the Court of Justice, albeit with some amendments on the identification of the bodies whose decision could eventually avoid the scrutiny of the Court of Justice. In particular, the Commission has proposed to clarify what is meant by the notion of '*independent administrative body*', either incorporating an exhaustive list of the Boards of Appeal to which the new provision applies or adding the clause '*whose members are not bound by any instructions when taking their decisions*'[28].

Accepting the general modification of the proposal requested by the Commission, the Court of Justice has followed the first approach suggested by the Berlaymont, thence introducing an exhaustive list of the bodies to which the new provision will apply[29]. Such an approach seems for the time being to be backed by the Council[30]. Curiously enough, the European Parliament has conversely endorsed the second way

[26] Commission opinion on the draft amendments to Protocol No 3 on the Statute of the Court of Justice of the European Union, presented by the Court of Justice on 26 March 2018 – Brussels, 11.7.2018, COM(2018) 534 final.
[27] See ivi, at para. 9 and Art. 3 of Regulation (EU, Euratom) n. 2015/2422 of 16 December 2015.
[28] Ivi, at para 40 and 41.
[29] Working document of the Council n. 11887/18 of 6 September 2018.
[30] Working document of the Council n. 13588/18 of 31 October 2018.

of clarification[31], namely the addition of a clause related to the functional autonomy of the members of the Boards of Appeal.

Therefore, at the current status of negotiations two slightly different models stand out, both of which will be discussed in detail below (§ 6). According to the former, the bodies to which the new filtering provision applies are mentioned explicitly; according to the latter, the field of application of the new provision should be marked by an open clause for every independent administrative body whose members are not bound by any instructions when taking their decisions and whose seising is a prerequisite of an action being brought before the General Court.

In any case, what has to be clearly highlighted for the purposes of the present study is that the proposal of reform is now essentially focused on the introduction of a filter for the decision taken by (not-well-defined) Boards of Appeal. Indeed, regardless of the precise wording that will be chosen to identify them, Boards of Appeal (together with the General Court) clearly stand out as being the main protagonists of the proposed reform – even if no official document reports their position on the matter.

4. A part of a bigger (yet postponed) debate?

In general terms, indeed, the fact that in this reform the Boards' voice on the matter has not been heard raises some doubts.

As already mentioned, the Boards' success is also due to their hybrid nature, i.e. their capability to stand equally on the two opposite sides of the agency and its stakeholders. While it is true that in some policy fields stakeholders had already called for a greater judicialisation of Boards[32], it has also to be noted that agencies seem quite jealous of their technical prerogatives, that are often shared with the Boards (think,

[31] Report on the draft regulation of the European Parliament and of the Council on amending Protocol No 3 on the Statute of the Court of Justice of the European Union (02360/2018 – C8-0132/2018 – 2018/0900(COD)), 6 december 2018, Committee on Legal Affairs, Rapporteur MEP Tiemo Wölken, at pag. 7-8.

[32] This happened both in terms of capability to revise the substance of the agency's decision and of protecting the rights of the private parties vis-à-vis the agency; see M. NAVIN-JONES, *A Legal Review of EU Boards of Appeal in Particular the European Chemicals Agency Board of Appeal*, cit., p. 143; L. BOLZONELLO, *Independent Administrative Review Within the Structure of Remedies Under the Treaties: the Case of the Board of Appeal of the European Chemicals Agency*, cit., p. 569. As interesting example stands out the Community of European Railway and Infrastructure Companies (CER) Position Paper of December 2016 on ERA Board of Appeal, where CER disagrees to the basic principle that the ERA Executive Director does not have to follow the findings of the Board of Appeal, using a quite strong wording and in particular stating that Board's decision 'must be binding. The separation of powers must be ensured' (available at http://www.cer.be/sites/default/files/publication/161208_CER%20Position%20Paper_Board%20of%20Appeal.pdf). See also, on ECHA Board, G. LIGUGNANA, *Dispute resolution in European Agencies: the ECHA Board of Appeal*, in B. MARCHETTI (ed.), *Administrative Remedies in the EU*, cit., p. 81.

for instance, to the Boards' power to amend the agency's decision, discussed above) only because these bodies are part of the same agency.

Therefore, one may wonder whether and to what extent EU agencies (and their Boards) are pleased by the proposed reform and its possible consequences. It bears reminding that even though EU agencies are usually made up by national administrations, the Council might not always be their representative, since EU agencies are sometimes made up of administrative authorities that are independent, at national level, by their governments (this is the case for ESAs, SRB, ACER and to a far lesser extent ERA and EASA).

Moreover, a further issue that stand on the side of the main debate on the proposed reform but that nevertheless deserves a brief mention is the lack of coordination between the reform currently under negotiation and the broader debate on the specialisation of the General Court, which is taking place within the same institution (even if some voice has leaked out, reaching the scientific community[33]) and which will be made object of the already mentioned report on the operation of the General Court that the Court of Justice will submit by the end of 2020.

The issue of the specialisation of the General Court goes far beyond the purposes of the present study and therefore will not be dealt with here[34]. However, it has to be highlighted that the proposed reform aims at holding the General Court responsible, since it intends to make the latter the potentially last instance Court with regard to the highly technical litigation arising from the Boards of Appeal. However, the same proposal does not tackle at all the issue on whether the General Court needs internal reform, for instance establishing specialised chambers, to enhance the judgments' quality and to better manage its workload.

This approach seems actually quite surprising. On the one hand, it is clear that the introduction of a filter mechanism for technical litigation does not need *as such* a specialisation of the General Court. On the other hand, however, it seems equally clear that if is pending a debate on the need of specialisation as a tool to increase the General Court's efficiency, the conclusion on the former issue (filter) should be reached taking into due account the one on the latter (specialisation).

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[33] U. ÖBERG – M. ALI – P. SABOURET, *On specialisation of Chambers at the General Court*, in M. DERLÉN – J. LINDHOLM (eds.), *The Court of Justice of the European Union: multidisciplinary perspectives*, cit., p. 211 et seq.

