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COMMENT ON THE REFORM OF THE STATUTE OF THE COURT OF JUSTICE

NOVEMBER 2023

On 30 November 2022 the Court of Justice made a request pursuant to Article 281(2) TFEU to amend Protocol No 3 on the Statute of the Court of Justice. The element of the proposal on which this comment will focus is the Court's request to generalise the leave for appeal mechanism in Article 58a of the Statute to encompass all the boards of appeal of EU agencies, whereas the mechanism now is limited to cases originating in only four of the EU agencies.

This comment argues that the generalisation of the mechanism may constitute a step backwards in the degree of judicial protection at EU level. While the generalisation of the mechanism is understandable from the perspective of ensuring coherence across EU agencies, the fact is that the practical need for the mechanism only presents itself for one of the (boards of appeal of the) EU agencies. In addition, the identical treatment of all the boards of appeal in Article 58a contrasts with the great diversity characterizing these bodies. If the one size fits all approach is maintained, the need to harmonise the functioning of the different boards of appeal will present itself even more acutely. In this light, this comment will make two recommendations.

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Context

The Court's request needs to be understood against the background of the reform of the General Court which goes back to the early days after the entry into force of the Lisbon Treaty. In a nutshell: the Court of Justice in 2011 requested an increase in the number of judges at the General Court (GC) by 12, in order to allow that court to deal with its backlog and to facilitate the establishment of specialized chambers. This request was not received well by the Member States in the Council, since it would have resulted in not all Member States having the same number of judges at the GC. The Court of Justice subsequently proposed to simply double the number of judges at the GC, partially compensating this with abolishing the Civil Service Tribunal. This request was much more acceptable to the Member States and the Statute was amended to that effect, progressively doubling the number of judges at the GC between 2016 and 2019.[2]

At that time this reform was already contested.[3] It resulted in a further imbalance in the workload of and (human) resources available to the two courts. In 2018, the Court of Justice therefore proposed a redistribution of jurisdiction between the Court and the GC,[4] transferring some categories of cases to the GC. That proposal resulted in the 2019 reform of the Statute of the Court of Justice which did not take over key elements of the Court's proposal.[5] However, it did take over the Court's suggestion to introduce the aforementioned leave for appeal mechanism, now laid down in Article 58a of the Statute.[6] The 2019 reform, that was partially unsuccessful from the perspective of the Court, resulted in the currently pending request of the

[1] For the text of the request, see Council Doc. 15936/22.
[2] See Regulation (EU, Euratom) 2015/2422 of the European Parliament and of the Council of 16 December 2015 amending Protocol No 3 on the Statute of the Court of Justice of the European Union, OJ 2015 L 341/14.
[3] See Franklin Dehousse, 'The reform of the EU courts (II). Abandoning the management approach by doubling the General Court', Egmont Paper 83, March 2016, 88 p.
[4] See the request annexed to Council Doc. 7586/18.
[5] The Court had proposed to transfer to the General Court the jurisdiction to adjudicate at first instance on the majority of infringement proceedings based on Articles 108(2), 258 and 259 TFEU, but this was not taken up by the EU legislator.
[6] See 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, OJ 2019 L 111/1.

Court which consists of two main axes: (i) a partial transfer of jurisdiction with respect to preliminary rulings to the General Court, and (ii) a generalisation of the leave for appeal mechanism of Article 58a of the Statute. Since the publication of the Court's request, most of the attention of the institutions and commentators has gone to the first axis. However, the present comment focuses on the second axis and will argue that its ramifications for the EU's system of remedies, while fundamental are insufficiently taken into consideration.

The boards of appeal of EU agencies

EU agencies that have been granted binding decision-making powers are always set up with a board of appeal. The agencies concerned are the European Union Intellectual Property Office, the Community Plant Variety Office, the European Chemicals Agency, the European Union Aviation Safety Agency, the three European Supervisory Authorities, the European Railways Agency, the European Agency for the Cooperation of Energy Regulators and the Single Resolution Board. These agencies' boards of appeal are specialized administrative review bodies, which are internal to the agency but independent from it.[7] As the Court of Justice confirmed in its *Aquind v. ACER* judgment in March 2023, the boards of appeal "*are administrative revision bodies, which are internal to the agencies. They have a certain independence, perform quasi-judicial functions through adversarial procedures, and are composed of lawyers and technical experts, which means they are better able to dispose of appeals against decisions which often have a strong technical component. Next, the right of appeal to these bodies is enjoyed by the addressees of decisions adopted by the agencies, in addition to the natural and legal persons to whom those decisions are of direct and individual concern. Furthermore, they review decisions, having effects on third parties, on which the secondary legislation creating those bodies gives them competence to adjudicate. Finally, they are a quick, accessible, specialised and inexpensive mechanism for protecting the rights of the addressees and persons concerned by those decisions*."[8] The relevant legislation, granting the agency binding decision-making power, will thus set out for which decisions adopted by the agency an interested party must first seize the board of appeal before being able to lodge an action for annulment before the GC.

