Preface

The European Union administrative system is being investigated with increasing interest by European and Italian legal scholars: both its original features and its connections and linkages with national administrative laws have been analyzed and specific contributions have been made to its structural and functional profiles, to the administrative procedure rules and their possible codification, to the influence produced by EU law on national administrations and to the EU integrated system of judicial protection.

This book aims to contribute to the study of a still not completely explored component of the European administrative system, the quasi-judicial administration. Since the 1990s, alongside the creation of a constellation of agencies and administrative bodies for the implementation of European policies, EU law has created a number of administrative appeals which are preliminary to the judicial review and sometimes alternative to it.

These administrative remedies represent the land between the decision making procedure and the judicial review procedure and, by their very nature, they offer a stimulating and intriguing occasion to reflect on the European administrative system and its original characteristics.

The contributions collected in this book represent a part of a more comprehensive research project, co-ordinated by professor Jacques Ziller of the University of Pavia and funded by the Italian Ministry of University and Research (PRIN 2012) focused on the analysis of the general principles and rules applicable to the EU administrative action.

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Administrative Justice Beyond the Courts: Internal Reviews in EU Administration

CONTENTS: 1. Introduction. – 2. Non-Judicial Protection in European Union Law. – 3. Appeals Before the Boards of Appeal of European Agencies: Main Characteristics. – 4. Relationship with Judicial Protection. – 5. Convergence and Divergence with Other Models of Quasi-Judicial Remedies.

1. Introduction

Many European countries have long had instruments and procedures alternative to the courts to protect the rights and interests of their citizens, in both civil matters and disputes with the public administration. A trial before a court is a complex, expensive and time-consuming process, which may prolong the uncertainty of the dispute, given the generally long duration of trials, and may significantly and – in some cases disproportionately – tie up the public legal apparatus. Each system has therefore sought less expensive, more flexible and possibly more expeditious alternative dispute resolution mechanisms.

Yet not all countries have identified common solutions, or developed equivalent mechanisms and procedures.

In this regard, it is essential to distinguish between non-judicial protection applicable to private law legal relations and extra-judicial remedies applicable to public law disputes. In the case of the former, extensive instruments for mediation, conciliation and arbitration point to a common substrate underlying the various European systems, despite the natural differences.

For disputes with the public administration, on the contrary, there appears to be less convergence between countries with each developing its own model of non-judicial protection, with special alternative and *ad hoc* reme-

dies conceived for individual sector-specific disciplines (for example, public works contracts and urban planning), that is appeals before the administration or a significant distrust of channels of protection alternative to the courts. Of the latter countries, reference may be made to Italy and France, which can be defined as having "trial-centric" systems, that is with a tendency to concentrate protection of citizens in the hands of the administrative court, with partial abandonment of administrative remedies.

Other countries, such as Germany and the United Kingdom, acknowledge the importance of protecting citizens through their alternative dispute resolution mechanisms. The British system has recently redesigned the circuit of Administrative Tribunals [1], rendering the tribunals more similar to courts, but also offering special alternative dispute resolution (ADR) options for public law disputes according to a logic of proportionate dispute resolution. On the other hand, the German system entrusts mediation procedures to the administrative courts and has established special boards of appeal and independent appeal authorities (such as the *Vergabekammer* for public procurement disputes) seeking to restore vigour to the administrative appeal system following a longstanding tradition [2].

Compared with national experiences, European Union law has exerted (and continues to exert) a divergent influence according to whether the disputes are governed by private or public law. In the case of the former, the impetus of Community Directives certainly was and remains significant; it suffices to refer to Directive (EC) 2002/22, which calls for transparent, simple and inexpensive proceedings for consumers; to disputes between the users and providers of public services [3] (for example Directive 92/44 (the Open Network Provision-ONP) for leased lines) and, more recently, to the online procedure for resolving consumer disputes (Reg. 2006/2004, Directive 2009/22 and Reg. 524 of 2013 of the Parliament and Council), followed by launch of the platform for online procedural management on 15 February 2016.

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[1] Through the *Tribunals, Courts and Enforcement Act* 2007. Cf. on this point P. CRAIG, *Administrative Law*, 7th ed., Sweet and Maxwell, London, 2012, 236.

[2] C. FRAENKEL-HAEBERLE, *Il ripensamento del ricorso amministrativo previo in Germania*, in G. FALCON, B. MARCHETTI, *Verso nuovi rimedi amministrativi? Modelli giustiziali a confronto*, Editoriale Scientifica, Naples, 2015, 59; S. MÜLLER GRÜNER, *Abshaffung des Widerspruchverfahrens – Ein Bericht zum Modellversuch in Mittelfranken*, in VBI, 2007, 65 ff.

[3] On this cf. G. DELLA CANANEA, *La risoluzione delle controversie nel nuovo ordinamento dei servizi pubblici*, in *Riv. it. dir. pubbl. comunit.*, 2001, 5, 737.

Conversely, in the case of the latter type of dispute, European law appears to be of limited impact. Excluding the Solvit [4] network and the procedure instituted by Directive 92/13, now repealed [5], the influence of EU law on national non-judicial protection systems is practically non-existent, particularly when compared with the influence of the Court of Justice and of the Remedies Directives on national systems of judicial protection. The reason for this limited interference probably resides in the fact that a trial before the court remains the main means of verifying effective application of European Union law. Where there exists – regardless of its nature – a system of remedies alternative to courts, it is rare for such systems to fall within the scope of interest of the Court of Justice for the purposes of monitoring the effectiveness of European Union law.

On the other hand, the Community legal system has produced its own system of non-judicial protection for disputes between European bodies and institutions and the subjects of their actions, whether citizens, enterprises or public authorities of Member States.

This book aims to analyse the most important aspect of the latter phenomenon, that is the appeals for internal review lodged with European agencies, by examining their fundamental features and their relationship with judicial protection, including in a logic of comparison with other European and non-European models [6]. It also seeks to supplement knowledge of European administration in a hitherto little explored aspect: the quasi-judicial protection.

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[4] L. MASSELLI, *Administrative Cooperation between Member States: the SOLVIT Network*, in L. AMMANNATI (editor) *Networks: in Search of a Model for European and Global Regulation*, Giappichelli, Torino, 2012.

[5] This was abandoned given its lack of success due both to the slowness of the procedure which burdened the Commission and the non-binding nature of the agreement reached between the parties. Cf. S. GRECO, *Le procedure di conciliazione nelle direttive comunitarie sui servizi pubblici, in Riv. it. dir. pubbl. comunit*., 2001, 5, 755.

[6] P. CANE, *Judicial Review and Merits Review: Comparing Administrative Adjudication by Courts and Tribunals,* in S. ROSE-ACKERMAN, P. LINDSETH, *Comparative Administrative Law*, Research Handbooks in Comparative Law, Edward Elgar Publishing, 2010, 426; A. MASSERA, *I rimedi non giurisdizionali contro la pubblica amministrazione: tendenze contemporanee*, in G. FALCON (editor), *Forme e strumenti della tutela nei confronti dei provvedimenti amministrativi nel diritto italiano, comunitario e comparato*, Cedam, Padova, 2010, 85-118.

2. Non-Judicial Protection in European Union Law

It is well known that the development of non-judicial protection in a legal system may respond to requirements of various kinds. A decisive impetus may derive from the excessive workload of the courts, which results in excessively long waiting lists and renders identification of alternatives obligatory. Another significant impetus may be the search for more flexible protection instruments which are less expensive, more expeditious or more specialised than the courts, regardless of any unsatisfactory or inefficient functioning of the judicial machine. Legal traditions may also influence the development or otherwise of non-judicial remedies, in addition to cultural and economic factors.

Paul Craig, in his recent volume on *UK, EU and Global Administrative Law*[7], identifies as one of the main challenges of administrative law in the European Union the problem of the workload of courts and the ever-greater response times.

In fact, the data available concerning appeals before EU courts indicate a constant growth trend, not only concerning the mechanism of preliminary rulings, that is the work of the Court of Justice as a "constitutional" court, but also having regard to the caseload of the Court, which is increasingly overloaded by a myriad of appeals against decisions of the Commission and the innumerable European agencies.

In 2015 there was a rise in the increase in the number of Community disputes, both before the Court of Justice and the General Court. In the case of the former, from 2014 to 2015 the number of appeals increased from 620 to 715, i.e. by more than 15%. The average number of cases before the General Court in 2013-2015 increased by 40% on 2008-2010. The average time for resolving cases was 15.3 months for preliminary rulings and 17.6 months for direct appeals, with peaks of up to 48 months for competition appeals[8]. The European Union Civil Service Tribunal, which for reasons of rationalisation was combined with the General Court[9], has in recent years seen an increase

[7] P. CRAIG, *UK, EU and Global Administrative Law. Foundations and Challenges,* Cambridge University Press, 2015.

[8] The data are set out in Press Communication No 34 of 18 March 2016, which can be read here: *http://curia.europa.eu/jcms/upload/docs/application/pdf/2016-03/cp160034it.pdf*.

[9] Regulation 2016/1192 of the European Parliament and Council of 6 July 2016, on transfer to the General Court of competence to decide, at first instance, on disputes between the European Union and its officials, with the consequent abolition of the European Union Civil Service Tribunal**.**

in disputes; the time for concluding cases was approximately 12 months, to which the various instances of appeal must be added.

A legal system which looks to a long-term internal coherence, including in terms of rule of law [10], must be aware of the risks of inefficiency of the system of judicial protection and identify measures to contain those risks.

It was for these reasons, among others, that the European Union established – starting above all in the 1990s and with ever-increasing conviction – a dispute resolution model as an alternative to the courts, and entrusted to its own administration, or more specifically by creating a quasi-judicial administration within its own administration [11].

This has been achieved by acting on several fronts: on the one hand, by establishing transversal internal appeals throughout the whole EU administration in order to protect certain instrumental rights and interests (access to documents, control of information, maladministration), in particular assigning a significant role to the European Mediator; on the other hand, it has provided for *ad hoc* administrative appeals to challenge various acts and final decisions of the several European agencies, establishing within the latter specialised boards of appeal to decide on such matters.

Appeals before these boards, in particular, present original features worthy of note, including from a comparative perspective: focusing on them allows us to understand the complex scheme in which they are included and the goals pursued. In particular, although they cannot be reduced to a single remedial model, given the degree of difference due in part to the diversity of the tasks performed by the agencies, these remedies nonetheless appear

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[10] In case C-294/83 (point 23), *Les Verts v. Parliament*.

[11] Examination of administrative adjudication has been the subject of various Italian legal theory studies: note, in particular, the contributions in L. DE LUCIA, *I ricorsi amministrativi nell'Unione europea dopo il Trattato di Lisbona*, in *Riv. trim. dir. pubbl*., 2013, 355; P. CHIRULLI, L. DE LUCIA, *Specialised Adjudication in EU Administrative Law: The Boards of Appeal of EU Agencies*, in *Eur. Law Journal*, 2015, 6, 832; other reflections are also included in L. DE LUCIA, *Rimedi amministrativi e rapporti con la tutela giurisdizionale nell'Unione europea*, and in B. MARCHETTI, *Note sporse sui sistema dei rimedi amministrativi dell'Unione europea*, both in G. FALCON, B. MARCHETTI (editors), *Verso nuovi rimedi amministrativi?*, op. cit., respectively on pages 3 and 23; the relation between judicial protection and internal review is also examined by G. GRECO, *Le agenzie comunitarie: aspetti procedimentali e giurisdizionali della tutela degli interessati*, in *Riv. it. dir. pubbl. comunit.*, 1997, 27; see in addition on this issue, S. MAGIERA, W. WEIß, *Alternative Dispute Resolution Mechanisms in the European Union Law*, in D.C. DRAGOS, B. NEAMTU (editors), *Alternative Dispute Resolution in European Administrative Law*, Springer-Verlag, Berlin, Heidelberg, 2014, 489.

based on a common logic, which seeks to guarantee the impartiality and independence of the decision-makers, their technical and legal competence, procedural rules which are becoming more refined and formalised and the award of powers to conduct a full review in fact and in law of the initial decision.

