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ADMINISTRATIVE APPEALS IN THE EUROPEAN UNION: TOWARDS A COMMON MODEL OF ADMINISTRATIVE JUSTICE

Purpose. *The aim of this paper is to analyse the activity of the European agencies as a mechanism of control prior to the judicial review. This procedure is carried out by independent and impartial administrative tribunals. This model supposes to create specialized administrative organs that solve conflicts previous to the judicial procedure. The "agencies model" is mainly used in western countries with legal Anglo-Saxon reminiscences. In this paper we analyze the importance of these agencies and its possibilities for improvement in the near future.*

Method. *To achieve this goal it is necessary to: 1) analysis the creative solutions of the agencies courts; 2) verify the performance of agencies through the information provided by themselves; 3) discuss the judicial decisions from a scientific perspective. This process has been implemented through direct contact with experts and professional actively involved at these European administrative courts.*

Results. *EU law is haphazardly creating a system of administrative review that is in many cases a pre-condition to judicial review. This system is most evidently manifesting itself in the application of EU law by administrative agencies. For this purpose, some of the EU's most important agencies have created specialised bodies known as boards of appeal. These objective and independent bodies have the power to review the decisions of the agency they form part on based on both questions of law and fact. The paper aims to establish a critical vision of the role that new judicial forms are developing and the importance of to reach a specialized criterion for solving technically increasingly complex issues.*

Conclusions. *The board-of-appeal model has proven a successful one as it offers parties a low-cost and effective way of having their complaints resolved without having to go to the European Union Court of Justice. Lastly, there appears to be a need for the European Union to, as it is currently doing with administrative procedure, establish a common set of rules for this emerging remedy for reviewing European administrative acts.*

Key words: *administrative law, European agencies, boards of appeal, courts, process, access to judicial review.*

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1. Introduction

Until relatively recently, the EU administration was basically the sum total of the administration of Member States. However, it is gradually playing an ever more prominent role in the application of EU law, both in the EU's centralised structure and in its increasingly important administrative institutions, typically via the agency model.

The application of EU law by the emerging Community administration has generated significant debate on whether there is a need for a common European administrative procedure that establishes a series of general guarantees for all direct intervention of these administrative structures. Arguments in the literature aside (Viñuales Ferreiro, 2015a; Fuertes López, 2012; Soriano García, 2012; Fuentetaja Pastor, 2014: 329–369; Parejo Alfonso, 2000: 229–278; Alonso García, 2012; Hofmann, Türk, 2009; Hofmann et al., 2011; Craig, 2012; Chiti, 2002; Mir Puigpelat et al., 2015), two key EU institutions have already called for a "procedural codification". First, the European Parliament passed a resolution on 15 January 2013 recommending to the European Commission that a "Law of Administrative Procedure of the European Union" be passed. The European Court of Auditors also advocates this in its Opinion 1/2015. And on 13 January 2016, a proposal for a regulation on the administrative procedure of the EU was published that had been adopted by the European Parliament's Committee on Legal Affairs the week before[1].

Although we find no direct reference to EU administrative procedure in primary law, with signing of the Lisbon Treaty, a particular set of rights became fundamental that are best understood in relation to administrative procedure. These fundamental rights are encompassed by the right to "good administration", which specifically entails the rights for citizens to have their "affairs handled impartially, fairly and within a reasonable time"; have access to their files; be heard; be given reasons for administrative decisions; use one of the EU treaty languages to communicate with institutions; and, lastly, have any damage caused by EU institutions or its agents repaired. Previously only recognised in EU case law, art. 41 of the Charter of Fundamental Rights of the European Union first sets down good administration as a general legal

[1] URL: http://polcms.secure.europarl.europa.eu/cmsdata/upload/0cc27221-1fd6-4023-9ad5-ec87fb4010fc/regulation.PDF.

principle, which includes the majority of principles essential to the administrative procedure of a rule-of-law state.

Therefore, although a specific legal rule is yet to materialise, there does appear to be consensus that one should exist, and it should not be too long before we see a European code of administrative procedure on the pages of the Official Journal of the European Union. Until now, however, the debate has overlooked the need or benefit of including in any common procedural framework a system of administrative appeals – like those existing in many Member States – for challenging administrative decisions before the administration itself or before specialised bodies prior to reaching the control that the European Court of Justice must necessarily offer.

Neither in the literature or the institutions has there been any debate on the need to implement a model of "administrative justice" that involves establishing a system of administrative appeals such as that found in Spain. However, despite this lack of debate, European positive law does contain the seed of an EU legal system of administrative justice or appeals. And while it is still only a loosely structured and in some aspects rudimentary system, it contains elements that the Spanish model could adopt to correct some of its well-known shortcomings.

As a minimum guarantee for a European Union subject to the principles of a rule-of-law state, it must be possible to contest administrative decisions made as a result of applying EU law by the EU administration before the Court of Justice of the European Union. However, as occurs in most Member States, before an action can be pursued in a court of law, there is the requirement, or at least the possibility, of filing what we could call an "administrative appeal" before the EU administration. J. Ziller claims: "<…> there are major differences from one Member State to another regarding the obligation to file an administrative appeal before filing a complaint before the court of competent jurisdiction. In Germany, an administrative appeal must be filed before a complaint can be filed with an administrative court. In France, for instance, there is no general obligation. The TFUE only requires a prior administrative appeal for appeals against bodies, offices and agencies of the EU for failing to act. In many Member States, although there is no general requirement for a prior appeal, it is often required for specific cases set out in the sectoral legislation" (Ziller, 2012: 53–54). Among other reasons, the diverse and varied nature of the national models of administrative justice has meant that such a question has not been examined to any depth, not even in the literature (essential reading on this topic is the Professor Luca Di Lucia of the University of Salerno, who has examined more thoroughly than anyone in Europe, and also nearly exclusively, the appeal system in the European Union (Di Lucia, 2014; Di Lucia, 2013; Chirulli, Di Lucia, 2015a; Chirulli, Di Lucia, 2015b; Navin-Jones, 2015); in the Spanish literature, the first attempt at an analysis of the boards of appeal was done by Professor Fernando López Ramón (López Ramón, 2007)).

