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PECULIARITIES OF THE ACTION FOR ANNULMENT AGAINST DECISIONS OF THE EU DECENTRALISED AGENCIES' BOARDS OF APPEAL**

Abstract: *There are ten EU decentralised agencies empowered to take decisions that are intended to produce legal effect vis-à-vis private persons in the context of regulating the internal market. In order to ensure effective protection of the rights of private persons against these agencies, EU law establishes mechanisms of internal and external legal control of their decisions. Internal control is achieved through the mechanism of administrative appeals before the Boards of Appeal (BoAs) established within each of the agencies. The BoA's decision on the appeal is final and legally binding on the parties to the appeal proceedings. It is therefore the subject matter of an action for annulment before the Court of Justice of the European Union (CJEU), which ensures external control of the agency decisions. The action for annulment of the BoA's decision is subject to the same rules that apply to the annulment of any act of EU law intended to produce legal effects vis-à-vis third parties, but there are certain peculiarities in the context of the judicial review of the agency decisions. These peculiarities exist in four aspects of the action for annulment, namely: 1) the jurisdiction of the CJEU; 2) the grounds for annulment – the scope and intensity of the review performed by the BoA; 3) the effects of the first-instance judgment – alteration of the BoA's decision in some agencies; and 4) the appeal against the first instance judgment – filtering mechanism under Art. 58a of the CJEU Statute. These peculiarities are the subject of this paper.*

Keywords: *EU decentralised agencies, Boards of Appeal of EU decentralised agencies, functional continuity in EU decentralised agencies, judicial review of the decisions of EU agencies, action for annulment of the decisions of EU agencies, filtering mechanism, Article 58a of the CJEU Statute.*

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1. Introduction

EU decentralised agencies play an important role in the implementation of EU law. Some of them are empowered to take decisions in the context of regulating the internal market intended to produce legal effect *vis-à-vis* third parties, mainly private persons. In order to ensure effective protection of the rights of private persons against these agencies, it was necessary to establish mechanisms for internal and external legal control of their decisions.

Internal control is achieved through the system of administrative remedies embodied in the appeal procedures before the Boards of Appeal (BoAs) established within the agencies. There are ten decentralised agencies empowered to take decisions intended to produce legal effect *vis-à-vis* third parties in the context of regulating the internal market, each of them having one or more BoAs. These agencies 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);
- the 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);
- the Single Resolution Board (SRB).

The legal outcome of the proceedings before the BoA is the decision that is final and legally binding on the parties to the proceedings. By its decision, the BoA proclaims that: 1) the appeal is dismissed as inadmissible; 2) the appeal is rejected as unfounded; or 3) the appeal is upheld as well founded.

In cases where the appeal is well founded, the BoA may immediately take a final decision on the appeal or remit the case to the competent agency body that issued the appealed decision, whereby the body is bound by the BoA's *ratio decidendi* (Magiera, Weiß, 2014: 520). The BoAs of the OHIM/EUIPO, CPVO

and ECHA may also use the powers of the competent agency body. This means that they can amend the appealed decision or issue a new one (Hanf, 2022: 75), which is called the 'power of substitution' in the doctrine (Alberti, 2022: 248). This was also the case in the EASA until September 2018, and in the ACER until July 2019, when their respective new founding regulations came into force (Simoncini, Verissimo, 2022: 110; Tovo, 2022: 45). The BoAs, which can either remit the case to the competent agency body or use the power of substitution, have discretion in deciding thereon; thus, there is no uniform practice (Hanf, 2022: 75). The BoA's power of substitution is referred to in the case-law as *functional continuity* between the agency and its BoA (Chirulli, De Lucia 2021: 129; Alberti, 2022: 247). The final decisions of the BoAs that are in functional continuity with their respective agencies on the appeal absorb and substitute the appealed decisions (Chirulli, De Lucia, 2021:112). The principle of functional continuity was originally proclaimed in cases related to the OHIM,¹ and later extended to the CPVO, the EASA, the ECHA and the ACER.² According to the provisions of the new founding regulations of the EASA and the ACER, their BoAs are no longer empowered to substitute the appealed decision. Thus, it is for the Court of Justice of the European Union (CJEU) to decide in the future whether and to what extent this principle is still applicable to them (Alberti, 2022: 248).³

The BoA's decision is subject to the judicial remedy in the form of an action for annulment before the CJEU, which ensures external control of agency decisions and judicial protection of the rights of private persons. The rules that apply to this remedy are the same as those pertaining to any act of EU law intended to produce legal effect *vis-à-vis* third parties, in accordance with the provisions of Art. 256, 263, 264 and 266 of the Treaty on the Functioning of the European Union (TFEU) (Lenaerts, Gutman, Nowak, 2023: 275), the CJEU Statute, the CJEU Rules of Procedure, as well as the relevant case-law. While not affecting the application of the remedy in general, there are some peculiarities that exist only in regard to the judicial review of agency decisions. These peculiarities exist in

1 Case T-163/98, *Procter & Gamble v OHIM (Baby-Dry)*, paras 36–44; Case T-63/01, *Procter & Gamble v OHIM (Soap bar shape)*, para. 21; Case T-308/01, *Henkel v OHIM (Kleencare)*, paras 24–32.