For the most part, these internal reviews are preliminaries to appeals before the Court of Justice.

3. Appeals Before the Boards of Appeal of European Agencies: Main Characteristics

Without entering into an analysis of the individual appeal mechanisms that will be examined in depth in the various contributions which follow, the history of their conception can be traced as they were established as part of the EU administrative bodies (authorities and agencies) vested with final powers.

In particular, if one considers the last 20 years of the institutional history of the Union, there are no agencies or authorities authorised to adopt binding individual acts without a board of appeal also being instituted to examine appeals against their decisions.

The recent institution of new financial supervisory authorities and the award to the European Central Bank of new banking supervision powers were accompanied, by example, by the creation of review mechanisms serving as the first tier for challenging decisions adopted by these new bodies [12].

The European Chemicals Agency (ECHA) [13], the European Aviation Safety Authority (EASA) [14], the European Union Intellectual Property Of-

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[12] For the study of these remedies cf. *infra* chapter by A. MAGLIARI, *Administrative Remedies in European Financial Governance. Comparing Different Models*; M. CLARICH, *Il riesame amministrativo delle decisioni della Banca Centrale europea*, in *Riv. it. dir. pubbl. comunit.*, 2015, 6, 1513.

[13] On administrative appeals which can be brought against the acts of these agencies cf. M. NAVIN-JONES, *A Legal Review of EU Boards of Appeal in Particular the European Chemical Agency Board of Appeal*, in *Eur. Public Law*, 2015, 21, I, 143 ff.; L. BOLZONELLO, *Independent Administrative Review Within the Structure of Remedies under the Treaties: The Case of the Board of Appeal of the European Chemical Agency*, in *Eur. Public Law*, 2016, 22, 3, 565 ff.; and *infra* chapter by G. LIGUGNANA, *Dispute Resolution in European Agencies: The ECHA Board of Appeal*.

[14] Specifically, on the Appeal Board for the European Aviation Safety Agency, cf. *infra*

fice (EUIPO), and the Community Plant Variety Office (CPVO) – all Community administrative bodies entrusted with powers to issue decisions which could potentially harm the rights of natural and legal persons – each provide for an internal board of appeal for the review of their acts.

Mechanisms for the review of special aspects are also provided in other sectors and policies of the Union. These are complaints which may be submitted to the European Data Protection Supervisor, should EU institutions and organisations breach the regulations on data processing [15]; the request for an internal review for acts (or omissions) of European institutions contrary to environmental law established under the Aarhus Convention [16]; remedies provided within European agencies operating in the agricultural and fishing sectors [17]; and instruments for protection and review established within the European area of freedom, security and justice [18].

To sum up, the European Union administration has established various types of review procedures within its bodies, which fulfil partly an implementation administrative function and partly an adjudication function, since they occupy a middle ground between implementation and adjudication. In order to attempt to follow up the logic, the model and the overall results within the administrative adjudication system of the European Union, a summary of the various constituent elements must be traced out [19].

A first noteworthy aspect concerns the independence of these review bodies. The boards of appeal are internal to, while also functionally isolated

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chapter by A. CASSATELLA, *Appeals Before the European Aviation Safety Agency*. Its review mechanisms are also examined by P. CHIRULLI, L. DE LUCIA, *Tutela dei diritti e specializzazione*, op. cit., 1305; and there are a few considerations in B. MARCHETTI, *Note sparse*, op. cit., 23.

[15] This remedy is examined *infra* in the chapter by A. SIMONATI, *The European Data Protection Supervisor: an A.D.R. Authority?*

[16] Cf. *infra* chapter by G. LIGUGNANA, *The Internal Review of Institutions' Decisions in Environmental Matters*.

[17] For an analysis of administration of justice in the sector cf. L. ZUANELLI BRAMBILLA, *La risoluzione alternativa delle controversie nelle agenzie europee in materia di agricoltura e pesca,* Academy of European Public Law, European Group of public law, Annual Reunion, Spetses, 9-10 September 2016.

[18] Cf. *infra* chapter by E. MITZMAN, *Administrative Remedies in the Area of Freedom, Security and Justice*.

[19] On this, see in addition to the previously referred to papers of De Lucia and Chirulli-De Lucia and the extensive discussion by S. MAGIERA, W. WEIß, *Alternative Dispute Resolution Mechanisms*, op. cit., 489.

from, the organisations to which they refer. The members are appointed by the management boards of the agencies where they are established, from a list provided by the Commission, to serve a term of 5 years (renewable), and therefore they are a part of the organisation; however, board members may not receive any instructions from the governing bodies of the agency, nor be involved in any way in the implementation of administrative procedures. Extremely rigorous standards are established to avoid conflicts of interest.

The position is, therefore, one of independence from a functional standpoint, but not from an organisational one.

In addition, the composition of these boards of appeal is a combination of members from technical and legal backgrounds. The proportion may vary – as may the number of members (frequently three, but on occasion five or even six for the single board of appeal for the European supervisory authorities responsible for financial regulation and supervision: EBA, ESMA and EIOPA) – but there are always members with specific expertise in the sector in the agency's field (chemists, aeronautical engineers, patent experts) and members with legal qualifications.

Both these aspects – isolation and the mixed nature of the board – are consistent with the tasks assigned to them: they conduct a review in law and in fact of the disputed acts, frequently overturning the original decision [20]. In these terms, the decision resulting from the review proceedings is the act resolving the dispute, but it is also the final expression of the will of the agency. Review mechanisms specific to financial and banking regulation agencies, which do not have the power to overturn, but merely to pronounce a ruling on lawfulness, are excluded from the power to conduct a review on the merits.

A second aspect to be considered concerns procedural law: the procedural rules governing the work of the boards of appeal are not established for all agencies with the same degree of detail. The rules may be developed gradually over time: from a few rules established in the founding regulations of the agencies in the 1990s to a body of increasingly detailed and specific rules identifying the terms of the appeal, the requirement for an appeal to the Board as a preliminary to any judicial appeal, the investigative powers of the commission, the burden of proof, the forms of evidence accepted, the deci-

[20] An exception to this rule is the case of the appeal mechanism provided for decisions adopted by the new financial supervisory authorities, by the ECB in its banking supervision duties and acts of the Single Resolution Board (SRB). Cf. on this point A. MAGLIARI, *Administrative Remedies in European Financial Governance*, op. cit.

sion-making powers and interim protection measures. In constructing the features of disputes procedures, in addition, the bipolar or multipolar nature of the dispute is of significance: the parties to the dispute may be members of the agency and private persons or in proceedings concerning trademarks, patents or the registration of plant varieties – private persons in dispute with other private persons during registration opposition proceedings.

Here the solutions chosen present some variables: in general, the disposition principle is applicable, but in some cases the board has extremely wide *ex officio* investigative powers not related to the claim of the parties (this is the case, for example, for the board of Appeal established at the European Aviation Safety Agency); the trend is for an appeal to produce an automatic stay effect, but in some cases suspension of the challenged act is a discretionary decision of the Board, in the light of the interests at stake (EASA, banking and financial supervision appeal bodies).

Sometimes the appeal may be lodged against all the decisions of the agency – provided they are individual and not general and abstract – and in other cases, however, only some decisions may be challenged before the board or by only some appellants (for example, natural and legal persons, but not States).

The provision, in certain cases (for example, for the Community Plant Variety Office) of the possibility of an interim review is worthy of note: this occurs when the rules allow the administration to conduct an internal review after an appeal has been lodged with the board and before the board decides the case.

This possibility results in a distinction between an internal review following an implementation logic and a review – that of the board – adhering to an adjudication logic.

4. Relationship with Judicial Protection

A common feature of review mechanisms envisaged within European agencies is their preliminary nature: generally, the proposing of a remedy within the agency is a condition for admissibility of an appeal before the EU Court of Justice. This means that the right of access to the Courts is conditional on the prior seeking of an administrative remedy.

This preliminary relationship is expressly referred to in article 263 of the TFEU which, in its fifth paragraph, states that "*Acts setting up bodies, offices and agencies of the Union may lay down specific conditions and ar-*

rangements concerning actions brought by natural or legal persons against acts of these bodies, offices or agencies intended to produce legal effects in relation to them".

It is implied, therefore, that the channel of access to the Court is guaranteed and the administrative appeal is not an alternative to a judicial appeal and the specific rules may require, for some acts, different proceedings for interim protection, other than a judicial appeal.

The mandatory nature of the appeals applies, for example, to the European Union Intellectual Property Office, the European Chemicals Agency, Community Plant Variety Office and the European Aviation Safety Agency although with some uncertainties. In contrast, an appeal to the Administrative Board of Review against decisions of the European Central Bank is optional: here, in truth, the non-obligatory nature is combined with a review limited to the legality (and not on the merits) by the Board. Another special aspect within EU financial governance is the appeal to the Board of Appeal of three agencies (EMA, ESMA, EIOPA), since control is limited to the legality of the contested decision, as previously stated, and its mandatory nature is uncertain, as indicated by the Board itself in the decision of 7 January 2016[21].

The mandatory and preliminary nature of the administrative remedy has a major implication, which operates with regard to procedural preclusions: the appellant is, in fact, precluded in judicial proceedings, from relying on new grounds for appeal other than those relied on during the administrative proceedings. This point was affirmed, *inter alia,* by the General Court in the judgment *Schniga GmbH v. Community Plant Variety Office (CPVO)*[22] and *Fiorucci v. OHIM*[23], in which it was confirmed that the judgment of lawful-

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[21] On this cf. A. MAGLIARI, *Administrative Remedies in European Financial Governance*, op. cit.

[22] In case T-135/08. According to the General Court: "*Since the interveners have relied, in answer to the present action, on an argument which was not examined by the Board of Appeal, their application to have the contested decision altered cannot be granted, since that would involve, in substance, the exercise of administrative and investigatory functions specific to the CPVO, and would therefore upset the institutional balance on which the division of jurisdiction between the CPVO and the General Court is based*".

[23] In case T-165/06 (points 21 and 22) the General Court established that "*it is not the Court's function to examine new pleas introduced before it or to review the facts in the light of documents adduced for the first time before it. To allow the examination of those new pleas or such evidence would be contrary to Article 135(4) of the Rules of Procedure of the Court, according to which the parties' submissions may not alter the subject-matter of the*

ness of the General Court of a decision of the board of appeal must be conducted with reference exclusively to points of law raised before the board of appeal, with the exclusion of relying on any new arguments not made during the internal appeal proceedings for the first time before the Court.

Other useful aspects to define the system of internal remedies are, on the one hand, the relationship between the ruling of the board of appeal and review by the courts, and on the other, the degree of effectiveness of the system, i.e. the capacity of these proceedings to satisfactorily protect the interests of private persons.