The introduction of Article 58a of the Statute in 2019

Article 58a of the Statute currently reads as follows:

An appeal brought against a decision of the General Court concerning a decision of an independent board of appeal of one of the following offices and agencies of the Union shall not proceed unless the Court of Justice first decides that it should be allowed to do so:

(a) the European Union Intellectual Property Office;

(b) the Community Plant Variety Office;

(c) the European Chemicals Agency;

(d) the European Union Aviation Safety Agency.

The procedure referred to in the first paragraph shall also apply to appeals brought against decisions of the General Court concerning a decision of an independent board of appeal, set

[7] On the boards of appeal, see Merijn Chamon, Annalisa Volpato & Mariolina Eliantonio (eds), *Boards of Appeal of EU Agencies*, Oxford, OUP, 2022.
[8] Case C-46/21 P, *Aquind v. ACER*, ECLI:EU:C:2023:182, para. 59.

up after 1 May 2019 within any other office or agency of the Union, which has to be seised before an action can be brought before the General Court.

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

The decision as to whether the appeal should be allowed to proceed or not shall be reasoned, and it shall be published.

The Article thus introduced a system for admitting appeals for those cases that have already been examined twice, first by a board of appeal of one of the four EU agencies identified in Article 58a, and then by the GC. Such appeals are then only admitted by the Court if the appellant demonstrates that the appeal raises an important question for the unity, consistency or development of Union law.

As will be discussed below, the current Article 58a raises a series of questions, none of which are addressed by the currently pending proposed amendment, apart from the peculiar scope of the current leave for appeal mechanism. Regarding the scope it may be noted that there is limited logic in the current Article 58a's limitation to the boards of appeal of the four agencies explicitly listed or any board of appeal set up after 1 May 2019. In fact, in the original request of the Court of Justice of March 2018, the mechanism's scope included all judgments by the General Court following from cases heard by "an independent administrative body".[9] The Court only explicitly mentioned the Boards of Appeal of the EUIPO, CPVO and ECHA in the explanatory memorandum accompanying its request, and this only by way of example. In its opinion, the Commission noted that the European Aviation Safety Agency was also equipped with a board of appeal but that the notion of an "independent administrative body" was insufficiently clear and that it could be clarified in two ways. Either an exhaustive list of Boards of Appeal would be drawn up and included in Article 58a, or a definition of the concept could be provided. The final regulation adopted by the Parliament and the Council simply took the four examples of the Court and the Commission and thus restricted the scope of the leave for appeal mechanism to those boards of appeal, excluding the boards of appeal in the other agencies.

Before looking at the amendment proposed by the Court in its request of November 2022, it may be noted that in practice, the leave for appeal mechanism is only relevant for cases originating in the EUIPO.[10] This is in line with the 'filter' function of the boards of appeal which is also only relevant for the EUIPO.[11] This in itself should invite greater reflection: as noted below, there is great diversity in the setup and functioning of the different boards of appeal today. At the same time, the challenge of dealing with (a great number of) appeals before the Court of Justice only presents itself for cases originating in EUIPO. In light of this, a strong case should be made why the boards of appeal of all other agencies (and future boards of appeal) should also be included in the mechanism, especially given the negative impact the generalisation has on effective judicial protection.

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[9] See the request annexed to Council Doc. 7586/18.

[10] According to the Court's statistics, of the 177 requests for leave to appeal lodged pursuant to Article 58a of the Statute until the end of 2022, only 2 did not concern a case originating in the EUIPO. See CJEU, Annual Report 2022 - Statistics concerning the judicial activity of the Court of Justice, p. 20.

[11] Only the EUIPO boards of appeal fulfil a meaningful filter function for the GC. The case load of the other boards of appeal could also easily be dealt with directly by the GC. This is not the case, however, for the EUIPO boards of appeal which were seized 2231 times in 2021, see Annex G of the 2021 consolidated Annual Report of the EUIPO, p. 3.

The proposed generalisation of the leave for appeal mechanism in Article 58a

In its request of November 2022 the Court of Justice notes itself that the restricted scope of the leave for appeal mechanism as introduced in 2019 made little sense, admitting that there was no particular reason why some of the existing boards of appeal were included while others remained excluded.[12] In its proposed amendment of Article 58a it therefore foresees the inclusion of all the other boards of appeals that have been established within EU agencies.[13] As hinted at above, such a generalisation will have a negative impact on the effectiveness of judicial protection. Since there is little coherence between the boards of appeal in terms of their functioning, the proposed generalisation would need additional justification. In addition, a generalisation leaves some further questions which the original Article 58a already raised, unaddressed.[14]

What is an independent board of appeal?