Thus, this article sets out to (a) identify cases where EU law has established an administrative appeal model, (b) outline the heterogeneous legal framework of this model, and (c) sketch out a possible administrative justice system that is indirectly and almost unintentionally being developed at the heart of the EU. Once we have described the main characteristics of this system, we will be in a position to determine

whether it contains any elements we might be able to adopt to improve the Spanish administrative appeal system.

Aside from the control of the EU administration provided through institutions such as the Court of Auditors, the Ombudsman, the European Data Protection Supervisor and the European Anti-Fraud Office (OLAF), which do not really bear resemblance to a traditional system of administrative appeals, at the core of EU administration, where procedures directly affecting the rights and interests of European citizens are resolved, we find two examples of control or internal review of EU administrative acts that resemble administrative appeals under Spanish law: a) review procedures before the body responsible for the act being appealed or internal review; b) procedures resolved by independent committees created within Community agencies (Di Lucia, 2014: 299). In addition to the two systems mentioned, Di Lucia also includes the review offered by some sectorial regulations that allows for a type of hierarchical appeal before the European Commission against illegal acts by particular European agencies. For instance, this author cites art. 18 of Regulation 337/1975 (European Centre for the Development of Vocational Training), art. 122 of Council Regulation 207/2009 (Community trademarks), art. 44 of Council Regulation 2100/94 and art. 22 of Council Regulation 58/2003 (executive agencies). This does not entail controlling the activity of EU agencies via specific and independent bodies created in these agencies but is an external control carried out by the European Commission. However, it does not appear to be a sufficiently developed system, and it does not bear the characteristics of a review system equivalent to an administrative appeal system. It approximates a kind of "internal" appeal for reconsideration that is a manifestation of the control the central administration has over an instrumental body dependent on it.

These two administrative review systems have three characteristics that make them comparable to an administrative appeal system such as that found in Spanish law: a) they are established in secondary legislation as provided for in art. 263 of the Treaty on the Functioning of the European Union (TFEU); b) they give rise to binding decisions; c) a decision from them is a pre-condition for judicial review. Therefore, the procedures of the Ombudsman do not meet these requirements as, in accordance with articles 228 of the TFEU and 3 of the Ombudsman's Statute, its decisions are not binding. Neither can infringements of European codes of conduct or purely optional administrative appeals such as appeals to the European Data Protection Supervisor be considered appeals in this sense.

In any case, the most clearly developed model of "administrative appeals" is offered by the specialised bodies, the boards of appeal, found in some EU agencies for resolving appeals. Here is where we find the origin of what may become a common model of administrative justice in the European Union. Although the TFEU neither governs nor expressly refers to EU agencies, from the 1990s on, there has been a significant increase in the number and presence of such agencies in the legal and administrative framework of the EU. This phenomenon is clearly described by J. Avezuela Cárcel (Avezuela Cárcel, 2012). It has been by means of art. 352(1) of the TFEU that most of these true entities have been created, which, alongside the EU Commission, constitute the essence of the EU administration.

European agencies (also called offices, centres, foundations, observatories, etc.) are specialised bodies of the EU administration established by secondary legislation for carrying out specific tasks. They are equipped with a range of competences and powers and have legal personality and functional autonomy, although they are subject to heterogeneous frameworks of administrative and judicial controls. Their organisational structure usually includes a management or administration board; an executive director; committees of experts, technicians and scientists; and a financial controller. They are normally funded by European subsidies allocated in the General Budget of the European Union. The organisation of the agencies depends largely on the regulation that creates them, which usually authorises the management board to create its internal regulations, which means agencies have broad scope for autonomous organisation. Both in terms of how they appoint their management bodies and with regard to financing, physical locations and internal legal frameworks, agencies are truly independent administration bodies that act fairly autonomously from the political power.

As has occurred in Spain, the excessive proliferation of institutional bodies has caused the EU to question whether these agencies should be reduced or reorganised. There are currently over 40 agencies[2].

As they all form part of the EU, all decisions by European agencies may be reviewed in the last instance by the Court of Justice of the European Union. However, in some cases, the EU agency itself has an internal procedure for reviewing its acts by which administrative appeals are heard and ruled upon by a specialised body created by the agency. This specialised body is usually called a "board of appeal". There is a clear separation of functions between the board of appeal and the agency to guarantee the independence of the board of appeal. Aside from this internal control by the agencies and the last-resort review provided by the Court of Justice of the European Union, there are other controls such as those foreseen in certain founding regulations of the EU Ombudsman and the European Court of Auditors.

In accordance with art. 298 of the TFEU requiring that institutions, bodies, offices and agencies of the Union be supported by an open, efficient and independent European administration, the direct basis for establishing internal review mechanisms for the decisions of Community bodies is found in art. 263 paragraph 5.

As we will see, the regulations of some of the most important EU agencies provides for the creation of independent and impartial boards of appeal formed by independent and impartial specialists who review, substituting in many cases, the act of the executive body of the corresponding agency.

This mechanism for reviewing the acts of Community agencies by means of specialised boards and bodies is likely to gradually become the model of administrative justice applicable to the increasingly numerous cases in which the application of European law is carried out directly by EU institutions. On the other hand, some of these boards of appeal may turn out to be the seeds of specialised courts as set out in art. 257 of the TFEU, which

[2] For a categorical listing of EU agencies, see the following EU information page: http://europa.eu/about-eu/agencies/index_es.htm. For a general rundown on the role of EU agencies and their classification, see the COM(2002) 718 final Communication from the Commission, "The operating framework for the European Regulatory Agencies".

has, for instance, given rise to the creation of the European Union Civil Service Tribunal and the proposed creation of the Community Patent Court (López Ramón, 2007: 562).