As seen, the review by the internal boards of appeal, excluding the case of financial and banking supervisory authorities, is conducted in fact and in law, with the full power to overturn the original decision.

It is clear this has three consequences: first of all, it ensures that private persons have access to a review on the merits (expeditiously and without excessive costs)[24] to defend their rights, which are rarely available before the courts. At the same time, the administration has a chance to reconsider, including in the light of the observations and arguments of the appellant, and to produce an improved decision before the court intervenes[25]. Finally, it fulfils the objective of seizing the court with a dispute which, insofar as possible, requires no further factual investigation, enabling the court to immediately and principally address the legal questions[26].

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proceedings before the Board of Appeal. Accordingly, the pleas introduced and the evidence submitted for the first time before the Court must be declared inadmissible and there is no need to examine them". On this, the precedents of the Court are recalled, 13 March 2007, in case C-29/05 P, OHIM/Kaul, Racc. Pages I-2213, point 54, and of the Court 23 May 2007 in case T-342/05, Henkel/OHIM – SERCA (COR), point 31; v. see also judgement of the General Court 31 May 31 May 2005, in case T-373/03, Solo Italia/OHIM − Nuova Sala (PARMITALIA), in *Racc.*, II-1881, point 25.

[24] Moreover, it should be stated that concerning decisions of the EUIPO and CPVO Appeal Boards, the Court of Justice has jurisdiction not only on points of law, but also extended to the merits. Cf. article 73 paragraph 3 Reg. 2100/1994. Concerning the judgement extended to the merits of the decisions of the EUIPO Board, Court of Justice I section, 11 May 2006, in case C-416/04, point 54.

[25] Even when conciliation and mediation procedures are provided, these are entrusted to institutional conciliators and mediators, who are required to safeguard the general interest of the Agency, such as for example, correct allocation of intellectual property rights according to European regulations cf. *infra* chapter by N. LA FEMINA, *Alternative Administrative Dispute Resolution Methods in the European Union Intellectual Property Office*.

[26] The General Court does not invariably control exclusively the lawfulness of the decision of the Appeal Boards, although this is the general rule. On occasion, in fact, the Court

With respect to this internal review, the judicial control of decisions of the boards of appeal is much more limited, not only because mostly the question is a review of legality, but also because the highly technical content of the agency's activity encourages the courts to be cautious.

At the same time, the system naturally incurs costs: access to justice is slowed down because deferred in time until after the conclusion of the internal review. These costs can be justified if the board of appeal produces convincing decisions, if the citizen can count on the real capacity of the administration to reconsider, and if the timescales for deciding the administrative appeal are relatively short.

Although there is a significant quantitative difference between the various agencies, a glance at some data may prove useful. For example, in the case of the European Aviation Safety Agency, the number of appeals is very low and hence the data are not meaningful[27]. The situation is different for the European Union Intellectual Property Office and the Chemicals Agency where the number of appeals submitted to the internal boards of appeal is relatively high.

Here, the likelihood that the dispute can be resolved within the agency, without reaching the courts, is very high. For the Intellectual Property Office, slightly over 10% of disputes ultimately reach the General Court (in 2015, of 2521 appeals only 297 were brought before the General Court)[28]. In the case of the Chemicals Agency, the overall number is decidedly lower (some 20 appeals a year), but the percentage of appeals which finally reach

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of Justice extends its decision including on the merits. This is the case for example for the Community Plant Varieties Office and the European Union Intellectual Property Office, although – as stated – rarely does the Court carry out a *de novo* ascertainment of the facts on which the dispute is based. On this point, cf. L. ZUANELLI BRAMBILLA, *La risoluzione alternativa delle controversie nelle agenzie europee in materia di agricoltura e pesca,* op. cit., 22. In this volume, cf. *infra* the chapter by the same author, *The Search for Alternative Dispute Resolution Remedies for the European Fishing and Agricultural Agencies*.

[27] From the research carried out by A. CASSATELLA, *Appeals Before the European Aviation Safety Agency*, op. cit., it appears that only three appeals were heard at the EASA. In a single case, the decision of the Board of Appeal was challenged before the European Union Court.

[28] In 2013 the EUIPO appeal boards confirmed 77% of the decisions *ex partes* and 64% of those *inter parties* whereas they overturned in full 36% of the decisions challenged for defects. The trend was confirmed in 2015 when the Appeal Boards confirmed 785 decisions of the 1113 *ex parte* appeals lodged, overturning in full 175 and partially 55, whereas of 1798 *inter partes* appeals 916 decisions were confirmed, 329 overturned in full and 182 partially. The data can be found on the website *www.euipo.europa.eu*.

the Courts remains below 20%, with a high degree of stakeholders' trust in the decisions of the board, which in 90% of cases pronounces on the appeal within the stated time limits [29].

It should also be noted that in some agencies, conciliation and mediation proceedings are offered in addition to internal appeals. Regulation 2015/ 2424 of the EUIPO provides for creation of a mediation centre within the Intellectual Property Office, with general purview, in keeping with the previous system: current article 137a, in fact, allows parties to approach the Centre jointly, without stating the *inter partes* or *extra partes* nature of the dispute, or that an internal appeal has already been lodged.

Considering, overall, the choices made by the European legal system in terms of non-judicial protection, in conclusion it can be generally observed that disputes arising from acts of the European administrative authorities are initially assigned to the same European administration, and in particular, its quasi-judicial structures [30].

The features of the administrative adjudication bodies are their specialisation and functional isolation. The nature of the board of appeal called to decide on a dispute is not judicial, but – as has been maintained several times by the Community court – administrative. This naturally entails a set of implications, including the inapplicability to the proceedings of article 6 of the ECHR.

However, European Union law shows, specifically in the provisions on

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[29] The data on the Board's activity are given in the general report of the Agency which can be found on the website *www.echa.europa.eu/about-us/the-way-we-work/plans-and-reports*. On this topic cf. the contribution of G. LIGUGNANA, *Dispute Resolution in European Agencies*, op. cit.

[30] The European Mediator, established in 1995 (by article 195 of the EC Treaty (now article 228 TFEU)) merits a separate chapter. The European Mediator's action within Community legal systems has assumed an increasingly important role: it suffices to consider that the rate of implementation of the Mediator's recommendations is now around 90%, in 2015 the latter received approximately 2,000 complaints of maladministration and conducted 248 enquiries. The Mediator's action may be macroscopic, manifested by micro-interventions, capable of identifying individual episodes of poor administration. Of its macro-actions, it suffices to recall the letter requesting the Commission to render the external (commercial) action of the EU more transparent during negotiation of the USA / EU TTIP agreements; its action impacting on the migratory policies and the tasks of Frontex; its control of potential conflicts of interest linked to the "Revolving Doors" of top officials in the Institutions.

The Mediator pays particular attention to applications to participate in decision-making processes. On this cf. M.P. CHITI, *Il mediatore europeo e la buona amministrazione*, in *Riv. it. dir. pubbl. comunit.*, 2000, 303.

procedural rules, that it is gradually privileging a more marked procedural and formal approach, reducing the discretion of board members when making decisions. It is this aspect, in the author's opinion, that will reconcile functional continuity and the defensive purposes of the proceedings, and place them in the middle ground between administration and the courts [31].

From the point of view of effectiveness, appeals constitute a necessary filter for judicial protection, but also an opportunity: economic operators appear to trust the internal appeals system and use it for a review, including on the merits, of the original act and hence the final caseload of the courts is significantly reduced.

5. Convergence and Divergence with Other Models of Quasi-Judicial Remedies

In the light of the characteristics reconstructed, it may be interesting to pose final questions on the similarities between European administrative adjudication and other experiences or models of administrative adjudication from a comparative standpoint [32]. For example, the contribution of Parona to this volume compares appeals at federal agencies in the United States with the European system.

On this, first of all it should be stated that the majority of national legal systems include and implement (with greater or lesser success) powers of review of acts of the administration through appeals by the interested parties. However, the methods used to construct a system of administrative appeals varies significantly from country to country, above all considering the degree of independence of the bodies called on to perform the review and the greater or lesser degree of formalisation of the proceedings. It is obvious

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[31] L. DE LUCIA, *Rimedi amministrativi e rapporto con la tutela giurisdizionale nell'Unione europea*, op. cit., 20, identifies specifically in the defensive logic and functional continuity, tensions at the Appeal Boards which, however, could constitute an added value insofar as they succeed in achieving "a mediated equilibrium between the diverse forces".

[32] An interesting comparative analysis is that of P. CANE, *Judicial Review and Merits Review: Comparing Administrative Adjudication by Courts and Tribunals*, op. cit., 426; an analysis of the various European systems was carried out by D.C. DRAGOS, B. NEAMTU (editors), *Alternative Dispute Resolution in European Administrative Law*, op. cit. On this cf. also A. MASSERA, *I rimedi non giurisdizionali contro la pubblica amministrazione: tendenze contemporanee*, in G. FALCON (editor), *Forme e strumenti della tutela nei confronti dei provvedimenti amministrativi nel diritto italiano, comunitario e comparato*, op. cit., 85-118.

that the more marked the independence of the appeal forum compared with the administrative body and the more similar the procedural rules to those for trials before the Courts, the further one moves from the administrative arena into that of adjudication.

The traditional construction of administrative appeals in the systems of Continental Europe is characterised, for example, by reduced independence of decision-making bodies from the body that issued the decision at first instance; in these systems, there exists, between the two bodies, a significant overlapping of competence. This is the case for example for the hierarchical appeal in the Italian system, governed by Presidential Decree No 1199 of 1971 [33], but also the preliminary administrative appeal governed by German law (*Vorverfahren*) [34] and the rules on French appeals [35].

In these legal systems, which are part of the civil law tradition, the review procedure is understood above all as continuing the administrative proceedings at first instance, according to a criterion of functional continuity; lesser regard is given both to the requirements of impartiality and independence of the decision-maker and the procedural aspects, the latter seeming far removed from the procedural paradigm of a trial.

Compared with this method of judicial administration, the differentiating features of the EU boards of appeal appear consistent, from the standpoint of both the independence and composition of the decision-making bodies and the procedural aspects.

More similar features can be identified in the Anglo-American experi-

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[33] On this cf. the two monographs of M. CALABRÒ, *La funzione giustiziale nella pubblica amministrazione*, Turin, Giappichelli, 2012 and M. GIOVANNINI, *Amministrazioni pubbliche e risoluzione alternativa delle controversie,* Bononia University Press, Bologna, 2007; recently cf. also A. PAJNO, *I ricorsi amministrativi tradizionali. Una prospettiva non tradizionale*, in G. FALCON, B. MARCHETTI, *Verso nuovi rimedi amministrativi*, op. cit., 87.

[34] On this, cf. H. MAURER, *Allgemeines Verwaltungsrecht*, XVIII ed., C.H. Beck Verlag, Munich, 2011; G. SYDOW, S. NEIDHARDT, *Verwaltungsinterner Rechtsschutz. Möglichkeiten und Grenzen in rechtsvergleichender Perspektiv*, Nomos, Baden-Baden, 2007, who also proposes a comparative analysis of judicial remedies in the British, French, German and EU legal systems; C. FRAENKEL-HAEBERLE*, Il ripensamento del ricorso amministrativo previo in Germania*, op. cit., 59.