[34] For interesting reflections on this point, see (together with the article cited at the previous footnote) also F. MONTAG, F. HOSEINIAN, *The Forthcoming Reform of the General Court of European Union: Potential Specialization within the General Court*, in *International Antitrust Law & Policy*, 2012, p. 83;

From the draft amendments, the filter mechanism clearly stands out as being related to litigation in technical cases, where a specialized quasi-judicial body has already reached a decision. If and to what extent the General Court could better perform its new role of potentially last instance Court over those technical cases enhancing its own specialisation, or on the contrary increasing its generalist approach, is a crucial issue that might have an impact on the overall success of the same filter.

Good arguments stand on both sides. A Specialised (and-not-General-anymore) Court could well perform a deeper scrutiny on the decisions adopted by the Boards of Appeal, potentially using less time; a *de nomine et facto* General Court could better tackle the risk of sectoral isolation and fragmentation of the jurisprudence on technical issues. However, the solution could well be a mixed one, establishing specialized chambers only in those fields where the litigation rate and the type of arguments usually raised by the parties tip the balance to that direction, while maintaining a generalist approach on other sectors.

Be that as it may, dividing the two issues (filter and specialisation) seems thence counterintuitive – at least from a theoretical perspective. More pragmatically, it cannot be excluded that this fragmentation can be due to the fact that the proposed filter, beyond the field of trademarks, actually does not raise any concern in terms of relevant cases that could elude the scrutiny of the Court of Justice, as will be discussed below. But then, if this is the case, why the proposed reform aims at introducing a generalised filter, also in fields different from trademarks?

5. A quantitative assessment of the proposed reform

To better evaluate the proposed reform, it seems crucial to develop also a quantitative approach, i.e. assessing as carefully as possible how many cases have been introduced over the last years before the Court of Justice concerning a decision originally arising by a Board of Appeal and, thus, understanding how many cases could in future be excluded from the scrutiny of the top EU Court. This could certainly help in evaluating in concrete terms the possible impact of the reform both on the CJEU and on the Boards of Appeal, as well as the policy fields that would be particularly affected by the draft amendments.

Curiously enough, neither the original proposal for amendment of the CJEU Statute, nor the subsequent acts of the same proceeding (or, at least, the ones that can be officially obtained), present clear data on the cases brought before the two articulations of the Luxembourg judges against decisions of Boards of Appeal. The original proposal does present some data (even if in a footnote), aimed however at highlighting a different issue, i.e. how many appeals related to EUIPO Boards' decisions are dismissed as being manifestly inadmissible or manifestly unfounded in proportion to the total amount of such

dismissals[35]. While this information helps in shedding some light on the need of a bipartite (instead of tripartite) system of judicial protection (even if only in the specific sector of trademarks and designs), it does not explain the full story, which is made also (and, perhaps, foremost) of the numbers (related to every policy fields where Boards operate) on the total amount of decision taken by these bodies and those of their appeals before the General Court and the Court of Justice.

These data cannot be easily obtained from the official CJEU case-law dataset, because the decisions of the Boards of Appeal are not listed therein. A worth mentioning exception are the Boards of Appeal of EUIPO (the oldest and by far more active Boards of Appeal ever established), which regularly publish these statistics[36], and that of CPVO, which has published the statistics for the years 1995-2015[37].

For all the other policy fields, a quantitative analysis has been made and it is proposed here. The following table has been composed matching the results of the databases of each Board of Appeal with those available (i.e. only published judgments and orders) on the one of the CJEU.

It bears noting that this table aims at tracking the work of the Boards of Appeal and their impact on the CJEU. Thence, it does not cover the entire 'EU agencies related' workload of the Luxembourg judges, the evaluation of which goes slightly beyond the purposes of the present study and it is therefore left for future researches. In particular, the following table does not involve the decision taken at the Kirchberg on EU agencies' acts that have not been previously challenged before a Board (because of the limited or optional jurisdiction of the latter[38], or the fact that in few cases the parties file parallel actions[39]).

While, for the reasons stated above, mistakes and errors cannot be totally excluded, the table below provides at least a first attempt in shedding some light on issues that are crucial to assess the meaning and the possible impact of the proposed reform.

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35 See the working document of the Council n. 7586/18 of 28 March 2018, p. 7, at footnote 2.

36 See, for the more updated statistics, here: https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/contentPdfs/about_euipo/the_office/appeal_statistics/appeal_stats_2018_en.pdf. Data related to 2018 have to be meant until December 6th. These data have been incorporated in the chart below, in the text.

37 CPVO case-law 1995-2015. Summaries of decisions and judgments of the Board of Appeal, the General Court and the Court of Justice of the European Union, Luxembourg, 2015 (ISBN 978-92-9152-158-6).

38 As shown by Table n. 2 (and the rich debate mentioned above at footnotes 1 and 2), Boards of Appeal usually have compulsory jurisdiction over selected decisions for appeals lodged by private parties; in the case of SRB is optional, in the case of the ESAs is disputed. It is worth reminding that Boards of Appeal have also no jurisdiction over disputes related to civil service or tendering procedure; actions on these issues are currently brought directly to the General Court, and therefore fall outside the scope of Table n. 2.

39 In some cases, actions have been put forward simultaneously before the Boards of Appeal and before the General Court, for instance when the jurisdiction of the former was disputed (see, *ex multis*, case T-243/17). This has happened in particular with ECHA. Thus, in these cases technically speaking the General Court has not decided over a decision taken by the Board of Appeal and thence they have not been counted in Table n. 2.