Firstly, what is exactly meant by the notion of 'an *independent* board of appeal'. This will not become a moot point once all existing boards of appeal are included in the exhaustive list of Article 58a, since the leave for appeal mechanism would still also apply to boards of appeal that are yet to be established. However, it is clear that not any body set up by the EU legislator within an EU office, body or agency and that is formally qualified as a 'board of appeal' should be considered to constitute an *independent* board of appeal. The requirement of 'independence' would have to be separately checked and met.

However, what is meant by 'independent' is unclear. There is of course the continuously developing case law of the Court of Justice on the notion of *judicial* independence pursuant to Article 19 TEU and Article 47 of the Charter of Fundamental Rights,[15] but that cannot serve as a determining guide to the interpretation of the notion of an independent board of appeal, since the latter is not a judicial body. At the same time, the degree of independence of the boards of appeal that already now come under Article 58a varies greatly. Since EU agencification (and therefore also the establishment of boards of appeal in EU agencies) has proceeded *ad hoc*, different requirements are in place, from one agency to the next, as regards the appointment and removal of members of the boards of appeal and concerning the boards' functional, personal and financial independence.[16] This means that it is also impossible to simply inductively infer from the boards coming under article 58a what 'independent' is supposed to mean.

Although 'independence' is an important constitutive requirement to be met by these boards of appeal, the proposed inclusion of the hitherto excluded boards of appeal has not been accompanied by an assessment of their degree of independence to ensure that they are *sufficiently* independent to merit inclusion in Article 58a. As already noted, Article 58a already now arguably also imposes a duty on the EU legislator to ensure that any board of appeal which it establishes in the future is independent in the sense of Article 58a. Conversely, it

[12] See the request annexed to Council Doc. 15936/22, p. 8.
[13] To be complete, the Court of Justice also proposes to include the judgments ruled on at first instance by the General Court pursuant to an arbitration clause, within the meaning of Article 272 TFEU, but this part of the proposal will not be further commented on in this note.
[14] For a further discussion of these implications, see Merijn Chamon, 'Les chambres de recours des agences décentralisées de l'UE et la CJUE', (2023) *Journal de droit européen* (forthcoming).
[15] For a recent overview, see European Parliamentary Research Service, ECJ case law on judicial independence – a chronological overview, October 2023, 12 p.
[16] See Jacopo Alberti, 'The Position of Boards of Appeal: Between Functional Continuity and Independence', in: Merijn Chamon, Annalisa Volpato & Mariolina Eliantonio (eds), *Boards of Appeal of EU Agencies*, Oxford, OUP, 2022, pp. 245-272.

imposes a duty on the Court of Justice, when it would be seized with an appeal against a judgment of the General Court against a decision rendered by a board of appeal established after 1 May 2019, to first verify whether that board of appeal qualifies as *independent* in its consideration of whether the mechanism of Article 58a is at all applicable.

Given these important ramifications for the actual functioning of the mechanism, the notion of 'independence' in relation to administrative review bodies ought to be clarified before the mechanism is generalised.

The possible implications of Repubblika

Once it is determined which standard of independence Article 58a requires in order for administrative review bodies to come within its scope, it is important to realize that that standard is now (already) part of primary law and therefore binding on the EU institutions, as noted above. Further implications of the introduction and generalisation of the leave for appeal mechanism become clearer when the analogy is drawn with the *Repubblika* case of the Court of Justice.

That case, ruled in April 2021, has been generally interpreted as introducing a new jurisprudential 'hook' to uphold EU values.[17] In paragraph 63 of the ruling, the Court noted that "*compliance by a Member State with the values enshrined in Article 2 TEU is a condition for the enjoyment of all of the rights deriving from the application of the Treaties to that Member State. A Member State cannot therefore amend its legislation in such a way as to bring about a reduction in the protection of the value of the rule of law, a value which is given concrete expression by, inter alia, Article 19 TEU*."[18] A principle of non-regression would thus apply to the Member States. If such a principle of non-regression would apply *mutatis mutandis* to the EU itself, and there are no obvious reasons why it should not, several ramifications of the introduction of Article 58a in the Statute in 2019 present themselves.