[35] On this, cf. J.-C. BONICHOT, *Le recours administratif préalable obligatoire: dinosaure juridique ou panacée administrative?*, in AA.VV., *Juger l'administration, administrer la justice, Mélanges en l'honneur de Daniel Labetoulle*, Paris, Dalloz, 2007; R. BOUSTA, A. SAGAR, *Alternative Dispute Resolution in French Administrative Proceedings*, in D.C. DRAGO, B. NEAMTU (editors) *Alternative Dispute resolution in European Administrative Law*, op. cit., 57 ff.

ence, and in particular the English one, above all, considering first generation Administrative Tribunals [36].

Prior to the 2007 [37] reform, which accentuated "judicialization", these were specialised administrative bodies which the appellant had to approach before applying for a judicial review before the courts. With internal differences, they had various features which closely recall the European boards of appeal: they enjoyed a certain degree of independence from the implementing administration, a mixed composition of sector-specific specialists and legally qualified members, and operated on the basis of different but formalised procedural rules with inquisitorial and investigative powers; they could conduct a review in fact and in law of decisions, with powers of substitution and ensured the rapid, informal and far more cost-effective settlement of disputes compared with the judicial route [38].

Their structure changed significantly following the Tribunals, Courts and Enforcement Act of 2007, promulgated to satisfy the recommendations of the Leggatt Report [39], on reducing fragmentation by incorporating the various tribunals in a unitary system structured on two levels, First-tier Tribunals and the Upper Tribunal. Their original characteristics were not superseded: they remain specialised bodies competent to conduct reviews, including on the merits, and they represent a preliminary stage for any possible appeal before the courts [40], although their degree of independence and sepa-

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[36] P. CHIRULLI, L. DE LUCIA, *Specialised adjudication in EU Administrative Law*, op. cit., 839-840.

[37] This is the Tribunals, Courts and Enforcement Act 2007. On the reforms cf. recently M. MACCHIA, *La riforma degli Administrative Tribunals nel Regno Unito*, in *Riv. trim. dir. pubbl.*, 2009, 1, 209; for a more general view cf. G. LIGUGNANA, *L'altra giustizia amministrativa. Modelli ed esperienze d'oltre Manica*, Giappichelli, Torino, 2010; R. CARANTA, *Administrative Tribunals e Courts in Inghilterra (e Galles)*, in G. FALCON, B. MARCHETTI, *Verso nuovi rimedi amministrativi*, op. cit., 37, and in the same volume M.P. CHITI, *La giustizia nell'amministrazione. Il curioso caso degli Administrative Tribunals britannici*, 50; G. RICHARDSON, H. GENN, *Tribunals in Transition: Resolution or Adjudication?*, in *Public Law*, 2007, 116; P. CANE, *Administrative Tribunals and Adjudication*, Oxford, 2009.

[38] P. CRAIG, *Administrative Law*, op. cit., 232: it is not by accident that in the English legal system also the question of the nature of administrative tribunals is "*no easy matter*": in fact, the properties indicated by Craig: "*ability to make final, legally enforceable decisions, subject to review and appeal; independence from any department of government, the holding of a public hearing judicial in nature; the possession of expertise, a requirement to give reasons, and the provision of appeal to the High Court on points of law*".

[39] *Review of the Review of Tribunals* by Sir Andrew Leggatt, *Tribunals for Users – One System, One Service*, August 2001, available at *www.tribunals-review.org.uk*.

[40] P. CRAIG, *Administrative Law*, op. cit., 250: "The TCE Act s. 22 is intended to produce

ration from the Departments and integration in the judicial system is such as to render them more like courts than administrations [41].

Interesting convergences may also be identified with the appeal system in the United States federal agencies [42]. Common to the two systems, in particular, is the circumstance that the officials required to conduct reviews – in fact and in law – of decisions mostly act in collegial form and are part of the agency which adopted the decision subject to review [43].

Their independence, therefore, as in the European Union context, is guaranteed not through their belonging to a separate body of officials who are autonomous from the administration subject to review, as is the case for the Commissioners of Administrative Tribunals, but through rules and codes of conduct intended to ensure, within the agency, their separation from the administrative officials responsible for implementation.

In addition, appeals in the United States agencies and appeals internal to the administration of the European Union have in common the latitude of their powers of review, which mostly includes substituting the original decision: both, finally, are characterised by their preliminary role as a condition for judicial protection [44].

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greater consistency in the development of procedure". The power to adopt the procedural rules is assigned to the Tribunal Procedure Committee, which exercise said power with a view to providing for the system of Tribunals, rules which render them effective, expeditious and fair.

[41] P. CANE, *Administrative Tribunals and Adjudication*, Hart Publishing, 2010, 69; P. CRAIG, Administrative Law, op. cit., 233: "It should in any event be recognised that while tribunals may differ from the courts in the way in which they operate, the difference is one of degree rather than kind"; P. CHIRULLI, L. DE LUCIA, *Specialised adjudication in EU Administrative Law*, op. cit., 839-840.

[42] This possible analogy is highlighted by L. DE LUCIA, *I ricorsi amministrativi nell'Unione europea dopo il Trattato di Lisbona*, op. cit., 323. Specifically, on the appeal system in the American federal system cf. *infra* chapter by L. PARONA, *The Appeal System within the U.S. Federal Agencies*.

[43] This applies when appropriate appeal boards are constituted, and also with more reason, when the appeal is submitted to the head of the administration. An exception to this rule, for example, is the case of decisions adopted by the Immigration and Naturalization Service (INS), which are subject to review by officials of the Department of Justice. In any event, the Administrative Law Judges, as they are called in the United States system, are appointed on the basis of meritocratic criteria by the Office of Personnel Management and their mandate may be revoked exclusively by the Merit Systems Protection Board. See P. CANE, *Judicial Review and Merit Review*, op. cit., 441.

[44] On this point, see L. PARONA, *The Appeal System within the U.S. Federal Agencies*, op. cit.

Alongside these converging elements, are significant differences, which concern above all the tasks carried out and the applicable procedural rules: in the United States, an appeal is not always addressed to technical review boards established within the administration, since the decision on a review frequently falls within the remit of the agency head. In some cases, in particular, the board of appeal examines the case but is not authorised to express the final will of the agency, which must be expressed, rather, by the head of the administration, the only body competent to make policy choices. In these cases, what is delegated to the technical review body is not the function of adjudication, but exclusively the power to reconstruct the facts and examine the arguments of the parties.

Functional continuity, therefore, seems to prevail over the requirements for autonomy and independence, to the point that the review procedure may also be carried out *ex officio* by the agency head.

From a procedural standpoint, although there is no lack of regulations intended to guarantee impartiality of the decision-maker within the administration, many rules for conduct of the review procedure and admissibility of an appeal by a private person fall within the discretion of the appeal body, which varies from agency to agency and without the specific duty of stating reasons. This information in a sense pleads a reduced degree of "judicialization" of the internal review procedure, which remains anchored to the logic of administration rather than that of adjudication.

Wade, commenting on the system of British tribunals, in his 1985 study entitled *Towards Administrative Justice,* recalls these implied that "*modern administration calls for a vast supplementary organization for the dispensation of justice which must operate in quite a different way from the ordinary courts*". According to the well-known English academic, the circumstance that a judicial review is provided by the Courts "*if tribunals exceed their jurisdiction or if they commit errors of law on the fact of the record (...) does not alter the fact that the tribunals are a new kind of legal system in themselves*" [45].

The observation appears still current if one considers the proliferation of internal review procedures in European administration. In this sense, the degree of specialisation of the agencies appears to be the main reason for the growth of administrative appeals with the characteristics described herein.

Perhaps it cannot (yet) be stated that the European boards of appeal con-

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[45] H.W.R. WADE, *Towards Administrative adjudication*, William S. Hein & Co. Inc., Buffalo, New York, 1985, 88-89.

stitute a legal system unto themselves, nor that they are the main and principal forum where European citizens can obtain justice.

However, it is beyond doubt that the quasi-judicial function of the EU administration has notably increased in the last three decades and constitutes a major component of the administrative justice system of the European Union, such that its *modus operandi* and guarantees therein provided cannot be ignored, as they represent a cornerstone for verifying the effectiveness of the Community administrative justice and respect for the rule of law.

Antonio Cassatella

Appeals Before the European Aviation Safety Agency (*)

CONTENTS: 1. The EASA: Protected Interests, Powers, Functions. – 2. The Internal Appeal: Organisational and Procedural Aspects. – 3. The Remedial System in Concrete Terms. – 4. Real and Apparent Problems of the Appeal System. – 5. The Board as Administrator and Adjudicator.

1. The EASA: Protected Interests, Powers, Functions

The analysis of appeals to the European Aviation Safety Agency (hereinafter: the EASA) calls for a preliminary examination of its organisational structure and functions [1]. That is, both because the administrative remedies internal to the EASA have as their object the previous exercise of functions awarded to it within its own sector of intervention, and because it is considered that the whole remedial system is conditional on the type of interests relevant to EASA's activity, understood as the central body with responsibility for implementing the reference public policies [2].

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[1] On administrative appeals in the EU, Cf. P. CHIRULLI, L. DE LUCIA, *Tutela dei diritti e specializzazione nel diritto amministrativo europeo. Le commissioni di ricorso delle Agenzie Europee*, in *Riv. it. dir. pubbl. com.*, 2015, 1305 ff.; L. DE LUCIA, *I ricorsi amministrativi nell'Unione Europea dopo il Trattato di Lisbona*, in *Riv. trim. dir. pubbl.*, 2013, 323 ff.; ID., *Rimedi amministrativi e rapporto con la tutela giurisdizionale nell'Unione Europea*, in G. FALCON, B. MARCHETTI (editors), *Verso nuovi rimedi amministrativi? Modelli giustiziali a confronto*, Napoli, 2015, 3 ff.; B. MARCHETTI, *Note sparse sul sistema dei rimedi amministrativi nell'Unione Europea*, *ibid*, 23 ff.; ID., *Agenzie Europee e accountability: cenni al problema della tutela giurisdizionale*, in B. MARCHETTI (editor), *L'amministrazione europea: caratteri, accountability e sindacato giurisdizionale*, Padua, 2009, 117 ff.

[2] This is an organization which tends to link organizational aspects with the proceedings

The EASA was established in 2002, and is governed by Regulation (EC) No 216/2008. It operates in a sector crucial to the implementation of the fundamental freedoms guaranteed by the Treaties system, already the subject of a series of regulatory interventions from the second half of the 1980s [3]. At the same time, its scope is relevant from the standpoint of environmental protection with regard to the technology and standards for the manufacturing of aircraft and their impact on air pollution; the latter aspect was already the subject of international regulations in the scope of the *Chicago Convention* of 1944, subscribed to by all EU Member States [4].

From the outset it can be observed that the activity of EASA is the natural centre of a network of interests in air transport [5]: for example, those of

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and the final decision, as efficaciously described –by the general theory of methodology of the time, although with some differences – by M. NIGRO, *Studi sulla funzione organizzatrice della pubblica amministrazione*, Milan, 1964, and by M.S. GIANNINI, *Diritto amministrativo*, I, II ed. Milan, 1988, 95 ff.