It covers the last five years (data related to 2018 have to be meant, however, until December 1st) and all the Boards of Appeal currently established within EU agencies, regardless whether their seising is a prerequisite for an action to be brought before the General Court (this, indeed, is an issue that could be revised during the negotiations and, in any case, that should be discussed thoroughly: see below, at § 6). The Board of the European Railway Agency has been mentioned only for the sake of completeness, since it is not operative yet. On the contrary, the Administrative Board of Review of the ECB's supervisory decisions in the realm of the Single Supervisory Mechanism is not part of the present survey, since it adopts only a non-binding opinion. This marks a fundamental difference with the other Boards[40] and, except for future amendments, it currently prevents to apply the proposed reform also to the ECB/SSM Board.

BoA	**Number of cases decided**		**Number of appeals introduced**		**Compulsory jurisdiction?**
	Year	*No.*	*GC*	*CJ*	
EUIPO	2018	2081	229	42	Yes *Art. 72*
	2017	2694	299	54	
	2016	2878	334	49	
	2015	2907	296	64	
	2014	2783	292	33	
CPVO	2018	1	1	1	Yes *Art. 73*
	2017	2	1	0	
	2016	21	3	0	
	2015	7	4	1	
	2014	6	3	0	
EASA	2018	1	1(0)[1]	0	Yes *Art. 114(2)*
	2017	0	0	0	
	2016	0	0	0	
	2015	0	0	1[2]	
	2014	2	0	0	
ECHA	2018	13	1	0	Yes *Art. 94*
	2017	15	2	1	

[40] See Art. 71(2) EUIPO Regulation; Art. 72 CPVO Regulation; Art. 113 EASA Regulation; Art. 18 ECHA Board Rules of Procedure (Commission Regulation (EC) N. 771/2008 of 1 August 2008, OJ 2008 L 206/5, as amended in 2016); Art. 19(5) ACER Regulation; Art. 60(5) EBA Regulation (taken as example for all the ESAs); Art. 85(8) SRB Regulation; Art. 62(3) ERA Regulation.

BoA	Number of cases decided		Number of appeals introduced		Compulsory jurisdiction?
	Year	*No.*	*GC*	*CJ*	
	2016	24	0	0	
	2015	15	0	0	
	2014	16	1	0	
ACER	2018	1	0	0	Yes *Art. 20*
	2017	1	4[3]	0	
	2016	0	1	0	
	2015	2	0	0	
	2014	0	0	0	
ESAs	2018	1	0	0	Disputed *Art. 61(1)* *(See BoA decision 2016 001, 7.1.2016, Kluge et al v. EBA)*
	2017	1	0	0	
	2016	1	0	0	
	2015	1	2	1	
	2014	3	1	0	
SRB	2018	8	0	0	No *Art. 86(2)*
	2017	54	0	0	
	2016	14	0	0	
	2015	0	0	0	
	2014	NA	NA	NA	
ERA	NA	NA	NA	NA	Yes *Art. 63(1)*

[1] The appeal has actually been immediately repealed: see order of 11 September 2018, *Reiner Stemme Utility Air Systems GmbH v EASA*, case T-371/18, ECLI:EU:T:2018:553.
[2] Please note that this appeal has been introduced in 2015 against a decision delivered by the General Court in 2014 but introduced before this latter Court in 2013 (see case T-102/13); therefore, it does not appear in the table above.
[3] The fact that the numbers of appeal introduced before the General Court is higher than the one of the decisions taken in the same (and previous) year by the Board of Appeal is because the same decision has been challenged by different parties which, thus, have generated different cases (cases T-123/17, T-146/17, T-332/17, T-333/17, all against the ACER BoA decision of 17 March 2017, Case A-001-2017).

Table n. 2 – Statistics on BoAs' cases before CJEU over the last 5 years

Interestingly, these data clearly confirm what could easily be inferred also looking to the 'sectoral examples' made by the Court of Justice and the Commission in their proposal and opinion on the reform[41], i.e. that at the present time there is no need in terms of workload to introduce any filter in fields other than trademarks and designs.

Over the last 5 years, all the other six Boards of Appeal have generated only 5 cases (!) before the Court of Justice. Moreover, looking from a more general perspective and thus considering also the General Court, it clearly stands out that Boards of Appeal (except those of EUIPO) have created a very scant workload at the CJEU, since they either decide only few cases per year (see, for instance, the Boards of EASA, ACER, ESAs, to a lesser extent also CPVO) or have a quite small percentage of appeal before the General Court (see, for instance, the Board of SRB, ECHA, but also the example provided by that of CPVO in 2016).

6. Detailed analysis of the draft amendments under negotiation

In light of the above, the exact wording of the provision under negotiation can thence be discussed. In particular, the following reflections can be made on the two models of identification of the bodies whose decisions could potentially not be challenged before the Court of Justice[42].

6.1 The position of the Council and of the Court of Justice

The provision currently backed by the Court of Justice and the Council has the undoubted merit of being crystal clear in the identification of the bodies to which it will apply. According to this proposal,

an appeal brought against a decision of the General Court concerning a decision of a board of appeal of the European Union Intellectual Property Office, the Community Plant Variety Office, the European Chemicals Agency or the European Aviation Safety Agency shall not proceed unless the Court of Justice first decides that it should be allowed to do so.[43]

However, a potential dark side of this clarity is the fact that it does not underline, not even implicitly, the need of amendment in the listed Boards to enjoy the privilege of possibly eluding the scrutiny of the court of Justice. Even though, as will be argued below (§ 8), amendments will naturally follow because

[41] See the already mentioned above original proposal of the Court of Justice (Council working document 7586/18 of 28 march 2018, in particular at p. 7, footnote 2) and the first opinion of the Commission (COM(2018)534 final, at para. 38).

[42] Please note that the other differences between the text backed by the Council and that of the Parliament (in particular, concerning paragraph 3 of the proposed new Art. 58a) fall outside the scope of the present study.