In any case, this embryo of "specialised administrative justice" more closely resembles the common-law model than the continental one. Although, as I will elaborate on, Spain has also had some experience with similar instruments, the United Kingdom and United States have by far the longest traditions with such systems. In the case of the United Kingdom, these originally administrative boards have gradually become more judicial in nature as they have come to exercise jurisdictional functions – being, in fact, composed partly by professional judges – and lighten the judiciary's caseload of conflictive and high-volume matters such as immigration and asylum (Chirulli, Di Lucia, 2015a: 9).

In Spanish law, there are examples of bodies that exercise internal and specialised administrative control. These are the tax appeal boards, the Administrative Tribunals of Contractual Appeals (*Tribunales Administrativos de Recursos Contractuales*), the Administrative Court for Sport (*Tribunal Administrativo del Deporte*) created by Organic Law 3/2013 of 20 June and the Provincial Boards on Condemnation Proceedings (*Jurados Provinciales de Expropiación Forzosa*) and the bodies with identical functions and similar composition created by the autonomous communities. The model of specialised bodies ruling on administrative appeals is therefore by no means new to Spanish law, neither in positive law or the literature. Some time ago, Professor Tornos Más proposed a system of administrative appeals that would be optional and handled through an informal and free procedure ruled on by non-hierarchical bodies of mixed membership (civil servants and professionals appointed according to subject matter competence) who cannot be removed during their appointment. The key is to create specific bodies external to the hierarchical structure with powers for resolving or deciding appeals (Tornos Más, 1993).

2. Common characteristics of EU agency boards of appeal

After examined the legal framework of the boards of appeal of six EU agencies[3], we are in a position to identify the most significant common features characterising this initially diverse and heterogeneous model. Despite this legal and organisational diversity (which is to be expected given the absence of any unifying framework), systematically identifying the most important features will allow us to map out the main characteristics of a possible common European model for administrative appeals by specialised bodies.

2.1. Legal nature of the boards of appeal

The great majority of the regulations for the boards of appeal aim to guarantee their autonomy and independence with respect to the entity that creates them and issues the contested decisions, i.e., the corresponding EU agency. Both how members are appointed and, secondly, the reinforced guarantee of their functional autonomy might lead us to consider the boards of appeal as judicial bodies or at least hybrid or quasi-judicial bodies. Indeed, in some respects, they can be seen as courts. For instance, they can submit requests for preliminary rulings to the Court of Justice of the European Union.

[3] Agency for the Corporation of Energy Regulators, European System of Financial Supervision, Community Plant Variety Office, European Aviation Safety Agency, European Chemicals Agency and Office for Harmonization in the Internal Market (Trade Marks and Designs).

A recent judgment of the Court of Justice (Grand Chamber) (6 October 2015)[4] spelt out the requirements for considering an entity, regardless of its national status, a jurisdictional body for Community purposes for requesting preliminary rulings in accordance with art. 267 of the TFEU. In applying these requirements in this case, the Court of Justice determined that the *Tribunal Català de Contractes del Sector Públic,* an administrative court for appealing public contracting decisions, was indeed a jurisdictional body for the purposes of art. 267 of the TFEU.

Despite this case law, which only refers to the possibility of requesting preliminary rulings, when the Court of Justice of the European Union has directly examined the legal nature of the boards of appeal, it has ruled that, regardless of their composition and independence, they are authentic administrative bodies and not courts. For instance, Judgment of the Court of First Instance (Fourth Chamber) of 12 December 2002[5] states that: "<…> while the Boards of Appeal [of the OHIM] enjoy a wide degree of independence in carrying out their duties, they constitute a department of the Office [i. e., the OHIM] responsible for controlling, under the conditions and within the limits laid down in Regulation № 40/94, the activities of the other departments of the administration to which they belong. Since a Board of Appeal enjoys, in particular, the same powers as the examiner, where it exercises them it acts as the administration of the Office [i.e., the OHIM]. An action before the Board of Appeal [of the OHIM] therefore forms part of the administrative registration procedure <…>".

As boards of appeal are administrative bodies, in its judgment of 13 July 2015[6], the Court of First Instance (Fourth Chamber), in determining the reasonable time for a board of appeal (in this case, of the OHIM) to provide its decision, finds that the criteria and rights set out under art. 6 of the European Convention of Human Rights, which sets out the rights of individuals with regard to the administration of justice, are not applicable. However, precisely given the administrative nature of the board, this court did not leave the individual concerned in this case unprotected, stating that the decisions of boards of appeal must be issued in a reasonable timeframe as this is a requirement of the general legal principle of good administration provided for in art. 41 of the Charter of Fundamental Rights of the European Union for administrative procedures in the EU (Bacigalupo Saggese, 2012; 465).

[4] *Consorci Sanitari del Maresme v Corporació de Salut del Maresme i la Selva* (2015) (C-203/14) EU:C:2015:664, Request for a preliminary ruling from the Tribunal Català de Contractes del Sector Públic (Spain). In this case, other judgments were cited, including *Vaassen-Göbbels*, 61/65, EU:C:1966:39, and *Umweltanwalt von Kärnten*, C-205/08, EU:C:2009:767.

[5] *Procter & Gamble v OHIM (T-63/01)* (*Soap bar shape*) [2002] E.C.R. II-5255. Along the same line, also see, among others, Judgment of the Court of Justice of 20 September 2001 *Procter & Gamble v OHIM (BABY-DRY)* (T-163/98) [1999] E.C.R. II-2383 and Judgment of the Court of First Instance (Fourth Chamber) of 13 July 2005 (*The Sunrider Corp. v OHIM (*T-242/02) [2005] E.C.R. *II-02793*. Also see Judgment of the General Court of the European Union (Eighth Chamber) of 11 December 2014 (*Heli-Flight GmbH & Co. KG, v AESA (T-102/13) EU:T:2014:1064).*

[6] Judgment of the Court of First Instance (Fourth Chamber) of 13 July 2005, *The Sunrider Corp., v OHIM* (T-242/02) E.C.R. II-02793.