[3] On public policies on air safety and civil aviation, cf. F. PELLEGRINO (editor), *Regole e pratiche della navigazione aerea in Europa: verso un'armonizzazione*, Milan, 2012; ID., *Sicurezza e prevenzione degli incidenti aeronautici nella normativa internazionale, comunitaria e interna*, Milan, 2007, especially 191 ff., for a diachronic reconstruction of European regulations. With specific reference to the EASA and its functions, Cf. M. GESTRI, *Le competenze decisionali dell'EASA nell'ordinamento comunitario*, in B. FRANCHI (editor), *La sicurezza del volo nell'ordinamento interno e in quello internazionale*, Milan, 2005, 151 ff.; M. SIMONCINI, *The Erosion of the* "*Meroni*" *Doctrine: The Case of the European Aviation Safety Agency*, in *Eur. Public Law*, 2015, especially 318 ff.; C. POZZI, *L'Agenzia europea per la sicurezza aerea*, in AA. VV., *Il nuovo diritto aeronautico. In ricordo di Gabriele Silingardi*, Milan, 2002, 91 ff.; V. RANDAZZO, *Alcuni profili problematici relativi all'attribuzione di funzioni all'Agenzia per la sicurezza aerea*, in *Dir. Un. Eu.*, 2004, 847 ff.

[4] On the Chicago Convention of 1944 cf. T. BALLARINO, S. BUSTI, *Diritto aeronautico e spaziale*, Milan, 1988, 56 ff.

[5] In partial superseding of the so-called "Meroni doctrine" (by the European Court of Justice, 13 June 1958, C-9/56, *Meroni*), according to which European Agencies cannot issue general laws, as decisions distinguished by exercise of political discretion or complex economic valuations. This appears a direct consequence of the difficulty of identifying the boundary between economic-political and technical-discretionary decisions. On this point, cf. V. RANDAZZO, *op. cit.*, 848 ff. On the European Agencies and the characteristics of their organizational model, cf. *inter alia* E. CHITI, *Le trasformazioni delle Agenzie europee*, in *Riv. trim. dir. pubbl.*, 2010, 57 ff.; ID. *Agenzie europee*, in S. CASSESE (editor), *Dizionario di diritto pubblico*, I, Milan, 2006, *ad vocem*; ID., *Le Agenzie europee. Unità e decentramento nelle amministrazioni comunitarie*, Milan, 2002; ID., *European Agencies' Rulemaking: Powers, Procedures and Assessment*, in *Eur. Law Journal*, 2013, 93 ff.; E. D'ALTERIO, *Agenzie e autorità europee: la diafasia dei modelli di organizzazione amministrativa*, in *Dir. amm.*, 2012, 801 ff.; E.O. ERIKSEN, C. JOERGES, J. NEYER (editors), *European Governance, Delibe-*

the aeronautical industry concerning the manufacturing and marketing of aircraft and technological innovation, of airlines for the acquisition and use of specific aircraft and the selection and training of crew; of users who require transport services with high standards of safety; of the European legal system understood as a whole, given that growth of air traffic appears essential from a socio-economic standpoint, and in the context of increased competition with other airspace and the respective markets [6].

That the EASA's activity is of international relevance, not only "beyond the State", but also "beyond the territory" as a constituent element of Statehood appears too obvious for further comment. The striking growth in air transport is indeed the cause and effect of phenomena linked to the socio-economic globalisation typical of recent decades [7]. This explains not only the creation of the EASA, but also how functions attributed to the Agency are correlated to existing prerogatives of the administrations of Member States, in an institutional framework which includes, together with the original – but receding – State regulation, the predominance of European and international regulation.

The very complexity of the interests of the sector under examination and

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ration and the Quest for Democratisation, Oslo, 2003; M. EVERSON, C. MONDA, E.I.L. VOS (editors), *European Agencies in between Institutions and Member States*, Alphen aan den Rijn, 2014; C. FRANCHINI, *Autonomia e indipendenza nell'amministrazione europea*, in *Dir. amm*., 2008, 87 ff.; M. GROENLEER, *The Autonomy of European Union Agencies: A Comparative Study of Institutional Development*, Delft, 2009. From among less recent papers, cf. R. DEHOUSSE, *Regolazione attraverso reti nella Comunità europea: il ruolo delle Agenzie europee*, in *Riv. it. dir. pubbl. com*., 1997, 629 ff.; A. KREHER, F. MARTINES, *Le agenzie della Comunità europea: un approccio nuovo per l'integrazione amministrativa?*, in *Riv. trim. dir. pubbl*., 1996, 97 ff.; G. MAJONE, *The new European Agencies: Regulation by Information*, in *Journal of European Public Policy*, 1997, 262 ff.

[6] On the EASA and the underlying interests of the aeronautic sector, Cf. C. DOBRE, S.A. PURZA, *The Strategic Importance of the Current and Future EU Legal Framework on Aviation and the Harmonisation of the Rules Applicable to State Aviation Operators*, in *National Strategies Observer No 1/vol. 1 (2015)*. Available on the website: *http://ssrn.com/abstract =2637108.*

[7] On overcoming the necessary relationship between states, law, territory, cf. the theoretical and general reflections of S. CASSESE, *Lo spazio giuridico globale*, in ID., *Lo spazio giuridico globale*, Rome-Bari, 2003, 3 ff.; M.R. FERRARESE, *Diritto sconfinato. Inventiva giuridica e spazi nel mondo globale*, Roma-Bari, 2006; F. GALGANO, *La globalizzazione nello specchio del diritto*, Bologna, 2005; N. IRTI, *Norma e luoghi. Problemi di geo-diritto*, Rome-Bari, 2001. For a reconstruction of the traditional categories and their gradual superseding cf. A. DI MARTINO, *Il territorio dallo Stato-Nazione alla globalizzazione. Sfide e prospettive dello Stato costituzionale aperto*, Milan, 2010.

the obvious technological nature of the subject-matter appear to justify the necessary recognition of its "independence" from the Commission. Such independence is guaranteed not only by the legal, administrative and financial autonomy of the EASA, by its organisational structure based on a Board of Management and the role of its Executive Director, but also by the specific capacities of personnel responsible for the examination and decision-making processes [8].

These aspects are well summarised in many "recitals" to Regulation (EC) No 216/2008. On this, it suffices to recall that "*the effective functioning of a Community civil aviation safety scheme ... requires strengthened cooperation between the Commission, Member States and the Agency*", in the scope of which the EASA must be supported by administrations of the Member States, notably concerning "*the certification tasks required by this Regulation*" [9].

One cannot underestimate the importance of the functions directly devolved on the EASA: besides the *specific* "*certification tasks*", the Agency is competent to adopt "*necessary measures related to the operation of aircraft*", and "*qualification of crew*" and the "*safety of third-country aircraft*" [10]. Moreover, the Agency has the power to conduct investigations and must provide information concerning the list of carriers prohibited from flying in European airspace [11]. The EASA is responsible for requesting the Commission to apply financial penalties deriving from violations of the regulations on air safety [12].

In more detail, the active administration powers giving rise to decisions, which may be challenged by their addressees, are the following [13]: *a)* certification of various categories of aircraft, including the preparation of technical specifications applicable by State administrations for functions within their remit [14]; *b)* certification of training and education of pilots and of flight sim-

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[8] On these aspects, Cf. S. SCIACCHITANO, *Profili organizzatori dell'European Aviation Safety Agency (EASA)*, in B. FRANCHI (editor), *op. cit.*, 141 ff.

[9] Cf. the thirteenth recital of Regulation (EC) No 216/2008.

[10] Cf. the thirteenth recital of Regulation (EC) No 216/2008.

[11] Cf. the seventeenth and eighteenth recitals of Regulation (EC) No 216/2008.

[12] Cf. the eighteenth recital of Regulation No 216/2008/EC.

[13] On the decision-making activity of the Agency, Cf. M. GESTRI, *op. cit.*, 163 ff.; M. SIMONCINI, *op. cit.*, 318 ff.; V. RANDAZZO, *op. cit.*, 861 ff.

[14] Cf. article 20 of Regulation (EC) No 216/2008.

ulators [15]; *c)* certification of flight operations and preparing technical specifications applicable by State administrations on flight time limitation, for functions within their remit [16]; *d)* certification of organisations which provide air transport management (ATM) and air navigation (ANS) services [17]; *e)* certification of organisations training air traffic controllers [18]; *f)* authorisations of the activities of third country operators in/out of EU airspace [19]. All these activities also imply the power to amend, suspend or withdraw individual certifications or authorisations, given changes in factual circumstances or failure to comply with the applicable regulations by the individual economic operators.

EASA has, in addition, powers to investigate the activity of enterprises operating in the aeronautic sector, to be conducted directly or in cooperation with State administrations. In the scope of these investigations, the Agency may exercise powers of inspection by examining registers and procedures, or by accessing buildings and means of transport, including individual aircraft [20].

The regulation provides that any natural or legal person may appeal against a decision addressed to that person, or against a decision which, although in the form of a decision addressed to another person, is of direct and individual concern to the former [21]. This appeal is a mandatory phase, preliminary to any subsequent judicial proceedings [22].

On the other hand, the remedy is not applicable for decisions addressed to Member States, which may be appealed directly before the Court of Justice [23]. Also sanctions adopted by the Commission on the recommendation of the Agency may be challenged before the Court, which has "*unlimited*" jurisdiction on such matters (that is extended to the merits) [24].

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[15] Cf. article 21 of Regulation (EC) No 216/2008.

[16] Cf. article 22 of Regulation (EC) No 216/2008.

[17] Cf. article 22a of Regulation (EC) No 216/2008.

[18] Cf. article 22b of Regulation (EC) No 216/2008.

[19] Cf. article 23 of Regulation No 216/2008/EC.

[20] Cf. article 55 of Regulation No 216/2008/EC.

[21] Cf. article 45 of Regulation No 216/2008/EC, with a reference to article 44 on the objective scope of application of the appeal rules (which include, other than what has been stated above, also decisions on the rights and duties for the granting and renewal of certificates or the provision of special services, pursuant to article 64 of the Regulation).

[22] Cf. specifically the twenty-sixth recital of Regulation No 216/2008/EC and see below.

[23] Cf. article 51 of Regulation No 216/2008/EC.

[24] Cf. article 25, para. 4, of Regulation No 216/08/EC.

2. The Internal Appeal: Organisational and Procedural Aspects

The provision of an internal remedy by EASA is certainly not a *unicum* of European administration, since it is generally covered by article 263, paragraph 5 of the TFEU, which expressly permits the creation of special quasi-judicial systems for the acts of European bodies and organisations [25].

Despite analogies with other remedial systems, a specific analysis of the EASA internal appeal is required, given that it reflects the requirements of the underlying socio-economic substrate, which justified its creation [26].

The twenty-sixth recital of Regulation No 216/2008/EC is explicit in this regard, as it specifies that "*It is necessary to ensure that parties affected by decisions made by the Agency enjoy the necessary remedies in a manner which is suited to the special character of the field of aviation*" by establishing "*An appropriate appeal mechanism ... so that decisions of the Executive Director can be subject to appeal to a specialised Board of Appeal, whose decisions are, in turn, open to action before the Court of Justice*".

The rules of the appeal on the activity of the Board of Appeal are established by Regulations (EC) No 216/2008 and No 104/2004 and supplemented by what can be defined – except as clarified below – internal EASA regulations: procedural rules, (hereinafter the "rules") and the Code of Conduct for members of the Board, (hereinafter the "Code").