[43] Working document of the Council n. 13588/18 of 31 October 2018.

of the general context of the reform, a more careful approach might perhaps be preferred. While it is true that the listed Boards are among those who perform better on a crucial issue as the procedure for members' removal, they nevertheless raise some doubts on several other elements of independence. Moreover, one may wonder why the Boards of ACER and ERA have not been listed therein. Even though they have weaker rules on members' removal, they also offer more guarantees in relation to members' appointment (requesting a public call for expression of interest which, for instance, is not envisaged for EASA's Board) and to the power of substitution (with regard to ERA Board only).
As highlighted above, the independence of the Boards of Appeal (also in the case of EUIPO, CPVO, EASA and ECHA) is currently so debatable that it seems more cautious to leave the precise definition of the field of application of the new provision to a case by case approach.

6.2 The position of the European Parliament

The proposal currently backed by the European Parliament goes directly in this direction, yet raising some other issues. According to this other version,

where the seising of an independent administrative body whose members are not bound by any instructions when taking their decisions is a prerequisite of an action being brought before the General Court, an appeal brought against the decision of the General Court shall not proceed unless the Court of Justice first decides that it should be allowed to do so.[44]

The first element that deserve attention here is the use of the expression 'independent administrative body', which presents both risks and potential.
On the one hand, it has to be borne in mind that nowadays there is no Board of Appeal that can be deemed as 'independent'. This comes not only from the information contained in Table n. 1 above, but also from the case law of the CJEU[45]. Therefore, using such a wording the EU legislator should be aware that at least at the beginning there will be uncertainty on the bodies to which this provision applies and

[44] Report on the draft regulation of the European Parliament and of the Council on amending Protocol No 3 on the Statute of the Court of Justice of the European Union (02360/2018 – C8-0132/2018 – 2018/0900(COD)), 6 December 2018, Committee on Legal Affairs, Rapporteur MEP Tiemo Wölken, at pag. 7-8.
[45] In relation to EUIPO (but this can easily be extended to other bodies) the Luxembourg judges have stated that 'while the Boards of Appeal enjoy a wide degree of independence in carrying out their duties, they constitute a department of the [Agency] responsible for controlling […] the activities of the other departments of the administration to which they belong'. See Court of First Instance, case T-63/01, 12 December 2002, *The Procter & Gamble Company v OHIM*, ECLI:EU:T:2002:317, at para. 21; see also Court of First Instance, 8 July 1999, case T-163/98, *The Procter & Gamble Company v. OHIM (Baby Dry)*, ECLI:EU:T:1999:145, at para. 38. Particularly interesting is also what the same ECHA Board has underlined with regard to its own functions in the decision in case A-005-2011, *Honeywell Belgium N.V.*, at para 117.

some case law on this point may well arise. Applicants, indeed, would certainly state that the new filter should not apply with regard to this or that Board, because the challenged act has been previously scrutinized by a Board which is not 'independent'. Such an uncertainty, however, would not be necessarily bad, allowing the Court of Justice to decide on a case-by-case basis the bodies to which the new provision should apply.

Moreover, on the other hand, this wording has certainly also the potential to further influence the evolution of Boards of Appeal. Indeed, if this wording enters into force, there would be an act of primary EU law (CJEU Statute has indeed the same legal value of the Treaties, being a Protocol attached to the latter) clearly stating that the bodies whose decisions could potentially elude the scrutiny of the Court of Justice shall be 'independent'.

This bring us, however, to a second set of remarks, which deals with the expression 'independent administrative body *whose members are not bound by any instructions when taking their decisions*'.

The idea to specify that the degree of independence that is necessary to elude the Court of Justice is simply given by the fact that the Boards' members 'are not bound by any instructions when taking their decisions' seems extremely dangerous and raises several doubts.

As already discussed above, currently every Board satisfies this criterion. However, no Board can be deemed as being 'independent'. Independence is much more than a formal legal expression on the freedom from instructions (as, paradoxically enough, the EU knows well, in light of the Polish judiciary's saga and the conspicuous case-law on the independence of judges[46]). It entails personal independence, financial independence, rules on appointment and removal, procedures to be followed for taking decisions. From all these other perspectives, Boards' independence is far from being satisfactory. Thence, the expression 'independent administrative bodies' should be better used alone (or rather together with a mention to the principle of fair trial, as will be discussed further below at § 7).

A last reflection should be dedicated to the expression 'where the seising of an independent administrative body […] *is a prerequisite of an action being brought before the General Court*', which is misleading. Even though it is fully understandable that the 'privilege' to potentially elude the Court of Justice's scrutiny can be given only when the Boards have delivered a decision on the matter, it has to be highlighted that there are cases in which the nature of the Board's jurisdiction (compulsory v. optional) is debated. This is the case of the Joint Board of Appeal of the ESAs, as highlighted above in Table n. 2[47]. Moreover, in the

[46] See Court of Justice, 19 September 2006, case C-506/04, *Wilson*, EU:C:2006:587; 14 June 2017, case C-685/15, *Online Games et al.*, EU:C:2017:452; 13 December 2017, case C-403/16, *El Hassani*, EU:C:2017:960; 27 February 2018, case C-64/16, *Associação Sindical dos Juízes Portugueses*, ECLI:EU:C:2018:117.

[47] For a further discussion on this point, see *ex multis* A. MAGLIARI, *I rimedi amministrativi nel settore della vigilanza finanziaria europea. Modelli a confronto*, in *Rivista Italiana di Diritto Pubblico Comunitario*, 2016, p. 1331;

case of SRB the Board's jurisdiction is optional. This opens few scenarios that are currently not ruled by the provision and would bring a (in this case, useless) legal and practical uncertainty. Would ESAs Board fall within the field of application of the new provision? And could a judgment of the General Court given on appeal of a decision of SRB Board be filtered by the Court of Justice, even if the SRB Board's jurisdiction was not a *prerequisite* for the action to be brought before the General Court, but simply a *discretionary choice* of the applicant?