2 Case T-177/16, *Mema v CPVO*, paras 40–42; Case T-102/13, *Heli-Flight v EASA*, para. 27; Case T-125/17, *BASF v ECHA*, para. 55; Case T-735/18, *Aquind v ACER*, para. 32.

3 Some of the principles applied in the context of an action for annulment of the BoAs' decisions have been established by the General Court (GC), preceded by the Court of First Instance (CFI), and others by the Court of Justice of the European Union (previously the European Communities). In the interest of clarity, the abbreviation CJEU shall be used hereinafter, unless there is a need to emphasise that the judgment was delivered by the first-instance Court (CFI or GC) or the second-instance Court (CJ), or that it concerns the jurisdiction of one of these instances.

the following four aspects of the action for annulment: 1) the jurisdiction of the CJEU; 2) the grounds for annulment; 3) the effects of the first-instance judgment; and 4) the appeal against the first-instance judgment.

2. Jurisdiction of the CJEU

In the period before the entry into force of the Treaty of Lisbon (ToL), there was a lacuna in primary law regarding the jurisdiction of the CJEU for actions for annulment against the decisions of the agencies, including the decisions of their BoAs. A strict interpretation of Art. 173/230 of the Treaty establishing the European Community (TEC) meant that the jurisdiction of the CJEU was restricted only to the acts of the institutions, thus excluding the acts of the agencies (Craig, 2010: 95), i.e. the decisions of their BoAs. The CJEU jurisdiction to decide on actions for annulment of the BoA decisions was established by the provisions of the founding regulations of the agencies, i.e. the acts of secondary law, which means that the jurisdiction of the CJEU was extended beyond the Treaty (Chamon, 2016: 334).

Following the entry into force of the ToL, the lacuna was filled. According to Art. 263(1) and (4) of the TFEU, the CJEU now has jurisdiction for annulment actions that private persons may bring against agency acts having legal effect *vis-à-vis* them, if the acts are addressed to them or are of direct and individual concern to them. This also includes the BoA decisions (Schima, 2019: 1802). Furthermore, the provisions of Art. 263(5) of the TFEU entrenched the administrative protection preceding judicial review against the agency decisions in primary law (Simoncini, 2018: 158), thereby enabling the consolidation and generalisation of administrative remedies against agency decisions embodied in the BoA model (Chirulli, De Lucia, 2021: 106).

Filling the lacuna in primary law regarding the jurisdiction of the CJEU to review the legality of agency decisions has raised the question of whether private persons could bring an action for annulment against the initial agency's decision or whether they were still required to turn to the BoAs first in order to initiate the relevant appeal procedure. The provisions of Art. 263(5) of the TFEU refer private persons to the founding regulations of the agencies, but do not oblige them to exhaust the mechanisms of administrative review before turning to the CJEU. Therefore, the existence of this obligation depends on the specific provisions of the founding regulations, and their wording suggests that CJEU proceedings can only follow the BoA's decision, except in cases where private persons do not have the right of appeal, i.e. when the BoA does not have jurisdiction (Magiera, Weiß, 2014: 528; Chamon, 2016: 349; Ritleng, 2022: 317–318; Tovo, 2022: 42). Consequently, in cases when the BoA has jurisdiction, the subject of the action for annulment can only be the BoA's decision and not the initial agency's decision

(Chamon, 2016: 343). The main consequence of the binding and preliminary nature of the appeal before the BoA is that the plaintiff cannot raise new grounds in the CJEU proceedings that go beyond those already raised in the administrative proceedings (Marcetti, 2017: 10–11), which is confirmed by case-law.⁴

Before the entry into force of the ToL, it was clear from the case-law that the review of the BoA's decision did not aim at re-examining the facts that were assessed within the agency, i.e. the appealed agency's decision.⁵ Consequently, the plaintiff cannot request the annulment of the initial agency's decision (Chamon, 2016: 344). After the entry into force of the ToL, in some cases the CJEU has allowed the actions even if the plaintiff requested the annulment of the agency's decision, but only in circumstances in which it was able to identify the elements to reclassify the action as an action against the BoA's decision. In such cases, the CJEU was taking into account only the pleas concerning the BoA's decision, while dismissing the pleas concerning the initial agency's decision.⁶ Accordingly, the CJEU would allow the action, not as an action for annulment against the agency's decision but as an action for annulment against the BoA's decision (Chamon, 2016: 343; Simoncini, Verissimo, 2022: 111). On the other hand, in cases where the plaintiff requested the annulment of both the agency's and the BoA's decisions, the CJEU held that the action against the agency's decision was not admissible and that only the BoA's decision could be challenged before the CJEU.⁷ In view of the provisions of the founding regulations and of the relevant case-law, the action for annulment against the BoA's decisions is the only way to ensure effective judicial protection of private persons in relation to most of the agency decisions that produce legal effects *vis-à-vis* third parties.