Finally, in addition to the organisational and structural aspects of the boards of appeal, it is their objective jurisdiction and, therefore, their capacity to act, that sets them apart from jurisdictional bodies. The fact that they can substitute technical decisions of the EU administration and that they do not just review the legality of the decision is a strong indicator that the boards are actually administrative and not judicial bodies.

2.2. Functional independence of the boards of appeal

The regulations for all the boards of appeal reiterate that these bodies are created for reasons of procedural economy and are independent of the Community agencies that create them. Aside from the guarantee of impartiality and independence of their members, which we will come back to, in its creation of these types of bodies, EU law supports their functional independence. Formally at least, this independence is found both at the regulatory level and in terms of administrative structure (see, for instance, Regulation (EC) 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators (ACER), Recital 19. See also, Regulation (EU) 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), Recital 59). All the regulations creating these boards of appeal expressly and emphatically state that their members may not receive instructions from any member of any other body in the agency.

As EU case law demonstrates, one of the most important characteristics of these boards of appeal is the independence with which their members are able to act, free from instructions from their respective EU agencies or offices. As the Court of Justice finds in Judgment of the Court of First Instance (Second Chamber) of 30 June 2004[7] (paragraph 33): "Boards of Appeal and their members have functional independence in carrying out their tasks. The Office [i. e., the OHIM] cannot therefore give them instructions".

However, there are certainly grounds for questioning this independence given that, for instance, the budget and the resources of the boards of appeal clearly depend on the budget and resources of the agencies that create them (Navin-Jones, 2015: 165). Somehow guaranteeing or strengthening the budgetary autonomy of the boards of appeal with respect to the agencies they officially form part of would significantly contribute to their desirable and fundamental substantive and functional independence.

3. Objectivity, impartiality and independence of board of appeal members

The pronouncement that boards of appeal are autonomous and independent finds its real basis in a series of measures aimed at ensuring the objectivity, impartiality and independence of the members of the boards of appeal. All the measures, which are listed and examined below, are proceeded by the following general statement found in all the regulations looked at: "The members of the boards of appeal are independent and will not be bound by any instructions". This would, of course, be an empty statement if it were not accompanied by and embodied through specific measures and strategies such as the ones listed in the following sections.

3.1. Appointing of board of appeal members: public call, required technical qualifications, and formal declarations of interest and commitment to independence

Board of appeal members are usually appointed by the highest governing body of the corresponding agency – the management or administration board. This discretion-

[7] In *GE Betz v OHIM – Atofina Chemicals (BIOMATE) (*T-107/02) E.C.R. II-01845.

ary decision is limited to the extent that members can only be selected from a list proposed by the European Commission. In turn, the Commission's proposal usually comes out of a public call for expression of interest done after consultation with some other specialised body of the European Union.

In some agencies, the discretional appointing of board of appeal members is even further limited as it is frequently conditioned regarding the origin of the candidates. For instance, board of appeal members may have to be selected from candidates who belong to or have belonged to regulatory bodies of a given sector.

For example, Regulation (EC) 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators, art. 18(1), states: "The Board of Appeal shall comprise six members and six alternates selected from among current or former senior staff of the national regulatory authorities, competition authorities or other national or Community institutions with relevant experience in the energy sector". Both with regard to the appointment process and the professional requirements of board of appeal candidates, Regulation (EU) 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority) ("ESA Regulation"), art. 58 provides for similar measures, although they are, logically, related to the competence area of the corresponding administrative authority. As does art. 41 of Regulation (EC) 216/2008 of the European Parliament and of the Council of 20 February 2008 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency ("EASA Regulation"). See also art. 89(2) of Regulation (EC) 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency. This last regulation contains a more up-to-date public call of interest for board of appeal candidates.

In most of the regulations of the boards of appeal, the guarantee and commitment to impartiality and independence for each of the members of the board usually takes the form of a written document or declaration stating their commitment and declaration of interests in which they indicate the absence or presence of any direct or indirect interest that may compromise their independence. These declarations are public and must be done annually (ACER Regulation, art. 18(7), and the ESA Regulation, art. 50(6)).

3.2. Term of office, renewal and impossibility of removal: five-year, renewable terms and removal by the agency or the Court of Justice of the European Union

The terms of office of members in "independent" bodies and administrations is a key element to understanding the real extent of the body's autonomy. For the boards of appeal, we do not find permanent terms of office, as occurs with courts. This is, perhaps, the element that most differentiates these administrative bodies from the courts that review the legality of EU activity. In the case of the boards of appeal of Community agencies, practically across the board we see five-year terms of office that can be renewed, normally for one term (an example of this is art. 50(4) of the ESA Regulation). In some cases, members are not limited to one renewed term of office and may renew for additional five-year periods or until retirement age if this age is reached during the new term of office (as occurs in art. 131(1) of Council Regulation (EC) 40/90).

The performance of the duties of board of appeal members is characterised by the fact that they cannot be removed during their terms of office unless they are found guilty of serious misconduct, and the administrative or management board, after consulting with some other agency body, decides to remove them (see articles 18(3) of the ACER Regulation, 50(5) of the ESA Regulation and 90(4) of the ECHA Regulation).

However, in two instances this guarantee against removal is further strengthened because it requires a decision from the Court of Justice of the European Union, normally at the request of the European Commission and following recommendation by the corresponding management or administration board. This occurs in the OHIM and the CPVO (this is a case in the OHIM in which art. 131(1) and (3) of its regulation prohibits removing the members of the board of appeal, "unless there are serious grounds for such removal and the Court of Justice, after the case has been referred to it by the Administrative Board on the recommendation of the President of the Boards of Appeal, after consulting the chairman of the Board to which the member concerned belongs, takes a decision to this effect"; the same provision is found in art. 47(1) of Council Regulation (EC) 2100/94 of 27 July 1994 on Community plant variety rights). Therefore, in these two cases, the irremovability of the board of appeal members bears closer resemblance to judges than other public servants.