Therefore, the wording currently chosen by the European Parliament seems quite misleading and should be better rephrased as referring not to the concept of 'being a prerequisite' but of having concretely caused a Board's (or, if preferred, an 'independent administrative body's) decision.

7. Proposal for a different wording

Against this framework, a third version of the same provision will be proposed here. It develops the one currently backed by the Council (new text in bold), while mixing it with the approach chosen by the Parliament. It goes as follows:

an appeal brought against a decision of the General Court concerning a decision of an ***independent*** *board of appeal* ***on the annulment of an act, the failure to act or the non-contractual liability of bodies, offices and agencies of the Union*** *shall not proceed unless the Court of Justice first decides that it should be allowed to do so.* ***For this purpose, the acts setting up bodies, offices and agencies of the Union shall lay down the rules on the independence of the board of appeal pursuant to Article 47 of the Charter of Fundamental Rights.***

[The subsequent paragraphs should remain the same of the Parliament's proposal].

7.1 Explanatory notes: the opportunity to extend the Boards' jurisdiction (and to fully legitimise ERA Board)

Before entering on the issues already discussed above (method of selection, need for independence and type of jurisdiction), attention should be given to a side-issue that, nevertheless, deserves to be mentioned. The current reform could seize the opportunity to introduce in the CJEU Statute a clear specification of the class of actions that could be delegated to the first-instance scrutiny of a Board of Appeal.

Such a specification is, indeed, not pleonastic at all. On the contrary, it aims at solving a possible lack of legitimacy of ERA Board and establishing the legal basis for further enhancements of the Boards' jurisdiction.

Almost all the Boards established so far extend their jurisdiction only on the action for annulment[48]. Only the one of ERA, which is the most recent and it is not operative yet, has the power to decide on both action for annulment and action for failure to act[49]. The jurisdiction over the action for failure to act, however, does not seem fully compatible with primary law. According to the Treaties currently in force (see Art. 263(5) TFEU), only the power to decide on the action of annulment can be granted to authorities different from the CJEU. Indeed, Art. 265 TFEU does not admit the possibility that the acts setting up bodies, offices and agencies of the Union lay down specific conditions and arrangements concerning the action for failure to act.

The usual argument according to which what is not forbidden is allowed does not seem applicable for the present purposes, exactly because in the case of the action of annulment the delegation of adjudicatory powers to the Boards is allowed on the basis of the explicit clause contained in Art. 263(5) TFEU. It is true that for several years Boards of Appeal have exercised their jurisdiction over actions of annulment even in absence of a formal authorization in primary law (Art. 263(5) TFEU has been introduced only by the Lisbon Treaty). However, it is equally true that since almost 10 years there is such an authorization, which is limited only to the action for annulment.

A fascinating counter-argument in favour of the full legitimacy of ERA Board's jurisdiction over actions for failure to act even under the Treaties currently in force comes directly from the late 70s, and namely from the position of the Court of Justice during the negotiations that have led to the establishment of what is currently named EUIPO. At that time, the Court of Justice argued in favour of the legitimacy of a first scrutiny of the EUIPO Boards over actions for annulment, without amending the Treaties, stating that '*Article 164 TEEC [currently Art. 19 TEU] charges the Court of Justice to ensure "that … the law is observed". This necessarily involves reviewing the decisions of subordinate authorities in regard to errors of law, but not the repetition of complicated statements of facts*'[50]. Therefore, one could apply the same argument to the jurisdiction of ERA Board over the actions for failure to act, which will be mainly focused on the statements of facts and that in any case do not prevent a further scrutiny by the CJEU with regard to errors of law.

[48] Only with regard to ESAs Joint Board one could wonder whether its jurisdiction *de iure* limited to the action for annulment might not *de facto* be deemed as extended to the failure to act and, to some extent, to the infringement proceedings: see the very interesting analysis by P. SCHAMMO, *Actions and inactions in the investigation of breaches of Union law by the European Supervisory Authorities*, in *Common Market Law Review*, 2018, pp. 1423–1455. For a possible enhancement of EU agencies' role (and of their Boards) in infringement proceedings, see J. ALBERTI, *Le agenzie dell'Unione europea*, cit., in particular at p. 246-253.

[49] See Art. 58 of ERA establishing regulation.

[50] European Commission Working Paper, Working Group on the Community Trade Mark, *The need for a European trade mark system. Competence of the European Community to create one*, III/D/1294/79-EN, October 1979, p. 46.

However, time has passed since this position and, as already mentioned, with the Lisbon Treaty the Member States have clearly shown their will to explicitly authorize the Boards' jurisdiction (see Art. 263(5) TFEU). Moreover, the proposed reform goes exactly in the opposite direction to the only caveat raised by the Court of Justice, i.e. the possibility to review the Boards' and the General Court's decisions with regard to errors of law. Indeed, if none of the parties lodge an appeal, the Court of Justice will not have any voice on the potential errors of law. It bears also noting that together with the delegation of *executive* powers to agencies, also the issue related to the *judicial* powers that can be delegated to EU agencies' Boards is attracting a growing attention. Remarkable, in this regard, is the recent appeal lodged by Germany aimed at defining the powers of ECHA Board of Appeal[51]. Finally, it has to be highlighted that Art. 263(5) has been applying thoroughly over the last years: even when the Boards' jurisdiction is compulsory, EU institutions and Member States maintain their privilege to lodge an appeal against the agency's decision directly before the General Court[52], because Art. 263(5) TFEU permits the delegation of judicial powers to the Boards only with regard to actions brought by natural or legal persons.

Therefore, a careful approach seems now to be more advisable. The proposed reform could thence seize the opportunity to clearly state in an act having the same legal value of the Treaties that Boards of Appeal may be conferred with the jurisdiction over actions that are not limited to the one for annulment. This could concretely tackle the issue of ERA Board, despite its 'academic' and not 'practical' relevance (at least for the time being), but also open the possibility to enhance in the next future the Boards' powers, extending their jurisdiction also beyond the action for annulment.