3. Grounds for annulment

Under the provisions of Art. 263(2) of the TFEU, the grounds for annulment of the BoAs' decisions can be: 1) lack of competence; 2) infringement of an essential procedural requirement; 3) infringement of the treaty, founding regulation of the agency or of any rule of law relating to their application; or 4) misuse of power. These are explicitly stated in the founding regulations of the OHIM/EUIPO and CPVO, as well as in the Regulation on designs.⁸

4 Case T-165/06, *Elio Fiorucci v OHIM*, paras 21–22; Case T-135/08, *Schniga GmbH v CPVO*, para. 85.

5 Case C-214/05 P, *Sergio Rossi v OHIM*, para. 50.

6 Case T-102/13, *Heli-Flight v EASA*, paras 27–32; Case C-61/15 P, *Heli-Flight v EASA*, paras 79–84.

7 Case T-735/18, *Aquind v ACER*, paras. 31–34.

8 Art. 63(2), Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark, OJ L 11, 14.1.1994, p. 1–36 (hereinafter: OHIM 40/94); Art. 61(2), Council Regulation

The specific grounds for annulment of the BoAs' decisions of those agencies where functional continuity was proclaimed, representing a combination of infringement of an essential procedural requirement and infringement of the founding regulation, were defined in the case-law. These are the scope and intensity of the review performed by the BoAs of such agencies.

3.1. The scope of the review of the BoA

The scope of review performed by the BoA in those agencies in which functional continuity is proclaimed refers to three following questions:

- 1) Is the BoA limited by the grounds of the appeal?
- 2) Does the BoA have an obligation to conduct a *de novo* examination of the appealed decision?
- 3) Does the BoA have an obligation to take into account new evidence, i.e. the evidence that was not presented in the proceedings before the competent agency body that issued the appealed decision?

The CJEU answered these questions in the case-law related to the OHIM. First, in *Baby-Dry*, the Court of First Instance (CFI) held that the BoA could not reject the appellant's arguments simply because they had not been previously presented before the competent agency body.⁹ In *Kleencare*, the CFI went a step further by stating that the outcome of the appeal depends on 'whether or not, in the light of all the relevant matters of fact and of law, a new decision with the same operative part as the decision under appeal may be lawfully adopted at the time of the appeal ruling'.¹⁰ Consequently, the CFI took two basic positions on the scope of the BoA's review. First, the BoA may allow an appeal based on new facts adduced by the appellants or new evidence presented by them during the appeal proceedings. Second, during the examination of the appeal, the BoA is not limited by the grounds of the appeal.¹¹ In *Asetra*, the CFI held that, apart from not being limited by the grounds of the appeal, the BoA also had an obligation

(EC) No 6/2002 of 12 December 2001 on Community designs, OJ L 3, 5.1.2002, p. 1–24 (hereinafter: OHIM 6/2002); Art. 65(2), Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (codified version) (Text with EEA relevance), OJ L 78, 24.3.2009, p. 1–42 (hereinafter: OHIM 207/2009); Art. 72(2), Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (Text with EEA relevance), OJ L 154, 16.6.2017, p. 1–99 (hereinafter: EUIPO 2017/1001); Art. 73(2), Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights, OJ L 227, 1.9.1994, p. 1–30 (hereinafter: CPVO 2100/94).

9 Case T-163/98, *Baby-Dry*, paras 36–44.

10 Case T-308/01, *Kleencare*, para. 26.

11 Case T-308/01, *Kleencare*, para. 29.

to examine the case as a whole, i.e. to conduct a *de novo* examination.¹² Finally, in *OHIM v Kaul*, the Court of Justice (CJ) confirmed the obligation of the BoA to conduct a *de novo* examination and to take into account new evidence submitted in the appeal proceedings.¹³ In these cases, the CJEU unequivocally established three principles regarding the scope of the BoA's review, i.e. three obligations that must be fulfilled; otherwise, the BoA's decision might be annulled. These obligations are as follows: 1) the BoA is not limited by the grounds of appeal during the appeal proceedings; 2) the BoA has the obligation to conduct a *de novo* examination of the appealed decision; and 3) the BoA has the obligation to take into account new evidence and facts presented during the appeal proceedings (Chirulli, De Lucia, 2021: 128–130; 134–135; De Lucia, 2022: 177).