With regard to the organisational aspects, the Board is composed of three members, selected by the EASA Board of Management from a list of qualified persons previously adopted by the Board. The Chair must have legal training – with specific competence in international and European law – whereas the other two members must have technical competence in the aeronautics industry, proven by qualifications and/or extensive professional experience [27]. In the event of absence or conflict of interest of its members, the composition of the Board can be guaranteed by alternates and may also be supplemented by two additional members [28], if necessary and after hearing the parties [29].

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[25] Cf. L. DE LUCIA, *I ricorsi amministrativi*, op. cit., 323 ff.

[26] That is consistent with the strict correlation between the organizational, procedural and judicial aspects, in the terms of M. NIGRO, *op. cit.*, 123 ff.

[27] Cf. article 2 of Regulation No (EC) 104/2004.

[28] Cf. article 20, paragraphs 1 and 4 of Regulation (EC) No 216/2008.

[29] Cf. article 1 of the procedural rules of the Board.

After defining the duration of the mandate – five years, renewable [30] – special emphasis is paid to the independence of Board members who, in making their decisions "*shall not be bound by any instructions*" [31] and may not "*perform any other duties*" within EASA [32].

Although Regulation (EC) No 216/2008 emphasises the independence of Board members from the organisational structure of EASA, more incisive are the provisions on the content and characteristics of the functional duties of Board members set out in the internal rules: independence is thus defined as a specific behavioural criterion.

The Code requires that Board members adopt a true *modus operandi*. Although its contents may, for some aspects, appear emphatic and, for others, too detailed, they are anyway indicative of the need to guarantee the independence and reliability of the Board's decisions [33]. In addition, the Code provides: full subjecting of the Board to *lawfulness*, which requires ensuring decisions on individual rights are adopted on the basis of the law and in compliance with the latter [34]; *absence of abuse of power*, which prohibits Board members from exercising powers for purposes extraneous to those established by law or which are not based on grounds of public interest [35]; obligation to guarantee *equality of treatment* and *absence of discrimination*, by treating analogous situations in the same way with no discrimination against persons appealing to the Board [36] on grounds of nationality, race, colour,

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[30] Cf. article 20, paragraph 1, of Regulation (EC) No 216/2008.

[31] Cf. article 42, paragraph 2, of Regulation (EC) No 216/2008.

[32] Cf. article 42, paragraph 3, of Regulation (EC) No 216/2008, which adds that members of the Board may "*work on a part-time basis*". This appears necessary, particularly considering the reduced activity of the Board.

[33] This concerns, moreover, provisions analogous to those of the *Code of Good Administrative Behaviour* of 2000 (applicable to the Board) and the subsequent *European Code of Good Administration Behaviour*, approved by the Parliament in 2001, applicable to all European institutions. On the rules of the Code and its impact on European law, Cf. J. MENDES, *Good Administration in EU: Law and the European Code of Good Administration Behaviour*, *EUI Working Paper* No 2009/9. For a more extended analysis of the phenomenon Cf. A. SIMONATI, *Procedimento amministrativo comunitario e principi a tutela del privato nell'analisi giurisprudenziale*, Padua, 2009, especially 163 ff.

[34] Cf. article 3 of the Code.

[35] Cf. article 4 of the Code.

[36] Not only parties, but generally the "public", understood in article 1 of the Code as any natural or legal person, in particular external stakeholders, regardless of the fact whether they are citizens of the European Union or have an establishment in its territory.

ethnic or social origin, genetic profile, language, religion, beliefs, political beliefs or other orientations, membership of a national minority, heritage, birth, disability, age, sexual orientation [37]; *proportionality*, which implies a duty to make decisions proportionate to the purpose sought, avoiding decisions which restrict individual rights or which are not reasonably connected to the purposes pursued by the Board members [38]; *impartiality*, understood as a prohibition of arbitrary actions vis-à-vis persons addressing the Board and *independence*, expressly understood as a prohibition on being influenced by a person or national interests, or by external influences of any nature, including political [39]; *objectivity*, understood as a decision-making tenet which imposes considering all the relevant factors of the question and giving adequate weight to each of them, excluding any irrelevant aspect [40]; protection of *legitimate and reasonable expectations*, which requires due consideration of the expectations of persons appealing to the Board in the light of its previous orientations; obligation of *consistency* compared with previous practices of the Board [41]; *fairness* which requires impartiality, fairness and reasonableness [42]; *courtesy* which requires service-oriented, fair, courteous action being fully available to persons appealing before the Board [43]. Further provisions concern communications with parties, the Agency and the Executive Director, and the accessibility of information related to the Board's activity [44].

If these provisions – in which it is difficult to distinguish the legal dimension of the functional activity of the Board from the deontology of the individual Board member [45] – appear characterized by the clear requirement to

[37] This is the analytical list contained in article 5 of the Code.

[38] Cf. article 6 of the Code.

[39] Cf. article 7 of the Code.

[40] Cf. article 8 of the Code.

[41] Cf. article 9 of the Code, with reference to the administrative practice of the Board, understood in the broad sense of management of the entire appeal procedure, including during its investigative phases and communications with stakeholders which is discussed in more detail below.

[42] Cf. article 10 of the Code.

[43] Cf. article 11 of the Code.

[44] Cf. articles 12-17 of the Code.

[45] On the relation between the legal and deontological rules, from a theoretical and general standpoint, Cf. T.A. BRYER, *Toward a Relevant Agenda for a Responsive Public Administration*, in *Journal of Public Administration and Policy Research*, 2006, 469 ff.; T.L.

guarantee adequate and effective exercise of functional responsibilities of the Board, and so legitimate its operations [46], the provisions of Annex I of the Code are even more detailed on prevention and containment of conflicts of interests. It suffices to observe that, by analogy with the regulations on such matters of the OECD [47], specific implementation measures are established by article 7 of the Code, requiring individual members to make an annual declaration on situations of possible conflicts of interest with the Board's activity [48], and possibly an oral declaration during individual meetings of the Board [49]. The Code then sets out the rules on *gifts, hospitality,*

COOPER, *The responsible administrator: an approach to ethics for the administrative role*, IV. ed. San Francisco, 2012; R.W. COX (editor), *Ethics and Integrity in Public Administration: Concepts and Case*s, London-New York, 2009**;** D. RADHIKA, *Ethics in Public Administration*, in *Journal of Public Administration and Policy Research*, 2012, available also on *www.academicjournals.org/JPAPR*. Cf. also B.G. MATTARELLA, *Le regole dell'onestà. Etica pubblica, politica, amministrazione*, Bologna, 2007, especially 62 ff.; N. PASINI, *Etica e pubblica amministrazione. Analisi critica di alcune esperienze straniere*, Milan, 1996.

[46] Cf. the *Preamble* to the Code, which describes the Board as "*responsible for deciding appeals against the decisions of the Agency*", and article 2, which affirms that the Code must be applied to all members of the Board, in exercise of their "*duty and responsibility*". If the term is not intended in the ethical and deontological sense but rather the legal one, this would be a form of *ex ante* liability imposed on the holder of a decision making power, which would impose the responsibility on the administration to fulfil a complex function of guaranteeing implementation of specific public policy. On this, similar to the German *Verantwortung* concept, cf. more broadly J. BRAITHWAITHE, *Accountability and Responsibility through Restorative Justice*, in M.W. DOWDLE (editor), *Public Accountability. Designs, Dilemmas and Experiences*, Cambridge, 2006, especially 44 ff.; M. BOVENS, *The Quest of Responsibility. Accountability and Citizenship in Complex Organization,* Cambridge, 1998*,* 25 ff.; J.H. KLEMENT, *Verantwortung. Funktion und Legitimation eines Begriffs im Öffentlichen Recht*, Tübingen, 2006, 50 ff.; J.R. LUCAS, *Responsibility*, Oxford, 1993, especially 54 ff.

[47] Cf. OECD guidelines *Managing Conflict of Interests in the Public Service* (2003), available on *www.oecd.org/gov/ethics/48994419.pdf*. On conflict of interests and the need to prevent it there is an ample bibliography: for a theoretical and general overview, motivated by problems of enterprises and markets, Cf. G. ROSSI, *Il conflitto endemico*, Milan, 2003, specially 93 ff.; for an analysis of the phenomenon in the scope of a wider recognition of the problem of the relationship between public powers and individual interests, cf. rather A. DI GREGORIO, L. MUSSELLI (editors), *Democrazia, lobbyng e processo decisionale*, Milan, 2015. With specific regard to administrative acts cf. J.B. AUBY, *Conflict of Interests and Administrative Law*, in A. PETERS, L. HANDSCHIN (editors), *Conflict of Interest in Global, Public and Corporate Governance*, Cambridge, 2012, 145 ff.

[48] Also extended to own family members: cf. article 4.1. and 4.2. of Annex I to the Code.

[49] Cf. article 4.2.1 of Annex I to the Code.

decorations and *honours* awarded to individual Board members [50].

The consequences deriving from violations of the organisational and procedural rules are governed by the regulations and general principles applicable to European administrative proceedings. Regulation (EC) No 216/08 requires abstention of Board members with personal interests regarding an issue, or who were involved in previous proceedings as a representative of the parties, or who have in any way participated in the latter [51]. Furthermore, the regulation governs the recusing of members of the Board – which may be requested by the party for the same reasons, or for mere *suspicion of partiality* [52].

Failure to exclude a Board member, together with all the hypotheses of violation of the rules of conduct, would in turn be grounds for unlawfulness of the decision of the Board of Appeal, to be challenged by bringing an action for annulment before the European Court of Justice. It can be assumed that all procedural violations committed by the Board would vitiate the final decision under article 263 of the TFEU.

Turning to a more detailed analysis of the appeal procedure, it appears obvious this is structured in a way which is not dissimilar to the traditional administrative appeals known in all continental legal systems [53]. Considering, from a historical standpoint, that the administrative process represents an evolution of the typical systems of the *justice retenue*, it would seem reasonable to identify significant analogies between the Board's activity and traditional procedures for challenging decisions – of an objective character – developed by the *Conseil d'État* and the *Consiglio di Stato* [54].

This analogy – that could allow an Italian observer to liken the remedy under examination to a form of improper hierarchical appeal – is useful not only for descriptive purposes, but also serves to clarify the dual nature of the Board's activity. Even admitting that the appeal system seeks to resolve a

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[50] Cf. article 5 of Annex I to the Code.

[51] Cf. article 43, paragraph 1, of Regulation (EC) No 216/2008.

[52] Cf. article 43, paragraph 3 of Regulation (EC) No 216/2008.

([53]) For a detailed description of the phenomenon, cf. the individual contributions collected by G. RECCHIA (editor), *Ordinamenti europei di giustizia amministrativa*, Padua, 1996.

[54] On these aspects, cf. F. BENVENUTI, *Autotutela (Dir. Amm.)*, in *Enc. Dir.*, IV, Milano, 1959, *ad vocem*; E. CANNADA BARTOLI, *Giustizia amministrativa*, in *Dig. Disc. Pubbl.*, VII, Torino, 1991, *ad vocem*, and B. SORDI, L. MANNORI, *Storia del diritto amministrativo*, Rome-Bari, II ed. 2003, especially 343 ff.

dispute between EASA and economic operators, it must be added that the protection guaranteed by the Agency is contemporaneously intended to ensure an internal review of the acts of the administration: protection of individual interests is instrumental to protection of the public interest [55].