Assessing the pros and cons of granting the Boards the power to adjudicate over the action for failure to act and the action for non-contractual liability goes beyond the purposes of the present study, and it has already been discussed elsewhere[53]. What deserves to be highlighted here is that the proposed wording gives to the EU legislator the possibility to discuss the opportunity of such a conferral on a case-by-case basis, while establishing new Boards or amending the existing ones. This would potentially enhance the Boards' role, but also maximise the benefit for the Court of Justice in terms of reduction of its workload: the more decisions are taken by the Boards, the more appeals can be filtered by the Court.

[51] See case T-755/17.

[52] See e.g. Art. 114(3) EASA Regulation and Art. 61(2) EBA Regulation (taken as example for all the ESAs).

[53] M. CHAMON, *EU Agencies. Legal and Political Limits to the Transformation of EU Administration*, cit., p. 361; J. ALBERTI, *Le agenzie dell'Unione europea*, cit., p. 253-258. In general terms on the enhancement of the powers of ECHA Board, see A. BARTOSCH, *Sogelma II*, in *Europäische Zeitschrift für Wirtschaftsrecht*, 2010, p. 441.

7.2 (…): a careful approach on Boards' independence

With regard to the field of application of the proposed reform and, thence, to the issue related to their independence, the proposed wording pleads for a change of perspective.

Instead of listing or somehow identifying the Boards[54] whose decisions could elude the scrutiny of the Court of Justice, the CJEU Statute could be amended to give the legal basis to subsequently take this decision while amending the Boards' (i.e. the agencies') establishing regulations.

The main disadvantage of this approach is obviously that the proposed reform would *de facto* enter into force and alleviate the workload of the Court of Justice only after further amendments. However, the proposal currently backed by the Parliament would actually suffer a similar problem, because also in that case the Court of Justice would be called to check case by case whether the Board of Appeal can be deemed as being 'independent' (*rectius*, independent enough to enjoy the privilege of a possible elusion of the Court's scrutiny). Moreover, the workload of the Court of Justice is given only by EUIPO, which is also the Boards with the more settled praxis and that would thus require the less extensive (or, it might be argued, even none) amendments.

The added value of the wording proposed here is to clearly state that the concept of Boards' 'independence' should be evaluated not only with regard to a single element thereof (for instance, the so called 'functional independence' proposed by the Commission and used by the Parliament) but looking in more general terms and taking into due account the principle of effective judicial protection pursuant to Art. 47 of the Charter of Fundamental Rights.

For the sake of clarity: there shall not be any 'one size fits all approach'. Every Board of Appeal operates in different policy field, which all have distinct needs. As already discussed above, the success of the Boards of Appeal is also due to their flexibility and the fact that their model has been implemented with subtle differences pursuant to the needs of each sector. Therefore, there shall not be a single set of rules for making the Boards 'independent', but on the contrary in each establishing regulation the legislator (and in each Rules of Procedure, the Board of Appeal) could decide how to reach this target holding Art. 47 of the Charter as polestar.

[54] It bears noting that in the wording proposed in this paragraph the expression 'board of appeal' is used instead of 'administrative body'. This has been done for the sake of accuracy. Indeed, even though these bodies may have also different names (Joint Board of Appeal for the ESAs, Appeal Panel for SRB, etc.), 'Board of Appeal' is the common definition, used also in the Joint Declaration of July 2012 on decentralised agencies. Moreover, this expression has no legal value (i.e. there is no rules defining what is a 'board of appeal' as, for instance, is the case for 'specialized courts') and thence it might well be referred also to offices which have different names and are not linked to EU agencies. Therefore, 'Board of Appeal' is accurate in defining the most important bodies, while being open also to be used with regard to others. On the contrary, 'administrative body' refers to everything yet being accurate to nothing.

To prevent a potential counter-argument: yes, it could also be argued that at least some Boards of Appeal are already sufficiently independent to participate at the new mechanism of appeals' selection. After all, the fact that the second proposal of the Court of Justice, now backed by the Council, expressly lists a number of Boards whose decision could elude the scrutiny of the same Court might also be interpreted as a 'legitimation'.

However, this raises some doubts, essentially because of the shortages already highlighted in the field of personal independence of the members, financial independence of the Board and of the rules on members' removal in Boards like the ones of ECHA, EASA and above all ACER, ESAs, SRB and ERA. Moreover, the established case law on the inapplicability of the principle of fair hearing to Boards of Appeal[55] seems strongly against the proposed reform, and the Court of Justice could also seize the opportunity given by this reform to amend the approach to this issue. Furthermore, a last example of the peculiarity of the Boards of Appeal is given by the rules on the parties' representation. Only in the case of EUIPO attorneys shall be entitled under national law of EEA States[56]; for all the other Boards, the Rules of Procedure do not set any limit to parties' representation[57]. This means that, after the UK withdrawal, British legal practitioners will be able to represent parties before the Boards (except EUIPO), but not before the General Court[58]. Thence, Boards might well be influenced by principles, practices and arguments belonging to a legal culture that will have a much more limited impact on the CJEU. Even though this may also have very short practical effects, it seems emblematic of the current distance between the Boards and the 'Luxembourg system' and, thus, of the need to carefully approach their 'incorporation' within the latter.

In any case, even assuming that some Boards are already sufficiently independent, the proposed wording might be taken into consideration, since it could consist in an open clause which also gives detailed instruction on which benchmarks should be evaluated by the Court to assess whether an appeal could avoid its scrutiny: namely, the general rules on independence of its establishing regulation and Art. 47 of the Charter.

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[55] See above, § 2 and in particular at footnote 10.

[56] Art. 120 EUIPO Regulation. See also, on this point, M. CONDINANZI – I. ANRÒ, *Brexit: Quelles sont les conséquences pour les avocats?*, in *Revue des Affaires Européennes*, 2019 (forthcoming).