The obligations regarding the scope of the BoA's review were established in the case-law related to the OHIM, so the question arose whether these obligations also applied to the BoAs of other agencies with functional continuity. The answer was positive with respect to the CPVO. The CJEU used the similarities between the OHIM and the CPVO, so it ruled by analogy with the case-law related to the OHIM (Ritleng, 2022: 302). The only difference concerns the taking into account of new evidence submitted outside the set time limits (Chirulli, De Lucia, 2021:136). While the OHIM/EUIPO BoAs may accept such evidence, the CPVO BoAs must reject it.¹⁴ On the other hand, the General Court (GC) explicitly stated that the ECHA and ACER BoAs, unlike the OHIM/EUIPO BoAs, were not invited to conduct a *de novo* examination and were limited by the grounds of appeal. With respect to these BoAs, the GC stated that the provisions on the functional continuity defined the powers of the BoA after a finding that the appeal was well founded, but not the review that the BoA performed with respect to the merits of the proceedings.¹⁵ Consequently, if the EUIPO and CPVO BoAs do not conduct a *de novo* examination, this may be a ground for annulment of their decisions, whereas the opposite is true for the ECHA and ACER BoAs – a *de novo* examination does not fall within their competence (Tovo, 2022: 56; Volpato, Mullier, 2022: 97–98).

3.2. The intensity of the review of the BoA

The judicial review generally includes the review of legal basis, facts and discretion (Craig, 2020: 99–100). When it comes to the legal basis, the CJEU completely substitutes the conclusions of the parties; but when it comes to facts and discretion, the intensity of judicial review is different. With respect to the acts of EU

12 Case T-252/04, *Caviar Anzali SAS v OHIM (Asetra)*, para. 32.

13 Case C-29/05 P, *OHIM v Kaul*, paras 42–44, 49, 56–58.

14 Case T-112/18, *Pink Lady America LLC v CPVO*, paras 97–100.

15 Case T-125/17, *BASF v ECHA*, paras 59–66; Case T-735/18, *Aquind v ACER*, paras 77–81.

institutions and other bodies, the CJEU is invited to perform a comprehensive review of the legal basis and to intensively examine the exercise of their powers. However, when the exercise of discretion includes the assessment of complex economic, scientific and technical (EST) issues, the CJEU limits its review to the question whether there has been a manifest error of assessment, a misuse of powers, or a manifest exceeding of discretion (Volpato, 2019: 15–16, 19). The limitation of judicial review is related to the understanding that the CJEU cannot substitute its own assessment of highly complex EST issues for those entrusted to certain institutions and bodies (Mullier, Cana, 2018: 110).

In this context, it is significant what intensity of review must be performed by the BoAs during the appeal proceedings in order to ensure effective judicial protection later on. Therefore, the CJEU had to answer two questions regarding the intensity of the BoA's review.

The first question was whether the BoA could limit its review to legal issues or whether it also had an obligation to address the EST issues that were essential to the appealed decision. In case-law related to the OHIM, the CJEU made a connection between the intensity and the scope of the BoAs' review stating that the BoAs 'are required to base their decision on all the matters of fact and of law', and that the BoAs' review 'is not limited to the lawfulness of the contested decision, but [...] it requires a reappraisal of the dispute as a whole'.¹⁶ In relation to the CPVO, the CJEU held that if the BoA decided to use the agency's powers, it had the obligation to carefully and impartially examine all the relevant circumstances of the application for granting plant variety rights and collect all the necessary factual and legal elements.¹⁷ Accordingly, the CJEU established the principle that the BoA could not limit the review to examining only the legal issues, but also had to address the EST issues (Simoncini, 2018: 162).

The second question was whether the BoA could limit the review to a search for manifest errors in the assessment of the competent agency body that issued the decision, which is compatible with the limited review of the CJEU. In cases involving the ECHA, the GC referred to the expertise of the BoA members and concluded that there was a clear intention of the EU legislator to provide the BoA with the expertise necessary to make an assessment of the complex EST issues. Accordingly, the review of the EST issues presented in the agency's decision is not limited to a search for the existence of a manifest error, but the BoA is required to consider whether the appellant's arguments can show that the assessment on which the agency's decision is based is vitiated by error.¹⁸ The same logic

16 Case T-252/04, *Asetra*, paras 31–32.

17 Case C-625/15 P, *Schniga v CPVO*, paras 84–85.

18 Case T-125/17, *BASF v ECHA*, paras 87–89, 124; Case T-755/17, *Germany v ECHA*, paras 192–194.

was applied in the case-law regarding the ACER when the GC concluded that the provisions regarding the BoA organisation, in particular its composition and powers, indicated that it was not established to be reduced to the limited examination of the complex EST issues. The provisions of the founding regulation of the ACER, according to which the action for annulment can be brought only against the BoA's decision, and not the initial agency's decision, indicates that the BoA cannot perform limited review of the agency's decision. If the BoA's review were limited with respect to the complex EST issues, this would mean that the GC performs limited review of a decision that itself was the result of a limited review, and such a system of "limited review of a limited review" fails to offer the guarantees of effective judicial protection'.¹⁹