3.3. Incompatibility with other agency duties

Another of the recurring guarantees aimed at ensuring the independence and objectivity of board of appeal members is to prohibit them from performing duties other than their board of appeal duties in any other body of the agency the board of appeal belongs to.

The requirement of very specialised and specific qualifications and experience of board of appeal members and requiring that they come from the sector being regulated could result in real conflicts of interests with regard to the professional commitments of these experts. In addition to other relationships we mention further down that give rise to the obligation of exclusion and the possibility of objecting to these members, the regulations governing these boards of appeal prohibit carrying out any other role or duty in the agency in question (see articles 18(3) of the ACER Regulation, 59(6) of the ESA Regulation, 90(3) of the ECHA Regulation and 131(5) of the OHIM Regulation).

In some cases, they are permitted to perform their duties part-time and are not required to work exclusively on the board of appeal (see articles 47(4) of the CPVO Regulation and 42(3) of the EASA Regulation). One measure not found in the EU regulations but that is considered an important guarantee of independence, both from the administration that appoints the boards and from the business groups that operate in a given sector, is the establishing of a system of *ex post* incompatibilities, as does art. 15 of Spanish law 3/2015 of 30 March governing the duties of senior public officials (*Ley Reguladora del Ejercicio del Alto Cargo de la Administración General del Estado*) (Santamaría Pastor, 2015: 62). An a posteriori guarantee of this nature would safeguard against what some politicians graphically refer to as the "revolving door" phenomenon. Such measures ensure that the decision-making of people with consequential responsibilities in important economic arenas cannot be influenced by the promise of future professional opportunities.

3.4. Exclusion and objection provisions

And if all these formal and substantive guarantees for independence and impartiality established prior to appointment were insufficient, the regulations of the boards of appeal provide for exclusion and objection provisions that are in part similar to those established in the Spanish legislation establishing the legal framework and the common administrative procedure but that go further by allowing a member of the board to object to another member taking part.

In general, members cannot take part in the board of appeal if they have any personal interest in the case in question or they were previously involved as representatives of any of the parties to the proceedings, or if they participated in the decision under appeal (the ACER Regulation art. 18(4)). Furthermore, if for these or any other reason a board of appeal member considers that another member should not take part in an appeal proceeding, this member must inform the board of appeal.

The regulations also state that parties to appeal proceedings may object to the participation of a member of the board of appeal on any of the aforementioned grounds or if they suspect any bias. There are, however, two limitations to objections to board of appeal members: 1) such objections cannot be based on nationality; and 2) while knowing a reason for objection exists, the objecting party to the appeal proceeding cannot take any other procedural step in the appeal proceeding apart from objecting to the composition of the board of appeal (for examples of this, see articles 48(4) of the CPVO Regulation, 43 of the EASA Regulation, 90(5) of the ECHA Regulation and 132(5) of the OHIM Regulation).

3.5. Technical qualification of board of appeal members: possibility of appointing non-legal experts and the requirement for a minimum number of members with legal training

One of the most interesting elements of the legal framework of boards of appeal, which could provide inspiration for improving the Spanish model of administrative appeals, is the possibility of including subject-matter, non-legal experts on boards. Because of their qualifications, these experts can provide the technical knowledge required to review the original decision of the EU agency in question.

Normally, as we saw above, the regulations that establish the agencies and their boards of appeal defer to the internal regulations of the agency with regard to the technical qualifications of board of appeal members. In some cases, the board of appeal must have a majority of legally trained members or at least a legally trained president.

This diverges from the model adopted by the Spanish legislation on public contracting that requires selecting civil servants of a certain grade with a minimum of 15 years' experience, preferably working in administrative law directly related with public procurement. This is precisely the type of very rigid criteria that EU law usually seeks to avoid at all costs in favour of its traditional flexibility and informality. The OHIM Regulation, for instance, sets out in art. 130(2) that: "The decisions of the Boards of Appeal shall be taken by three members, at least two of whom are legally qualified". Article 50(2) of the ESA Regulation is very ambiguous with regard to this requirement stating simply that the "Board of Appeal shall have sufficient legal expertise to provide expert legal advice on the legality of the Authority's exercise of its power" without specifying a specific number of legal experts.

Depending on the ratio of legally qualified to technical experts on the different boards of appeal, the decisions issued by these boards will put more emphasis on either reviewing the technical aspects of the facts taken into account by the executive body of the agency or on revising the legal and procedural basis of the decision (Chirulli, Di Lucia, 2015a: 21–22). In reference to the technical qualifications set out in the Directive on Public Procurement, while not discarding the presence of non-legal experts, J.A. Santamaría Pastor states it is preferable that these commissions or boards have a majority of legally trained experts given that their duties are based on legal reasoning (Santamaría Pastor, 2015: 45). Indeed, the different stages of the administrative procedures handled by this type of specialised agency emphasise one aspect or the other. Thus, the initial decision made by the executive body of an agency is based on technical criteria. Secondly, any appeal made to the board of appeal involves applying mainly legal criteria but also taking into account technical aspects, taking advantage of the presence of technical experts on the board. Finally, any appeal that reaches the Court of Justice is decided purely on a legal basis.

4. The appeal as a pre-condition for further action

One of the most important aspects to take into account in mapping out the common features of appeals filed with specialised boards of appeal of EU agencies is undoubtedly whether making use of this administrative remedy is a pre-condition for pursuing action in a court.

Although the regulations of the administrative agencies examined are not totally clear with regard to whether filing an appeal with the board of appeal is optional or required for pursuing a further action, an analysis of the regulations on the filing of appeals with the Court of Justice of the European Union against acts of Community agencies suggests that appeals must be filed with the corresponding board of appeal before parties can access the Court of Justice.