[57] See Art. 12 of ACER Board RoP (Decision BoA No1-2011); Art. 74 of CPVO Board RoP (Commission Regulation (EC) n. 874/2009 of 17 September 2009, OJ 2009 L 251/3) and art. 82 CPVO Regulation, which enables representatives who are domiciled or have their seat or an establishment within the territory of the EU and thus does not prevent that such representatives are entitled by a law of non-EU States; Art. 18 of EASA Board RoP (adopted on 26 October 2017); Art. 9 of ECHA Board RoP (Commission Regulation (EC) N. 771/2008 of 1 August 2008, cit.). The RoP of ERA (C(2018) 3683 final, Commission Implementing Regulation of 13.6.2018), ESAs (BoA Decision 2012 002) and SRB (consolidated version as of 10 April 2017) do not state anything on this point, thus enabling representatives entitled also according to national laws of non-EU States.

[58] See Art. 19 CJEU Statute.

7.3 (…): the need to go beyond the Boards' jurisdiction as 'prerequisite'

Concerning the issue related to the Boards' jurisdiction, the proposed wording aims at stating the principle according to which the scrutiny of the Court of Justice could be eluded when the General Court's decision (i.e. judgement or order) has been taken on appeal of a Board's decision, regardless the compulsory or optional nature of the latter jurisdiction.

This is because of the risks of legal uncertainty connected to the idea of 'action before a Board as prerequisite for an action to be brought before the General Court', which have already been highlighted above (§ 6) and which thus will not be recalled here.

8. Towards a new era for Boards of Appeal?

Regardless the wording that will be chosen for the new Art. 58a of CJEU Statute, the proposed reform seems able to bring the Boards of Appeal into a new dimension, developing a quite revolutionary approach.

Three arguments support this conviction.

First and foremost, it does not seem conceivable that a potential elusion of the Court of Justice's scrutiny will not be counterbalanced by a 'judicialisation' of the Boards of Appeal. Judicial control is one of the main check and balances that have been set forth by the Court of Justice to admit the legitimacy of the delegation of powers to EU agencies – bodies that, it bears reminding, still have shaky legal bases in primary law[59]. Even though Boards of Appeal have performed well so far, without rising fundamental criticism as happened in the case of the delegation of regulatory powers to agencies, a restriction of the top EU Court's ability to review their decision would inevitably have an impact over these bodies.

Second, also the history of the evolution of the EU system of judicial protection seems to reveal that the proposed reform marks a fundamental innovation, that will inevitably affect the nature of the Boards of Appeal. Indeed, the draft amendments aim at conferring to the Boards of Appeal the privilege that had been denied to specialized courts, i.e. a mechanism of private enforcement to overview their decisions.

As it is well known, at the time of the negotiation of the Treaty of Nice the possibility of a review of specialized courts' judgements based on the parties' initiative had been ruled out, because it had been deemed as being 'dangerous'. Parties could well avoid appealing a decision before of the Court of Justice because of economic or time reasons, and thence this decision could theoretically elude the scrutiny of the Court of Justice even if it potentially raised doubts on its coherence with the EU legal order. Therefore, for the scrutiny of specialized courts' judgements (i.e. the decision taken by the General Court

[59] Delegation of powers to agencies is a huge topic that cannot, and does not need to, be dealt with in detail here. See J. ALBERTI, *Le agenzie dell'Unione europea*, 2018, in particular at p. 274 et seq.

on appeal of the latter) a mechanism of public enforcement had been envisaged, based on the initiative of the First Advocate General at the Court of Justice[60].

What is more, the complexity of the review procedure had been several times indicated as one of the reasons according to which the establishment of further specialized courts was not desirable[61]. Specialized courts, thence, have been caught in a vicious circle that, as it is well known, has recently brought to their *de facto*, even if not *de iure*, decline.

Even though the decision to revise the established position of the EU legislator over the attractiveness of a review mechanism based on the parties' initiative should be welcomed, it seems quite paradoxical that this has happened in relation to the Boards of Appeal and thus it cannot be excluded that it will call to some amendments to the Boards' nature.

As previously highlighted, these latter bodies are far more 'dangerous' than the specialized courts that could have been established pursuant to Art. 257 TFEU. They are not fully independent; according to the already mentioned settled case law of the same CJEU they don't have to apply the principle of fair hearing; their seat is not in the CJEU's buildings at the Kirchberg and not even in Luxembourg, being on the contrary decentralised all over Europe within the same seat of the agency that they control; from an administrative perspective, they are not hierarchically subordinated to the Court of Justice, that cannot manage them in the same vein it does with the General Court and, in former times, the Civil Service Tribunal.

To be clear: Boards of Appeals are not 'dangerous' as such. On the contrary, they owe their success, i.e. the fact that they have been replicated in so many policy fields over more than 25 years, also to their hybrid nature of quasi-independent bodies, built within their agency but autonomously from the latter. However, if there were risks in enabling the private enforcement of specialized courts' judgements, these risks are much higher in relation to the Boards' decisions. Curiously, the reform neither motivates nor

[60] The literature on the review procedure is extremely rich; see, *ex multis*, H. JUNG, *Une nouvelle procédure devant la Cour: le réexamen*, in C. BAUDENBACHER – C. GULMANN – K. LENAERTS – E. COULON – E. BARBIER DE LA SERRE (eds.), *Liber amicorum en l'honneur de Bo Vesterdorf*, Brussels, 2007, p. 191-218; C. NAOME, *Procédure "RX" : le réexamen, par la Cour de justice, d'affaires ayant fait l'objet d'un pourvoi devant le Tribunal*, in *Journal de droit européen*, 2010, p. 104-109; A. TIZZANO – P. IANNUCCELLI, *Prèmieres applications de la procédure de "réexamen" devant la Cour de justice de l'Union européenne*, in *Il diritto dell'Unione europea*, 2010, p. 681-705; R. ROUSSELOT, *La procédure de réexamen en droit de l'Union européenne*, in *Cahiers de droit européen*, 2014, p. 535 et seq.