In the aforementioned cases, the CJEU established two principles regarding the intensity of the BoA's review. First, the intensity of the BoA's review is higher than the intensity of the CJEU's review regarding the assessments of the EST issues. The standard of review that the BoA should apply is to determine whether there is an error in the assessment of the competent agency body that issued the appealed decision, and not only whether there is a manifest error (Tovo, 2022: 52–53; Volpato, Mullier, 2022: 99). The second principle states that the established intensity of review applies to the BoAs of all agencies, and there are two reasons for that. First, all of the aforementioned cases emphasise the CJEU's position that the case-law limiting the review to the search for manifest errors refers exclusively to the CJEU and not to the BoAs, which protect the rights of the parties in situations where the judicial control is limited. Second, the CJEU found that the BoAs had the necessary expertise to be able to determine the existence of errors in the assessment of the complex EST issues (Ritleng, 2022: 303–304).

4. Effects of the first-instance judgment

If the action for annulment is well founded, the GC annuls the BoA's decision by its judgment. According to Art. 266 of the TFEU, as well as the provisions of their founding regulations, the agencies are required to take the necessary measures to comply with the GC judgment. Consequently, the GC cannot give the agency specific instructions on how to comply with the judgment or refer the case back to the BoA (Chamon, 2016: 344; Tovo, 2022: 50), but it is up to the agency 'to draw the consequences of the operative part of the judgment and the grounds on which it is based'.²⁰

19 Case T-735/18, *Aquind v ACER*, paras 52–58.

20 Case T-163/98, *Baby-Dry*, para. 53.

However, with regard to the OHIM/EUIPO and CPVO, the GC has jurisdiction to alter the decision of the BoAs.²¹ This means that the GC has additional jurisdiction that is not provided for in the TFEU, which only gives the possibility of the annulment of the contested decision (Magiera, Weiß, 2014: 523). Two following conditions must be met for the GC to alter decisions of these BoAs: 1) a formal request to alter the decision is submitted to the GC; and 2) the BoA's decision is annulled (Hanf, 2022: 79).

Since the provisions of the founding regulations of these agencies do not specify what the alteration entails, it was left to the CJEU to clarify this. First, it was clarified that the CFI/GC might only take into account the facts already examined by the BoA, and only in order to determine whether the BoA gave the correct legal qualification of those facts.²² Consequently, the CFI/GC does not examine the merits of the dispute before the BoA, but only whether the BoA made a correct decision on the basis of the established facts (Lenaerts et al., 2023: 617). Later on, the CJEU confirmed that the jurisdiction to alter the BoA's decision must be limited to situations in which the GC, after reviewing the BoA's assessment, is in a position to determine which decision the BoA was required to take on the basis of the matters of fact and law.²³ In doing so, the CJ took an explicit position that the GC could not substitute its own assessment for the BoA's or make a new one.²⁴ The restrictions related to the alteration of the BoA's decision, which were established in relation to the OHIM, were also confirmed in relation to the CPVO.²⁵ The restrictive interpretation of the possibility to alter the BoAs' decisions did not imply full jurisdiction as provided for in Art. 261 of the TFEU, but only the review along the lines of Art. 263 TFEU (Chirulli, De Lucia, 2021: 113). The final consequence of the aforementioned limitations is that the annulment or alteration of the BoA's decision in relation to the application for granting a trademark or design (OHIM/EUIPO) or a plant variety right (CPVO) does not constitute an instruction to the agency to accept the applicant's request (Chamon, 2016: 344).

5. Appeal against the first-instance judgment

According to Art. 256(1) of the TFEU, decisions issued by the GC may be subject to an appeal to the CJ on points of law only, under the conditions and within the limits laid down by the CJEU Statute (Schima, 2019: 1766). This means that, as

21 Art. 63(3), OHIM 40/94; Art. 61(3), OHIM 6/2002; Art. 65(3), OHIM 207/2009; Art. 72(3), EUIPO 2017/1001; Art. 73(3), CPVO 2100/94.

22 Case C-16/06 P, *Les Éditions Albert René SARL v OHIM*, paras 38–39.

23 Case C-263/09 P, *Edwin v OHIM*, para. 72.

24 Case C-263/09 P, *Edwin v OHIM*, para. 72.

25 Case C-534/10 P, *Brookfield and Elaris v CPVO*, para. 39.

a rule, the provisions of primary law ensure a two-level judicial review of the BoAs' decisions and that the decision of the agency itself is subject to three levels of review: one before the BoA and two before the CJEU. However, after the establishment of the filtering mechanism this became an exception.