Given the variety of functions and competences of some of these agencies, logically, it is only mandatory to file an appeal for matters that fall under scopes of the decision-making powers of the agency in question, meaning that appeals in other areas are optional (For example, the ESA Regulation states that a decision from the board of appeal on matters related to the application of articles 17, 18 and 19 of the ESA Regulations is a pre-condition for accessing the CJEC; this is not the case for ESA decisions on other matters, which can be directly appealed before the court. Furthermore, in accordance with art. 61(3) of the ESA Regulation and art. 265 of the TFUE, an appeal against an ESA for failing to act can be filed (Minguez Hernández, 2014: 14). See also articles 73 of the CPVO Regulation, 63 of the OHIM Regulation and 50 of the EASA Regulation). In my opinion, this element should be revised to make filing appeals before specialised bodies optional in all cases so that it does not constitute a limit or restriction on directly accessing the Court of Justice of the European Union. Let it be the prestige of the board of appeal in question, earnt based on both its effectiveness and the technical quality of its decisions, that make citizens opt for administrative over judicial appeals.

5. Automatic suspensory effect of the appeal on the original decision

In the case of Community administrative justice, as with judicial appeals, the general rule is established in art. 278 of the TFEU, which states: “Actions brought before

the Court of Justice of the European Union shall not have suspensory effect. The Court may, however, if it considers that circumstances so require, order that application of the contested act be suspended".

However, this judicial procedure rule does not always apply to EU administrative appeals. Some of the regulations of certain Community agencies provide for an automatic suspensory effect when a Community act is appealed before a particular board of appeal. This is the case with the Community Plant Variety Office (CPVO), art. 67(2) of whose regulation states: "The filing of an appeal has an automatic suspensory effect on the decision". In this case, the exception is that the appealed decision may be applicable where "circumstances so require" (the ECHA Regulation (art. 91(2)) and the OHIM Regulation (art. 58(1)) also include this provision; in this last case, the Regulation simply states that the appeal has a suspensory effect without specifying any specific time-limits or procedures for rectifying or adopting this preventative measure).

In other cases, the general rule is that the appeal does not have an automatic suspensory effect although, if the board of appeal in question considers that circumstances may warrant doing so, it may suspend the application of the contested decision (see articles 19(3) of the ACER Regulation and 50(6) of the ESA Regulation).

6. Content of the appeal decision: capacity for reassessing the facts and not just the legality of the contested act

As stated above, perhaps the element that most clearly determines the administrative and non-judicial nature of the boards of appeal is the content of their decisions. In accordance with the regulations of the Community agencies they form part of, boards of appeal can substitute administrative decisions of the agency if they consider these decisions entail elements of illegality. This is, therefore, different from the task of judges and courts of reviewing whether an administrative act is lawful. In actual fact and despite the special characteristics of autonomy and independence of these bodies, we have a kind of second procedural stage in which, aided by the mixed composition of the body (both technical and legal experts), the board of appeal can make a new decision based on the facts of the case or completely condition the response that the corresponding agency must formally issue. The board of appeal can, therefore, analyse new facts and adopt a new technical decision. This is what has been referred to in EU case law as "continuity in terms of their functions"[8].

In the majority of cases analysed and based on a review of their decisions, boards of appeal can substitute the decision of any agency body or remit to the corresponding body of this agency binding criteria for a new decision. These are, therefore, full powers for resolving the conflict given that the board of appeal can substitute the decision of the corresponding body or completely condition the new decision that the agency must issue.

[8] See *Procter & Gamble v OHIM (Soap bar shape)* (T-63/01) [2002] E.C.R. II-5255. Along the same line, also see, among others, Judgment of the Court of Justice of 20 September 2001 *Procter & Gamble v OHIM (BABY-DRY)* (T-163/98) [1999] E.C.R. II-2383 and Judgment of the Court of First Instance (Fourth Chamber) of 13 July 2005 (*The Sunrider Corp. v OHIM (*T-242/02) [2005] E.C.R. *II-02793*. See also Judgment of the General Court of the European Union (Eighth Chamber) of 11 December 2014 *Heli-Flight GmbH & Co. KG v EASA* (T-102/13) EU:T:2014:1064.

Given the technical background of some or at least one of its members, the board of appeal has the capacity to substitute the technical reasoning of the agency. The scientific basis for an agency decision, for instance, could be substituted by the board of appeal, whereas the Court of Justice of the European Union's review would only be based on grounds of legality.

Therefore, the board of appeal does not have to justify any correction of a decision issued by an agency body on grounds of illegality. It only needs to find flaw in the technical arguments used initially by the agency to rectify its decision. For instance, in its judgment of 13 March 2007, the Court of Justice (Grand Chamber)[9] states: "Second, no reason of principle related to the nature of the proceedings under way before the Board of Appeal or to the jurisdiction of that department precludes it, for the purpose of giving judgment on the appeal before it, from taking into account facts and evidence produced for the first time at the appeal stage".

It is basic EU legal doctrine that while the courts must control the legality and legitimacy of any specific decision or act by an EU body, they generally cannot substitute the assessment of questions of relevant facts, reasoning or the opinion of the body that made the initial decision. As stated in the DIR International Film case: "The Court of Justice and the Court of First Instance cannot under any circumstances substitute their own reasoning for that of the author of the contested act"[10].

In a recent judgment (13 May 2015), the Court of Justice of the European Union clearly and emphatically states: "It should be noted that the review carried out by the General Court under Article 61 of Regulation No 6/2002 is a review of the legality of the decisions of the OHIM Boards of Appeal. It may annul or alter a decision against which an action has been brought only if, at the time the decision was adopted, it was vitiated by one of the grounds for annulment or alteration set out in Article 61(2) of that regulation. It follows that the power of the General Court to alter decisions does not have the effect of conferring on that Court the power to substitute its own reasoning for that of a Board of Appeal or to carry out an assessment on which that Board of Appeal has not yet adopted a position. Exercise of the power to alter decisions must therefore, in principle, be limited to situations in which the General Court, after reviewing the assessment made by the Board of Appeal, is in a position to determine, on the basis of the matters of fact and of law as established, what decision the Board of Appeal was required to take"[11].