[61] See the Proposition of the Court of Justice of the EU of 28 March 2011 for amendments to its own Statute and to Annex I thereto, available at http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-04/projet_en.pdf; the Response to the invitation from the Italian Presidency of the Council to present new proposals in order to facilitate the task of securing agreement within the Council on the procedures for increasing the number of Judges at the General Court, attached at the EU Council working document No 14448/1/14 REV 1 of 20 November 2014; the analysis made by C. CURTI GIALDINO, *Il raddoppio dei giudici del Tribunale dell'Unione: valutazioni di merito e di legittimità costituzionale europea*, cit., in particular at p. 19-20.

debates such a change in the approach towards the private enforcement of the review; however, such a silence does not seem to allow the conclusion that Boards of Appeal will remain as they are today, but that their evolution will follow in future on a sectoral basis and a step-by-step approach.

It is true that, as already discussed, the filter mechanism proposed for Boards' decision will enable the scrutiny of the Court of Justice over a higher number of cases than the current review procedure: the requirements of the two procedures are, indeed, slightly different. However, the accessibility of the review by the Court of Justice is clearly not the main focus of the reform: as shown by the quantitative analysis, the only data given by the Court together with the reform proposal are those related to the cases that the latter can quickly dismiss pursuant to Art. 188 of its Rules of Procedure[62]. Therefore, it seems that the attention of the proposed reform is mainly devoted on how to dismiss cases easily, and not on how to attract them.

Therefore, the shift from public to private initiative is clearly a fundamental step. It might well enhance the possibility of this new evolution of the EU system of judicial protection to succeed, even though it might deserve a careful approach and, as will be discussed further below, some possible amendments to the Boards' composition and procedure.

Furthermore, there is also another element that seems to announce that the draft amendments under negotiations aim at remarkably evolving the Boards' nature.

From the quantitative analysis conducted above, it clearly stands out that currently there is no need to manage the workload of the Court of Justice in policy fields different from trademarks and designs. Therefore, the draft amendments seem to aim at stating a general principle of a (limited) autonomy of the General Court and of the Boards of Appeal. If this would not be the case, the reform would be simply focused on EUIPO litigation. The fact that, on the contrary, the draft amendments will apply to a plurality of (yet not well defined) Boards of Appeal is an element that has to be taken seriously. It shows the willingness of the EU legislator (and of the Court of Justice, which has drafted the proposal) to pave an evolutionary way before these bodies, that currently do not generate a conspicuous workload for the Court of Justice, but which may well enhance their role in future.

Of course, such a proposition might well be a side effect of a more general intention, namely the one to introduce a mechanism of filtering the appeal before the Court of Justice. This could be tested with regard to EU agencies decisions (mainly with the ones that generate a well-known litigation, which is not too sensitive in political terms) for subsequently extending it in other, more important, fields (as other agencies, or the infringement proceedings, if and when they will ever be transferred to the General Court).

[62] See above at footnote 35.

Be that as it may, the proposed reform seems to open new scenarios for Boards of Appeal.

They will be much more integrated in the EU system of judicial protection, adopting decisions that potentially may also elude the scrutiny of the Court of Justice and definitively acquiring the role initially envisaged by Art. 257 TFEU for specialized courts. Indeed, the quantitative assessment discussed above (§ 5) seems to reveal that Boards of Appeal are very efficient in filtering actions to the advantage of the Luxembourg judges. This clearly stands out in every sector where there is a workload sufficiently significant to draw conclusion (EUIPO, CPVO, ECHA, SRB).

Therefore, one may wonder whether these bodies could be better exploited in the protection of individuals' rights and interest, enhancing their jurisdiction over the whole actions related to EU agencies' technical acts. Apparently, the proposed reform goes exactly in this direction, even if some amendments could further maximise the impact and the advantages of the reform.

One may think, for instance, to explore the possibility to make Boards' jurisdiction always compulsory (theoretically, also with regard to EU institutions and Member States, even if this would need an amendment of Art. 263(5) TFEU), as well as to extend it in general terms to all the technical acts (i.e. leaving aside civil service's and public procurement's disputes) adopted by the agency, and not to a selection of them, as it is currently the case. And this not only for the various arguments raised so far to this end (for instance, the added value of at least one step of specialized adjudication, the possibility to develop innovative approaches with regard to the review of the several soft laws adopted by EU agencies)[63], but also for the sake of the present reform.

Indeed, if and when the proposed reform will enter into force, an enhancement of the Boards' role would consequently bring to a possible reduction of the workload of the Court of Justice. The more decisions will be first reviewed by Boards of Appeal, the more appeals over decisions of the General Court could subsequently be filtered by the Court of Justice[64].

[63] See above at footnote 1, 2, 3; M. CHAMON, *EU Risk Regulators and EU Procedural Law*, in *European Journal of Risk Regulation*, 2014, p. 324 et seq., in particular p. 334-335; A. BARTOSCH, *Sogelma II*, cit. Moreover, it has to be further highlighted that with regard to soft law it would be interesting to evaluate whether a specialized authority of review would have a different understanding of the capability of a soft act to produce legal effects vis-à-vis third parties (and, thence, to admit its reviewability, which is something currently hindered by the fact that usually only specific decision can be challenged before the Boards of Appeal).

[64] A possible extension of the Board's jurisdiction seems particularly relevant for ECHA, that indeed generates many cases directly before the General Court because the relevant decisions are excluded from the jurisdiction of its Board. Over the last 5 years, 22 appeals have been filed before the General Court against ECHA decisions that had not been previously decided by the Board of Appeal of the latter, 6 of which subsequently reached the Court of Justice.

To what extent this could also enhance the overall quality of the EU system of judicial protection depends on how the proposed reform will be drafted and implemented, as well as on the amendments to the Boards' model that will be taken consequently.