The filtering mechanism was introduced as a part of the reform of the CJEU formalised by the provisions of Regulation 2019/629, in force since 1 May 2019.²⁶ The provisions of this regulation amended the CJEU Statute, and one of the amendments was the introduction of Art. 58a, which established the filtering mechanism. The filtering mechanism implies that an appeal against the GC's decision concerning the decisions of the EUIPO, CPVO, ECHA and EASA BoAs, as a rule, does not proceed unless the CJ has previously decided that the appeal should be allowed. The appeal is allowed to proceed only 'where it raises an issue that is significant with respect to the unity, consistency or development of Union law'. In addition to the aforementioned BoAs, the mechanism will also apply in relation to any BoA that will be established within any other agency after 1 May 2019, provided that the BoA has jurisdiction for the agency's decisions.²⁷

The official reason for establishing this mechanism was to reduce the CJ case-load, since many appeals were brought before it in cases that had already been examined twice (first by an independent BoA, then by the GC), and many of these appeals were dismissed by the CJ because they were patently unfounded or manifestly inadmissible.²⁸ The GC clarified that the purpose of establishing this mechanism was to examine the case twice instead of three times, the agency BoA being the first instance.²⁹ In other words, according to Art. 58a of the CJEU Statute, the adjudication of disputes related to agency decisions is reduced to two levels of jurisdiction: the BoA as the first one, and the GC as the second one, assuming that these disputes have already been considered twice and that a third level is not necessary (De Lucia, 2022: 186). The establishment of this mechanism suggests that the BoAs of the aforementioned agencies provide sufficient protection to justify the exclusion of a final judicial review by the highest EU court (Lamandini, Ramos Muñoz, 2020: 120). It can be concluded from the above that the efficiency of the CJ is the main reason for establishing the mechanism. This conclusion is also supported by two important indicators related to the activities of the CJ itself. On the one hand, efficiency has been identified among

26 Regulation (EU, Euratom) 2019/629 of the European Parliament and of the Council of 17 April 2019 amending Protocol No 3 on the Statute of the Court of Justice of the European Union, PE/1/2019/REV/1, OJ L 111, 25.4.2019, p. 1-3 (hereinafter: Reg. 2019/629).

27 Art 58a, Protocol No 3 on the Statute of the Court of Justice of the European Union, OJ C 202, 7.6.2016, p. 210-229 as amended by Art. 1(2), Reg. 2019/629.

28 Rec. 4, Reg. 2019/629.

29 Case T-755/17, *Germany v ECHA*, para. 56.

the members of the CJEU as the main criterion for its activity (Krajewski, 2019: 222). On the other hand, the CJ is increasingly using procedures under Art. 181 and 182 of its Rules of Procedure, which imply issuing orders when appeals are inadmissible/manifestly unfounded or manifestly well founded, thus speeding up and simplifying the appeal procedures (Šadl, Lucía López, Stein Arne, Naurin, 2022: 550–551).

Following the entry into force of the amendments to the Statute, the CJ adopted amendments to its Rules of Procedure introducing Art. 178a and 178b, which set the conditions for the functioning of the mechanism. The main condition is that the appellant should annex to the appeal a detailed request that the appeal be allowed to proceed, setting out the issue raised by the appeal that is significant with respect to the unity, consistency or development of EU law and containing all the information necessary to enable the CJ to decide on the request. The CJ takes the decision promptly in the form of a reasoned order (Krajewski, 2019: 244–245; De Lucia, 2022: 184–185). Two essential elements of the annex to the appeal have already been established in the case-law. First, the appellant must specify the provision of the EU law or case-law that has been infringed, briefly explain the nature of the error of law allegedly made by the GC, and explain how that error affected the outcome of the judgment.³⁰ Second, the appellant must demonstrate that, independently of the legal issues raised in the appeal, the appeal raises one or more issues significant with respect to the unity, consistency and development of EU law, and that the scope of this criterion goes beyond the judgment under appeal, as well as the appeal against the agency's decision.³¹ This means that the appellant must demonstrate the existence and significance of these issues by presenting concrete evidence related to a specific case and not just arguments of a general nature (De Lucia, 2022: 185–186; Lenaerts et al., 2023: 658–659).

The CJ issues orders dismissing the appeals under the filtering mechanism by default, unless the appeal raises a significant issue for the preservation of the unity, consistency or development of EU law (Šadl *et al.*, 2022: 569–570). Since the beginning of the implementation of the mechanism until the end of 2022, 177 appeals were brought against the GC's judgments related to the BoAs' decisions, but only three of them were allowed (Court of Justice of the European Union [CJEU], 2023: 20). During 2023, three more appeals have been allowed. All of the allowed appeals relate to the EUIPO BoAs.³² By the end of September 2023, no judgment was given with respect to appeals under the mechanism.