However, this limitation on the EU courts does not extend, nor is applicable, to boards of appeal because, as stated above, they are not judicial bodies that must

[9] *OHIM v Kaul* (C-29/05) [2007] E.C.R. I-02213.

[10] DIR *International Film and Others v Commission* (C-164/98 P) [2000] ECR I-00447. See also *Spain v Commission* [2007] (C-525/04 P) ECR I-9947 and *Pfizer v Council of the European Union* (T-13/99) E.C.R. II-03305.

[11] Judgment of the General Court (Eighth Chamber), *Group Nivelles v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)*, (Case T-15/13) T:2015:281 (2015). See also the judgments of 5 July 2011 in *Edwin v OHIM*, (C-263/09) E.C.R. I-05853 and of 5 May 2015 of the General Court of the European Union in *Spa Monopole/OHMI – Orly International (SPARITUAL) v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* (T-131/12) C:2014:317.

only review the legality of the administrative activity. In Spanish law, the opposite occurs with the Public Procurement Administrative Courts. Despite being specialised administrative bodies, their decisions cannot contradict the intention of the contracting administrative body that initially issued the decision, and any new decision must be issued by the original administrative body (art. 47(2) and (3) of the Consolidated Text of the Spanish Law on Public Procurement (*Texto Refundido de la Ley de Contratos del Sector Púbico*)).

Providing for a complete review of the administrative decision by the boards of appeal, as occurs traditionally in the Spanish appeal system, is much more useful and effective. Such an administrative appeal system is likely to provide greater satisfaction to the appellant than through the obtaining of an administrative appeal strictly linked to the claims in the appeal filed. In addition to the fact that the appellant would be saved the ordeal usually entailed in trying to enforce a judgment, sidestepped completely with a favourable decision from an administrative appeal (Escuín Palop, Belando Garín, 2011: 40).

Despite this interpretation, there is another course of action open to boards of appeal. They can decide to consider only the legality of the measure adopted by the executive body of the agency without proceeding to substitute or replace its decision. This occurred, for instance, with the decision of the ECHA board of appeal in the *Italcementi* case[12]. In this case, the board of appeal, decided not to reassess the evidence or evaluate the factual basis. It simply annulled the decision of the ECHA for violating the principle of good administration by giving a very short time-limit for the appellant to resolve a particular matter.

However, once we have established that boards of appeal have the power to totally review agency decisions, the next question is whether they may decide or rule on matters not expressly requested by the parties but that, in any case, may arise in the appeal proceeding. In this regard, in paragraph 37 of its judgment of 13 September 2010[13], the General Court of the European Union (Sixth Chamber) states: "Admittedly, having regard to that continuity, the extent of the examination which the Board of Appeal must conduct with regard to the decision which is the subject-matter of the appeal is not, in principle, determined by the grounds relied on by the party who has brought the appeal. Even if the party who has brought the appeal has not raised a specific ground of appeal, the Board of Appeal is none the less bound to examine the appeal in the light of all the relevant matters of fact and of law (Case T-308/01 *Henkel v OHIM – LHS (UK) (KLEENCARE)* [2003] ECR II-3253, paragraph 29, and HOOLIGAN, paragraph 18)".

For P. Chirulli and L. De Lucia, this interpretation is only applicable in proceedings in which the boards of appeal must rule on disputes between two individuals as occurs with the boards of appeal of the OHIM (one party applies to register a trade mark and another

[12] *Italcementi Fabbriche Riunite Cemento S.p.A. Bergamo v ECHA*, A-007-2012, 25 September 2013. URL: https://echa.europa.eu/documents/10162/13575/a-007-2012_boa_decision_en.pdf.

[13] *Inditex v OHIM* (T-292/08) EU:T:2010:399. See also paragraph 80 of Judgment of the General Court of the European Union (First Chamber) of 21 September 2012 in *Wesergold Getränkeindustrie v OHMI – Lidl Stiftung*) (T-278/10).

contests it) and of the CPVO (an individual opposes the granting of a Community plant variety right). In all other cases, these authors believe that the boards of appeal should only review the decision of the corresponding agency based on the appellant's claim (Chirulli, Di Lucia, 2015a: 18).

Another matter that needs to be considered are the restrictions on the Court of Justice of the European Union for reviewing the decision of a board of appeal. Should it be bound by the pleadings made in the administrative appeal proceedings or can it rule based on other matters? In its judgment of 15 April 2010 (C-38/09 P), the Court of Justice of the European Union (Second Chamber) appears to lean towards the classic interpretation (in national law): "Facts not submitted by the parties before the departments of the CPVO cannot be submitted at the stage of the action brought before the General Court. The General Court is called upon to assess the legality of the decision of the Board of Appeal by reviewing the application of European Union law made by that board, particularly in the light of facts which were submitted to the latter, but that Court cannot carry out such a review by taking into account matters of fact newly produced before it (see, by analogy, Case C-29/05 P OHIM v Kaul [2007] ECR I-2213, paragraph 54)".

While this is the general rule, there is another line of EU case law that affords a certain amount of flexibility to the Court of Justice for dealing with matters not expressly stated by the parties in the appeal proceeding[14].

The review nature of the EU jurisdiction, as occurs with Spanish administrative law, does not allow pleading new facts not part of the administrative appeal before the Court of Justice although new arguments not dealt with or argued previously may be used.

7. Conclusions

The European Union has basically two mechanisms or systems for reviewing the administrative acts it directly implements. The first of these is a type of appeal for reconsideration by which the body that made the decision in question affecting the rights of European citizens may resolve the claim. Given that this option or mechanism is very straightforward without any significant nuance, there is little to be learnt or of use for improving the Spanish administrative appeal model.

The second system for reviewing administrative acts are the specialised and independent bodies known as the boards of appeal that form part of some EU agencies. These boards of appeal are responsible for resolving disputes arising between this particular type of administrative organisation, the agencies, and individuals affected by decisions made by these bodies.