Therefore, it is difficult to separate, with regard to the Board's activity, purposes typical of the *adjudication* activity from those of *implementation* [56], since it must be assumed that the pre-condition for resolving a dispute between economic operators and EASA is an opportunity for internal control of the most controversial questions, susceptible to a wider examination by the administration.

Turning to the procedure, the decisions of EASA must be challenged by the classic mandatory deadline of two months from their notification to the interested party, or from the date on which the latter became aware of the act [57]. The defence of the other parties must be filed within two months of notification of the appeal [58].

The appeal must state the subject of the challenged decision, the measure requested (to be attached), the grounds for the appeal, which must be considered "free", since they may concern both the lawfulness and the merits of the disputed act. The statements in defence have similar content. They can be used to challenge both the admissibility of the appeal and its foundation [59].

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[55] From a perspective which today can include both the historical and the theoretical and general aspects, it appears emblematic as observed by E. GUICCIARDI, *La giustizia amministrativa*, Padua, 1942, 84, in identifying the rationale for the appeal procedures, identified in the requirement to "create in the administrative authority an obligation to exercise the power of control over a specific act which was not exercised *ex officio*".

[56] The distinction is more relevant from the standpoint of the interests guaranteed that the purely structural aspect: in the case of adjudication, more heed is paid to the subjective prerogatives of the private parties; in the case of implementation, the public interest in implementation of the policies requested by the individual Agencies predominates. On this distinction, Cf. P. CRAIG, *EU Administrative Law*, Oxford, 2012, 160 ff.; L. DE LUCIA, *op. cit.*, 341 ff., which seeks, however, to nuance the difference in relation to the activity of Community Agencies, of which the dual character does not appear in discussion, although in some cases there is an impression that the interests of the parties prevail over those of the Agency and objective law. On adjudication procedures, typical of United States Agencies, cf. B. MARCHETTI, *Pubblica amministrazione e Corti negli Stati Uniti. Il judicial review sulle administrative agencies*, Padua, 2005, 63 ff.

[57] Cf. article 46 of Regulation (EC) No 216/2008.

[58] Cf. article 7 of the rules.

[59] Cf. articles 8 and 9 of the rules.

As already observed, the appeal is a preliminary mandatory remedy for the subsequent protection guaranteed before the European Court of Justice [60]. Although the lodging of an appeal does not automatically determine a suspension of the challenged decision, it may be provided by the Board depending on the specific circumstances of the case, without, however, giving rise to an interim action requiring a hearing [61].

Filing an appeal implies, on the other hand, opening of an initial procedural hearing, allowing the Executive Director of EASA to conduct a pretrial review of the challenged act in the hypothesis where the appeal is not also made against another party. If the Director considers the appeal admissible and well-founded, the challenged decision is rectified, determining the immediate conclusion of the proceedings [62]. If it cannot be rectified, the Board assesses whether the pre-conditions for suspension of the act are satisfied, and proceeds to hear the dispute [63]. In this phase the Board member-rapporteur, responsible for communications between the parties, identifies the defects which can be rectified in the case documents and sets appropriate procedural time limits for fulfilling any investigatory procedure [64].

During the proceedings, the Board may invite the parties to submit, by a set time limit, written observations on the other parties' deductions, without prejudice to the option of making oral observations as well [65]. The hearing must be notified to the other parties, which may intervene, without their absence implying acquiescence to the findings of the hearing [66].

During the discussions phase, the Board may also seek to clarify certain technical and legal aspects of the question: by requesting clarification from the parties or third parties, requesting submission of further detailed information in writing or by formal questioning, calling for further documents, convening the parties to clarification meetings, the deposition of witness statements, technical consultancy or inspections of sites and items [67]. Dis-

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[60] Cf. article 50, paragraph 2, of Regulation (EC) No 216/2008 according to which an appeal to the European court is admissible, for decisions adopted by the EASA against individual economic operators "*only after all appeal procedures within the Agency have been exhausted*".

[61] Cf. article 44, paragraph 2, of Regulation (EC) No 216/2008.

[62] Cf. article 47, paragraph 1, of Regulation (EC) No 216/2008.

[63] Cf. article 47, paragraph 2, of Regulation (EC) No 216/2008.

[64] Cf. article 4, paragraph 2, of Regulation (EC) No 104/2004.

[65] Cf. article 48, paragraph 2, of Regulation (EC) No 216/2008.

[66] Cf. article 10 of the rules.

[67] Cf. article 11 of the rules.

cussions may be suspended. Suspension may be ordered at any time, either *ex officio* or at the specific request of a party, after hearing the parties. If one party opposes suspension, the interlocutory decision pronounced must state the reason [68].

After the discussion phase (or restarting discussions after suspension) the rapporteur prepares a draft decision, which is submitted to the Board [69]. The final decision of the Board, adopted by a majority *shall be reasoned* [70] in substantive and discursive terms. In particular, it must incorporate, in addition to a sequence of formal aspects relevant to the status of the parties and the subject-matter of the appeal, a summary of the relevant facts, the arguments of the parties, the grounds for the decision and the methods to ensure implementation [71].

During the decision-making phase of the appeal there is a close connection between the Board and the Agency. On the one hand, the Board exercises the same competences as the Agency (that is, the same administration powers) and may overturn or amend the challenged decision, without necessarily limiting itself to annulling it. On the other hand, it is always possible that the dispute may be referred – not only for the purposes of implementation, but also for re-issuance of the power – to the Agency which, in this case, must comply with the decision adopted by the Board [72].

3. The Remedial System in Concrete Terms

To approach the practical and problematic aspects of the ambiguities and

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[68] Cf. article 12 of the rules.

[69] Cf. article 4 of Regulation (EC) No 104/2004.

[70] Cf. article 13, paragraph 1, of the rules.

[71] Cf. article 13, paragraph 2, of the rules. Therefore, the reasoning is of composite nature, as the Board has a substantive giving reason, that is the duty to identify in writing the substantive reasons for its decision. A mere reference to regulatory sources or generic justification of the reliability and reasonableness of its choice does not suffice. For analysis of this aspect, including in comparison with the rules applicable to United States Agencies, refer again to M. SHAPIRO, *The Giving Reasons Requirement*, in M. SHAPIRO, A. STONE SWEET (editors), *On Law, Politics and Judicialization*, Oxford, 2004, 228 et seq. For a recent reconsideration of the topic cf. G. DELLA CANANEA, *The Giving Reasons Requirement: a Global Standard for Administrative Decisions*, in G. DELLA CANANEA, A. SANDULLI (editors), *Global Standards for Public Authorities*, Naples, 2012, 5 ff.

[72] Cf. article 49 of Regulation (EC) No 216/2008.

limits of the appeal procedure it appears appropriate to examine the few decisions pronounced by the Board, which demonstrate the method according to which the Board views (and exercises) its own role within the EASA.

The examination of this fledgling practice demonstrates, in fact, that the Board frequently views its activity as a control of the mere legitimacy of the challenged decisions, without entering into the merits of the individual choices and overturning the contents. It should be added that in almost all the cases examined, the Board rejected the appeals filed by individual economic operators, confirming the decisions of the Agency by stating analytical reasons. This indicates that, in concrete terms, the activity of the Board is an opportunity to confirm the reliability and stability of EASA decisions following challenges by their addressees, that is the overall responsiveness of the Agency in implementation of public policy on air safety [73].

In decision 21.11.2014 (AP/06/2013), the Board had to deal with the issue of the absence of approval for a propeller, exclusively for reasons associated with the sound emission levels of the product, which did not impact on the granting of certification from other technical aspects. The manufacturing company challenged the decision before the Board, maintaining that the calculations of the Agency to evaluate sound emissions were not only erroneous, but also refuted by a test the company commissioned from a private certification body prior to conclusion of the proceedings.

In discussing the appeal, the Agency's defence demonstrated that the results of the test could not be considered for the purposes of environmental approval of the product, given that the company had failed to respect, to this end, the procedural requirements imposed by the rules implementing Regulation No (EC) 216/2008. Such rules require the prior submission to the Agency of a test program, to allow its own inspectors to participate and

[73] In this sense the appeal procedure appears instrumental to guarantee the accountability of EASA vis-à-vis stakeholders and shareholders, in terms typical of the Anglo-American science of administration and legal sociology which – on close examination – using different concepts expresses the fundamental logic of traditional remedies internal to the Administration, that is the requirement to guarantee the implementation of public policies and strengthening the decision-maker by a control by "sampling" requested by the appellant. On this problem cf. *inter alia*, E. CHITI, *L'accountability delle reti di autorità amministrative in Europa*, in *Riv. it. dir. pubbl. com.*, 2012, 29 ff., with extensive and specific references to the wider debate on the nature and extending the very concept of accountability. For an analysis of the legal and meta-legal dimensions of the phenomenon, cf. also F. PEZZANI (editor), *L'accountability delle amministrazioni pubbliche*, Milan, 2003, or with specific reference to the activity of the European agencies, cf. M. BUSUIOC, *European Agencies. Law and Practices of Accountability*, Oxford, 2013.

monitor the test activities. The fact that, notwithstanding the violation of these procedural requirements, the company had obtained partial approval for the product (limited to the technical aspects) and proved the proportionality of the decision, since this was the least severe measure for the company.

The arguments were endorsed by the Board, according to which the Agency had not only complied with the rules applicable to the certification procedure, but also had fully considered the interests of the company and acted "*in accordance with the principle of proportionality*" [74]. The control by the Board did not in this case appear exhaustive, but had the typical features of a judicial review of legality, as the conceptual instruments used by the Board were homologous to those used by the General Court and the European Court of Justice. However, on examining the full grounds for the Board's decision, it can be observed that the entire decision-making activity of EASA was reviewed and endorsed. Therefore, dismissal of the appeal had the structural and functional characteristics of a confirmation of the correct implementation of public policies entrusted to the Agency.

In another case, the Board interpreted the rules to clarify the concept of a decision open to challenge. In a decision of 30 April 2013 (AP/03/2012) the appellant disputed the failure to include a model of the aircraft in Annex II of Regulation (EC) No 216/2008, concerning historic aircraft. Besides the technical aspects of the case, the question at stake was the possibility of classifying a communication of the Agency, which clarified why the appellant's model was not included within the scope of the Annex, as a decision.

The Board first of all denied – on the basis of case law of the European Court of Justice – that this type of document, without any direct effect on legal or natural persons, could be classified as a decision open to challenge, since it was a mere information communication emphasising the content of the rules that would be applied by the government administrations. At the same time, it clarified that the insertion of an aircraft in the Annex did not fall within the scope of challengeable decisions before the Board [75].

The most interesting part of the Board's decision, however, was the reasoning according to which the Board excluded even in abstract the possibility of challenging the communication. Indeed, even if it was classified as an act that would directly harm individual rights, it would constitute a "*confirmatory act*" of a previous decision, which in turn had been unopposed [76].

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[74] Cf. point 46 of the decision.

[75] Cf. point 47 of the decision.

[76] Cf. point 51 of the decision, where this expression means – in the conceptual science

Also in this case, therefore, the decision of the Board was not resolved procedurally, but was a full review of the activity of the Agency, endorsing all its assumptions and effects from every standpoint. In other words, the "style" of the grounds for the acts indicates that the Board was carrying out a full review of the activity of EASA, without being excessively bound by the complaints of the appellant: this appears consistent with the finding that the decision of the Board replaces the challenged act, confirming its effects.