30 Case C-97/20 P, *Société des produits Nestlé SA v Amigüitos pets & life and EUIPO*, para. 15.

31 Case C-97/20 P, *Société des produits Nestlé SA v Amigüitos pets & life and EUIPO*, para. 18.

32 Opinion of Advocate General Čápetá delivered on 13 July 2023, Case C-382/21 P, *EUIPO v KaiKai Company Jaeger Wichmann GbR*, para. 28.

There was some criticism in the doctrine as to why the application of the filtering mechanism was limited to four agencies. In this regard, there are four lines of argument. First, the BoAs of the other agencies could also be considered independent within the meaning of Art. 58a of the CJEU Statute. Second, these BoAs are comparable to those listed in Art. 58a. Third, there is an increasing number of appeals related to the GC's judgments on actions against the decisions of these BoAs. Finally, the mechanism will apply to all agencies with independent BoAs that will be established in the future (Alberti, 2019: 21; Chirulli, De Lucia, 2021: 255; De Lucia, 2021: 188). There are opinions that the reason for their non-inclusion in the mechanism, especially in the case of the ACER, could be related to the socio-economic and political sensitivity of the areas in which these agencies operate. Given the increasing centralisation of regulatory powers in the hands of these agencies, the Member States are likely to have a growing interest in maintaining dual judicial control over the decisions of their BoAs (Tovo, 2022: 57–58). On the other hand, as far as the ESAs and the SRB are concerned, there is an assumption that the EU legislators believe that time has not yet come to limit judicial control in the financial area (Lamandini, Ramos Muñoz, 2020: 121).

However, the CJ itself took the position that the time had come to include other agencies in the mechanism. In November 2022, the CJ made a proposal to include within the scope of the mechanism the decisions of all BoAs that had already existed on 1 May 2019 (CJEU, 2022: 1). The official reason for the proposal is the ever-increasing CJ workload due to the large number of appeals against the GC's decisions and the desire of the CJ to continue to fulfil its role of ensuring timely compliance with rights related to the interpretation and application of the Treaty (CJEU, 2022: 1). In this sense, the CJ agreed with some of the criticism already made in the doctrine. Noting that there was no particular reason justifying the non-inclusion of the BoAs of other agencies in the list provided in Art. 58a of the CJEU Statute, the CJ pointed out that they should be included in the mechanism 'in the interest of enhanced consistency' (CJEU, 2022: 8). In this regard, the CJ proposed the draft regulation that would amend Art. 58a by including the ACER, EBA, EIOPA, ESMA, SRB and ERA BoAs to the list (CJEU, 2022: 10–15). By the end of September 2023, the European Commission (2023: 5) gave a favourable opinion on the draft regulation. The European Parliament's position in the first reading has not yet been adopted, although the committees responsible have not proposed any changes to the draft regulation in this regard (European Parliament, 2023).

6. Conclusion

The peculiarities regarding the action for annulment of the decisions of the BoAs of the EU decentralised agencies exist in the following four aspects of this judicial remedy: 1) the jurisdiction of the CJEU; 2) the grounds for annulment; 3) the effects of the first-instance judgment; and 4) the appeal against the first-instance judgment.

As regards the jurisdiction of the CJEU, there are two peculiarities. First, the jurisdiction for the actions for annulment against the BoA's decisions was established by the provisions of their founding regulations, i.e. the acts of secondary law. In the period before the entry into force of the ToL, this was an example of the CJEU's jurisdiction being extended beyond the Treaty. Second, after the entry into force of the ToL, although the jurisdiction of the CJEU is extended to the agency decisions by the primary law provisions, the action for annulment against the BoA's decisions remains the only way to ensure effective judicial protection for private persons in relation to most of the agency decisions that produce legal effects *vis-à-vis* third parties.

When it comes to the grounds for annulment, there are two sets of peculiarities that represent a combination of the infringement of an essential procedural requirement and the infringement of the founding regulation, the content of which has been established by the case-law. These are related to the scope and intensity of the review performed by the BoAs of those agencies where functional continuity was proclaimed. As for the scope of the BoA's review, the case-law has established two sets of obligations that must be fulfilled; otherwise, the BoA's decision might be annulled. The first one is related to whether the BoA is limited by the grounds of the appeal or has the obligation to conduct a *de novo* examination of the appealed decision. As far as the OHIM/EUIPO and the CPVO are concerned, the BoA is not limited by the grounds of the appeal and has the obligation to conduct a *de novo* examination, whereas the opposite is true for the ECHA and the ACER BoAs. The second one is related to the obligation of the BoA to take into account new evidence and facts submitted during the appeal proceedings. In relation to the intensity of the BoA's review, two obligations have been established in the case-law. The first states that the BoA's review must not be limited to examining legal issues, but must also take into account the complex EST issues. The second obligation relates to the intensity of the BoA's review with regard to the assessments of the EST issues. According to the case-law, the composition and powers of the BoAs indicate that the intensity of review performed by them should be higher than the intensity performed by the CJEU, whereby the standard of review includes determining whether there is an

error in the assessment by the competent agency body that issued the appealed decision, and not only whether there is a manifest error in assessment.