This is a successful model as it has lessened the workload of the Court of Justice of the European Union through the creation of these technically specialised administrative bodies that are both highly regarded and accepted by the citizens and economic sectors affected in each case. The system of administrative review by specialised bodies is well received because it is perceived as a true advance on what a judge or court might decide if the dispute went before an EU court.

[14] GCEU (Appeal Chamber), in its judgment of 10 July 2014, paragraph 110.

Although these boards of appeal vary widely, particularly with regard to their workload, on average 10 per cent of their decisions are contested before EU courts[15]. In other words, in the economically sensitive and specialised sectors in which these EU agencies operate, over 90 per cent of the decisions of their boards of appeal are taken by the citizens and companies affected as acceptable decisions that do not warrant being appealed before EU courts. This is because, among other reasons, these decisions are adopted via administrative procedures that cost significantly less than judicial proceedings and are normally handed down in less time, and the procedure is more flexible.

The power the EU legal system grants to these boards of appeal to completely review agency decisions, which can even include substituting the decision, is a clear advantage over judicial appeals, which in spheres as technical as those in question can only require that the agency instigate a new administrative procedure if it finds some irregularity. Appealing before a board of appeal is often seen as more effective and efficient than pursuing an action before the Court of Justice of the European Union.

It is also a model designed to emphasise the defence of the rights and freedoms of citizens over strictly defending the public interest represented by the corresponding agency. This favourable position of the appellant written into the regulations of boards of appeal is demonstrated, for instance, by the fact that agencies cannot appeal unfavourable decisions of boards of appeal in defence of the public interest they represent before the Court of Justice as, for instance, can be deduced from the case law arising out of the judgment of the Court of Justice (Second Chamber) of 12 October 2004 (C-106/03 P, E.C.R. I-09573). Among other reasons, allowing agencies to appeal board of appeal decisions before the Court of Justice would effectively put these boards outside of the organisational structure of the agencies and break the aforementioned principle of "functional unity" that underlies their legal configuration and nature.

This positive perception of the boards of appeal in Europe is comparable to the case in Spain of the Administrative Tribunals of Contractual Appeals which, at least at this point in time, are seen as a very useful tool for resolving disputes in the economically sensitive area of public procurement, and are based on the same philosophy as EU agency boards of appeal.

The accessibility, specialisation, independence and objectivity, informality, "full powers of review", and low cost are some of the main characteristics of EU agency

[15] For instance, in the case of the OHIM boards of appeal, by far the busiest of the boards of appeal examined, of the 2568 appeals cases handled in 2013, only 291 were appealed before the General Court of the European Union. In 2014, of the 3284 appeals lodged, 281 were contested before the General Court and 33 before the Court of Justice.

In 2015 (until December, when these lines were written), 2382 appeals had been filed, of which 255 had been appealed before the General Court and 45 before the Court of Justice. Therefore, there is a 90 per cent acceptance rate of board of appeal decisions (these statistics are available at: https://oami.europa.eu/tunnel-web/secure/webdav/guest/document_library/contentPdfs/about_ohim/the_office/appeal_statistics/appeal_stats_2014_en.pdf and https://oami.europa.eu/tunnel-web/secure/webdav/guest/document_library/contentPdfs/about_ohim/the_office/appeal_statistics/appeal_stats_2015_en.pdf).

According to information provided by the OHIM, the courts upheld board of appeal decisions over 80 per cent of the time. Specifically, 95 per cent for *ex parte* cases and 75 per cent for *inter partes* cases.

boards of appeal that have made this a model of success from which certain measures and lessons can be learnt for the necessary and desirable improvement of the Spanish administrative appeal system.

Furthermore, there appears to be a need for the European Union to standardise, as it is doing with administrative procedure, the board-of-appeal system by establishing common rules for this model of administrative review.

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АДМІНІСТРАТИВНІ ЗВЕРНЕННЯ ДО ЄВРОПЕЙСЬКОГО СОЮЗУ: ЩОДО СПІЛЬНОЇ МОДЕЛІ АДМІНІСТРАТИВНОЇ ЮСТИЦІЇ

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Мета. *Метою статті є аналіз діяльності європейських органів як механізму контролю перед судовим розглядом. Ця процедура здійснюється незалежними й неупередженими органами адміністративної юстиції. Така модель передбачає створення спеціалізованих адміністративних органів, які вирішують конфлікти, що передують судовій процедурі. Поняття «модель органів» використовується переважно в західних країнах із правовими англосаксонськими ремінісценціями. У роботі ми аналізуємо важливість цих органів та можливості їх покращення в найближчому майбутньому.*

Методи. *Для досягнення поставленої мети необхідно: 1) проаналізувати творчі рішення судів таких органів; 2) перевірити діяльність органів через надану їм інформацію; 3) розглянути судові рішення з наукової позиції. Цей процес здійснювався шляхом безпосереднього контакту з фахівцями та професіоналами, які активно беруть участь у відповідних європейських адміністративних судах.*

Результати. *Законодавство Європейського Союзу безладно створює систему адміністративного розгляду, що в багатьох випадках є передумовою для судового розгляду. Ця система найбільш очевидно проявляється в застосуванні законодавства Європейського Союзу адміністративними органами. Із цією метою деякі з найбільш важливих установ Європейського Союзу створили спеціалізовані органи, відомі як апеляційні ради. Ці об'єктивні й незалежні органи мають право переглядати рішення органу, до якого вони входять, на основі як питань права, так і фактів. У статті надано критичне розуміння ролі нових судових форм та важливості досягнення спеціалізованого критерію для вирішення технічно дедалі складніших питань.*

Висновки. *Модель апеляційної ради виявилася успішною, оскільки пропонує сторонам недорогий та ефективний спосіб вирішення скарг без звернення до Суду Європейського Союзу. Зрештою, видається, що Європейський Союз має встановити спільний набір правил для цього нового засобу правового захисту для перегляду європейських адміністративних актів, що зараз здійснюється адміністративною процедурою.*

Ключові слова: адміністративне право, європейські органи, апеляційні ради, суди, процес, доступ до судового розгляду.