A third case appears particularly interesting, both for aspects linked to the activity of the Board and because the decision of the Board was subsequently challenged before the General Court, which for the first time had to adjudicate on the outcome of an appeal before the Board. The General Court established a set of criteria on the characteristics of EASA activity and the extent of a judicial review of the decisions of the Board of Appeal.

The case concerned an application for approval of the flight conditions of a helicopter, which represents an essential precondition to obtain individual national authorisations and subsequently the flight permits. Against EASA's refusal, the applicant company appealed to the Board, which reviewed the question and subsequently rejected the appeal. In the decision of 17 December 2012 (AP/01/12), the Board made it clear that the appellant company had failed to provide proof of the safety of the aircraft and established that the Agency had a wide margin of autonomy when appraising such matters [77]. Again, according to the Board, the decision of EASA was founded on adequate grounds, given that the Agency had clarified the appraisal standards it used when examining the application for authorisation [78].

The Board's decision was challenged before the General Court. The latter, in its judgement of 11 December 2014 (T-102/13), reconstructed the rules on such matters, laying down various fundamental characteristics, for example: functional continuity between offices of the Agency and the Board, meaning that the decision of the Board absorbs and replaces the challenged act following a re-examination of the question [79]; the consequent

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of domestic law – a merely confirmatory act, without any effective autonomy causing harm and therefore as such not open to challenge.

[77] Cf. point 63 of the decision. Autonomy which does not oblige the Agency to comply with any approvals already obtained for the same model of helicopter from other administrations, such as the United States Federal Aviation Administration, which expressed a positive opinion on the matter.

[78] Cf. point 90 of the decision.

[79] Point 27 of the judgement.

need to challenge before the Court exclusively the decision of the Board, and not the original act [80]; the eminently technical and discretionary nature of the activity of the Agency and of the Board [81]; the correlative limits on judicial review of the Board's decisions, limited to a verification of the absence of any manifest irrationality of the act and of the appraisals made, without any margin for the Court to assume the prerogatives reserved to EASA [82]; the requirement for the Board's decision to be reasoned in relation to the investigative documentation acquired, so as to allow satisfactory control of the decision [83].

The judgement is certainly not innovative, because it assimilates in full the activity of the Board (and of EASA considered overall) with that of other Agencies and the Commission itself, without particular details concerning the structure and functioning of the appeal system and of the final decision. The formal and substantive administrative nature of the latter appears upheld and not discussed. However, it is obvious that the Court assumed that the merits of the dispute had been exhausted by the parties within EASA, limiting its control to an extrinsic procedural scrutiny, without any re-evaluation of the investigations conducted by the administration.

Although the available case law is too restricted to express an opinion on the actual functioning of the remedy, it appears possible to identify certain characteristic and original traits, at least in relation to the current stage of development of the system.

The review conducted by the Board has a "mixed" function, since it is an activity intended to offer contemporaneous protection to the interests of appellants and the more general public interest in the implementation of EU rules. In sum, it could be held that the Board has the purpose of verifying the fulfilment of functional duties entrusted to the Agency as a guarantor of air safety, with two-fold protection of economic operators and of the EASA itself [84].

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[80] Point 28 of the judgement.

[81] Cf. point 74 of the judgement.

[82] Cf. points 89-90 of the judgement, which state that the judgment must be limited to verifying compliance with the procedural rules, the material accuracy of the facts considered when making the challenged choice, the absence of any manifest errors during the evaluation of facts and the absence of any abuse of power.

[83] Cf. point 79 of the judgement.

[84] On the ambiguities of the Board's functions, from this standpoint, Cf. P. CHIRULLI, L. DE LUCIA, *op. cit.*, 1309 et seq.; B. MARCHETTI, *Note sparse*, op. cit., 24 ff.

Further proof of the above can be found considering the discretion enjoyed by the Board in evaluating the requirements for suspending the challenged act, conferred on it to guarantee the ongoing efficacy of the refusals of EASA, consistently with the principles of precaution and neutralisation of risks associated with management of air safety; in managing the investigative activity, modulated on the basis of the requirements of the Board of Appeal, rather than those of the appellant; the content and the substituting effect of the final decision, which in practice confirmed the initial decisions, reinforcing their grounds and the arguments, and addressing the criticisms raised by the appellant.

The effect is, therefore, both to reinforce the technical legitimation of EASA and to contribute to the creation of a sectoral system which – while complying with the fundamental principles of the general legal system – operates according to its own logic, reflecting the characteristics of the public interest entrusted to the Agency [85].

Paraphrasing a well-known legal theory, this seems a form of *Legitimation durch Wiederspruchsverfahren* [86], where the appeal is not only the institutional environment dedicated to settling disputes between economic operators and EASA or implementation of secondary law, but rather an instrument through which the Agency expresses its own definitive position in order to settle specific controversial questions and assuming full functional responsibility for implementing the policies conferred on it by the Treaties and secondary law. This appears to be a possible correction of the "Meroni doctrine", according to which the activity of EASA (and of other Agencies) cannot be redefined as mere "implementation" of policies predefined by EU

[85] This seems to be the meaning followed by S. SCIACCHITANO, *op. cit.*, 147, according to which the original function of the Board appears related to the requirement to "counterbalance" the power of the Executive Director of the Agency, through monitoring the latter's actions at the request of persons suffering harm as a result of the Director's decisions. From a theoretical and general standpoint, the legal dimension of the administration does not appear new, and was set out lucidly by V. OTTAVIANO, *Sulla nozione di ordinamento amministrativo e di alcune sue applicazioni*, in *Riv. trim. dir. pubbl.*, 1958, 825 ff., on which cf. however the critical observations of S. PUGLIATTI, *Diritto pubblico e diritto privato*, in *Enc. Dir.*, XII, Milan, 1964, 728 ff.

[86] Cf. N. LUHMANN, *Legitimation durch Verfahren*, Italian translation. *Procedimenti giuridici e legittimazione sociale, Milan*, 1995. On these aspects, cf. also A. ROMANO TASSONE, *Brevi note sull'autorità degli atti dei pubblici poteri*, in AA.VV., *Scritti per Mario Nigro*, II, Milan, 1991, 363 ff.; ID., *Sui rapporti tra legittimazione politica e regime giuridico degli atti dei pubblici poteri*, in P. CARTA, F. CORTESE (editor), *Ordine giuridico e ordine politico. Esperienze lessico prospettive*, Padua, 2008, 139 ff.

institutions, such as the Council, Parliament and Commission, but implies clear margins of appreciation which govern the efficacy and effectiveness of the air safety system [87].

The assumption of responsibility expressed in the decisions of the Board is relevant not only in relation with other EU institutions, but also appears linked to the general socio-economic importance of air safety from a supranational standpoint. In this respect, the appeal procedure ultimately guarantees the legal and technical reliability of the actions of the Agency, and the credibility of the entire air safety system established by the Union [88].

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[87] The same theory is posited recently by M. SIMONCINI, *op. cit.*, specially page 320 ff. On the limits of the "Meroni doctrine" *cf.* E. CHITI, *Le trasformazioni*, op. cit., 62 ff.; E. D'ALTERIO, *op. cit.*, 813 ff.; G. MAJONE, *The Credibility Crisis of Community Regulation*, in *Journal of Common Market Studies*, 2000, 273 ff., above all page 289 ff. Even excluding the possible superseding of the principle set out in the Meroni case in the TFEU, it must be observed that the Court of Justice has always considered as compatible with the system of Treaties the delegation of "*well-defined implementation powers, of which the exercise is under the full control of the [Commission]*", whereas it prohibited – if contrary to the requirements to guarantee the balance of powers within the Union – discretionary delegation of powers. The problem then becomes theoretical and general and concerns the same legal concept of "*discretionality*" and at the same time, the possibility of maintaining that technical evaluations of the individual Agencies are devoid of "discretionary" implications. If it is admitted that the boundary between the two concepts is movable and that even in the scope of technical valuations with complex content, implicit autonomous and institutional appraisals are reserved to the Agency, it seems apparent that the very foundations of the "Meroni doctrine" cede and that a dual alternative cannot be avoided: eliminating the system of Agencies protecting a restrictive and centralised concept of European administration, which appears refuted by the facts and evolution of the system; to maintain that the case law of the European Court of Justice is superseded, and admit that the appraisal autonomy of the Agencies is not limited to their institution, but is also the very *raison d'être* of an administrative model separate from the Commission. On these and other aspects of the relationship between administrative discretion and technical appraisal, *cf.* D. DE PRETIS, *Valutazione amministrativa e discrezionalità tecnica*, Padua, 1995, and also D.J. GALLIGHAN, *La discrezionalità amministrativa*, Italian translation, Milan, 1999.

[88] That the conferring of discretionary administrative functions *lato sensu* implies a "*a degree of latitude which implied a wide margin of discretion*" as was also emphasised by the European Court of Justice, Grand Chamber, 22 January 2014, C-270/12, *United Kingdom/Commission and Council* (point 42). That this shift of responsibility is now admitted by the Treaty and emphasised in the same judgement which states "*It should be noted in that regard that, while the treaties do not contain any provision to the effect that powers may be conferred on a Union body, office or agency, a number of provisions in the FEU Treaty none the less presuppose that such a possibility exists*" (point 79).

4. Real and Apparent Problems of the Appeal System

The examination of the relevant rules and case law allows to focus on various problematic implications of the system of appeals before the Board. However, it is necessary to distinguish the investigation of various problems, which are apparent – or extraneous to the subject of the research – from others which, on the other hand, are essential to the scope of this analysis.

First of all, the application of the principles of administrative action to the Board's activities does not appear problematic: participation in the procedure, obligation to state reasons, appropriateness of the final decision are tenets clearly applicable to the activity of the Agency and of the Board pursuant to articles 296 and 298 TFEU, article 41 of the Charter of Fundamental Rights of the EU and according to the case law [89].

It should be added that the general principles of European administrative action apply vis-à-vis the Board, irrespective of any express reference in the rules or in the Code, which emphasise the applicability of the legal tenets already binding on all institutions. This confirms that the internal rules of the EASA are not intended to introduce new rules of conduct or to specify, in any appreciable manner, the scope of application of general standards, but to legitimise from a broader perspective the activities of the Agency and the independence of the Board.

Although within a system which is intended to ensure, in the public interest, full and efficacious implementation of secondary law on air safety, it appears that the procedural legality of the decisions of the Agency and of the Board is sufficiently guaranteed, including with a view to protecting the interests of individuals and companies which are entitled to request a review of the acts of the EASA, and to obtain a prompt and reasoned decision.

It goes without saying that the appropriateness of consolidating EASA rules into a single regulatory text could be discussed, as well as separating some fundamental features to arrive at a unitary codification of appeals proceedings before European Agencies, but this would necessarily shift the in-

[89] On the general principles of European proceedings, in addition to the already cited A. SIMONATI, *op. cit.*, *passim*, reference is made to the now classical discussion by J. SCHWARZE, *European Administrative Law*, Oxford, 2006, and F. BIGNAMI, S. CASSESE (editors), *Il procedimento amministrativo nel diritto europeo*, Milan, 2004; G. FALCON (editor), *Il procedimento amministrativo nei diritti europei e nel diritto comunitario. Ricerche e tesi in discussione*, Padua, 2008.