As regards the effects of the first-instance judgment, the peculiarity concerns the GC's jurisdiction to alter the decisions of the OHIM/EUIPO and the CPVO BoAs, which is another example of the extension of the CJEU's jurisdiction beyond the Treaty. However, in the relevant case-law, the CJEU has adopted a restrictive interpretation of its jurisdiction, placing it in a framework consisting of three main elements. First, the alteration of the BoA's decisions does not imply full jurisdiction within the meaning of Art. 261 of the TFEU. Second, the GC is limited to examining whether the BoA took a correct decision on the basis of the facts established, and it cannot substitute its own assessment for the BoA's or make a new one. Finally, the GC cannot order the agency to accept the applicant's request for granting a trademark or design (OHIM/EUIPO) or a plant variety right (CPVO), which was the subject matter of the initial agency's decision that was appealed to the BoA.

When it comes to the appeal against the first-instance judgement in the context of the action against the BoA's decision, the peculiarity is related to the filtering mechanism established by the provisions of Art. 58a of the CJEU Statute, in force since 1 May 2019. The mechanism states that the appeal against the first-instance judgment in relation to the decisions of the EUIPO, CPVO, ECHA and EASA BoAs will not be allowed to proceed unless it raises an issue that is significant with respect to the unity, consistency or development of EU law. This means that the adjudication of disputes relating to agency decisions is by default reduced to two levels of jurisdiction: the BoA as the first level and the GC as the second level, assuming that these disputes have already been considered twice. From the beginning of the implementation of the mechanism until September 2023, only six from more than 170 appeals have been allowed, but no judgment has been given yet. In November 2022, the CJ proposed to apply the mechanism to the BoAs of the remaining six agencies, and the legislative procedure is still ongoing.

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СПЕЦИФИЧНОСТИ ТУЖБЕ ЗА ПОНИШТАЈ ОДЛУКА ОДБОРА ЗА ЖАЛБЕ ДЕЦЕНТРАЛИЗОВАНИХ АГЕНЦИЈА ЕУ

Резиме

Специфичности тужбе за поништај одлука одбора за жалбе (ОЖ) децентрализованих агенција ЕУ постоје у четири аспекта овог механизма. Први се односи на надлежност Суда ЕУ, а с тим у вези постоје две специфичности: 1) успостављањем овог механизма надлежност Суда ЕУ је проширена мимо

Уговора; и 2) тужба за поништај одлука ОЖ је једино средство судске заштите у вези са већином одлука агенција са правним дејством на трећа лица.

Разлози за поништај представљају други аспект, а специфичности се односе на обим и интензитет контроле коју ОЖ врши током жалбеног поступка. У вези са обимом, у пракси Суда ЕУ је успостављена разлика између ОЖ агенција ОНМ/ЕУИРО и СРВО који имају обавезу да спроведу де ново контролу спорне одлуке, и ОЖ агенција ЕСНА и АСЕР који су ограничени жалбеним разлозима. Кад је реч о интензитету, Суд ЕУ је у пракси утврдио да ОЖ мора да размотри како правна, тако и сложена економска, научна и техничка питања. Притом, интензитет контроле коју врши ОЖ мора бити већи од интензитета контроле коју врши Суд ЕУ, што подразумева утврђивање да ли у оцени органа агенције који је донео спорну одлуку постоји грешка, а не само очигледна грешка.

Трећи аспект представља дејство првостепене пресуде, а специфичност се односи на надлежност Општег суда да измени одлуке ОЖ агенција ОНМ/ЕУИРО и СРВО, што је други пример проширења надлежности Суда ЕУ мимо Уговора. Општи суд је у пракси то рестриктивно тумачио, тако да измена одлука ОЖ не подразумева пуну надлежност у смислу чл. 261. УФЕУ, већ утврђивање какву је одлуку ОЖ морао да донесе у светлу изнетих чињеница.

Жалба на првостепену пресуду је четврти аспект, а с тим у вези специфичност се односи на механизам филтера, успостављен одредбама чл. 58а Статута Суда ЕУ који је на снази од 1. маја 2019. године. Механизам подразумева да, по правилу, није допуштена жалба на првостепену пресуду која се тиче одлуке ОЖ агенција ЕУИРО, СРВО, ЕСНА и ЕАСА. Жалба може изузетно бити допуштена ако се њоме отвара важно питање за јединство, конзистентност или развој права ЕУ.

Кључне речи: децентрализоване агенције ЕУ, одбори за жалбе децентрализованих агенција ЕУ, функционални континуитет у децентрализованим агенцијама ЕУ, судска контрола одлука агенција ЕУ, тужба за поништај одлука агенција ЕУ, механизам филтера, чл. 58а Статута Суда ЕУ.