A first ramification is that the principle of non-regression might also apply to the boards of appeal, even if they are not judicial bodies. This is suggested by the judgment by the GC in *Germany v. ECHA* where it held that a board of appeal must perform a thorough review of contested decisions in order to "*ensur[e] an effective remedy for the purposes of Article 47(1) of the Charter of Fundamental Rights of the European Union*."[19] This finding of the GC has been interpreted as implying that boards of appeal, while not judicial bodies in a strict sense, do contribute, within the EU's integrated system of remedies, to upholding the right to an effective remedy guaranteed by Article 47 of the Charter.[20] Concretely this means that the EU legislator is not simply required to ensure that the boards of appeal are independent as noted above (in order for them to come within the scope of Article 58a of the Statute) but also that the EU legislator is now prevented from lowering the independence of the boards of appeal of the EU agencies already listed and (following the amendment) of those that would be added. This is particularly relevant given that today the EU legislator is acting *ad hoc* each time the setup or mandate of a board of appeal is decided on. The (non-binding) framework instrument governing the agencification process, the 2012 Common Approach on EU Decentralised

[17] Julian Scholtes, 'Constitutionalising the end of history? Pitfalls of a non-regression principle for Article 2 TEU', (2023) 19 *European Constitutional Law Review* 1, p. 60.
[18] Case C-869/19, *Repubblika*, ECLI:EU:C:2021:311, para. 63.
[19] Case T-755/17, *Germany v. ECHA*, ECLI:EU:T:2019:647, para. 57.
[20] See Dominique Ritleng, 'Boards of Appeal of EU agencies and Article 47 of the Charter: Uneasy Bedfellows?', in: Merijn Chamon, Annalisa Volpato & Mariolina Eliantonio (eds), *Boards of Appeal of EU Agencies*, Oxford, OUP, 2022, p. 307.

Agencies,[21] is almost silent on the requirements governing the boards of appeal within EU agencies. From this perspective, the proposed generalisation of the mechanism of Article 58a again underscores the need to update and upgrade the Common Approach.

A second potential consequence of the *Repubblika* case that should be highlighted presents itself if one considers that the generalisation of the leave for appeal mechanism, as proposed by the Court, de facto results in a reform of the judicial architecture of the Union. Even if the boards of appeal are not judicial bodies, the mechanism of Article 58a would transform them *de facto* into courts with specialised jurisdiction within the meaning of Article 257 TFEU, without being endowed with an independence that meets the requirements enshrined in Article 19 TEU and Article 47 of the Charter. Even if there is no right to a double degree of jurisdiction outside the field of criminal law,[22] the question arises as to whether the principle of non-regression, applying *mutatis mutandis* to the EU, does not simply prevent the introduction of a mechanism such as that of Article 58a.

After all, a person (typically a company) now confronted with a decision of an EU agency that is not mentioned in Article 58a will normally be able to challenge that decision first before a board of appeal, subsequently before the General Court and finally before the Court of Justice. Following the generalisation of the leave for appeal mechanism, the level of protection would effectively be lowered since applicants would only have guaranteed access to one properly independent judicial body (rather than two) and the right to bring an appeal before the Court of Justice would be subjected to an appreciation of the Court of Justice on whether the case presents a sufficiently important point of law touching on the unity, consistency or development of EU law.

Assuming that Article 2 TEU reflects the constitutional identity of the EU which cannot be deviated from,[23] including by other provisions of EU primary law, the proposed amendment of Article 58a of the Statute is far from evident. While it is not argued here that the amendment would be legally problematic per se, what is problematic is that the EU institutions involved in the revision of the Statute have not devoted any attention to the ramifications of the proposed generalisation of the leave for appeal mechanism.[24] While 'quadrilogues' have begun on 4 October 2023,[25] the preparatory documents only focus on the first axis of the Court's request, i.e. the proposed transfer of jurisdiction in preliminary references.

Recommendations

Against this background, the Meijers Committee recommends that the EU institutions

- assess the impact of the leave for appeal mechanism on the right to an effective remedy, before deciding on the mechanism's generalisation;
- clarify the notion of independent boards of appeal before the leave for appeal mechanism is effectively generalised by developing clear principles and requirements on the independence of boards of appeal in an updated and upgraded Common Approach on EU

[21] See the Common Approach on EU Decentralised Agencies, Council Doc. 11450/12.
[22] See ECHR, *Platakou v. Greece*, n° 38460/97, 11 January 2001, para. 38.
[23] Case C-156/21, *Hungary v. Council*, ECLI:EU:C:2022:97, para. 127.
[24] No specific observations are made in relation to Article 58a in the Commission's opinion of 10 March 2023 (COM(2023) 135 final), the Council's General Approach of 26 May 2023 (Council Doc. 9742/23) or the Report of the Legal Affairs Committee of the European Parliament of 27 September 2023 (A9-0278/2023).
[25] European Parliamentary Research Service, Amending the Statute of the Court of Justice of the EU - Reform of the preliminary reference procedure and extension of the leave to appeal requirement, October 2023.

Decentralised Agencies. In this respect, the current best practices in terms of functional, personal and financial independence as well safeguards in terms of appointment and dismissal of board members, across the different EU agencies could be combined and could serve as a common minimal standard.