1) **State of play de jure and in practice**

**Former 1st pillar agencies**

The founding regulations of five former 1st pillar agencies foresee one or more Boards of Appeal. All of these agencies adopt individual decisions, which could give rise to complaints from third parties. The role of the Board of Appeal is to check that the agency has applied basic regulation rules and the implementing rules correctly, within the scope of the tasks devolved on it and the responsibilities assigned to it.

In practice, ACER, CPVO, EASA and ECHA have one Board of Appeal each, whereas OHIM has five: four dedicated to the trade mark matters and one board working only on design.

The number of members of the Boards of Appeal varies between the agencies. The Board of Appeal of three agencies - CPVO, EASA and ECHA - have 3 members: the Chairman and two other members and their alternates. The Board of Appeal of ACER is composed of 6 members and 6 alternates.

The number of members of the Boards of Appeal of OHIM is not defined in the founding regulation. In practice, there are eleven ordinary members in total, and five chairpersons, one for each Board of Appeal. One of the abovementioned chairpersons is also the President of the Boards of Appeal; he has got managerial and organisational powers. In general, decisions are taken by three members, but in certain specific cases decisions can be taken by an enlarged Board chaired by the President or by a single member.

The members of the Boards of Appeal are appointed by the Management Board for the term of office of five years, renewable. The Commission prepares a list of qualified candidates for members of the Board of Appeal of three agencies - ACER, EASA and ECHA. In the case of CPVO, the members and their respective alternates are selected by the Chairman of the Board of Appeal from a list of qualified members established by the Management Board on a proposal from the agency. In the case of OHIM, candidates are preselected by an advisory committee, established by the Management Board.

The members of the Boards of Appeal are independent. They may not perform any other duties in the agency. They may not take part in any appeal proceedings if they have any personal interest therein, or if they have previously been involved as representatives of one of the parties to proceedings, or if they participated in the decision under appeal.

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1 ACER, CPVO, EASA, ECHA, OHIM
2 In the case of CPVO, where the Board of Appeal considers that the nature of appeal so requires, it may call up two further members.
3 The enlarged Board of Appeal consists of 9 members: the President, chairpersons of all the Boards and ordinary members. The enlarged Board takes the decision when the case is legally difficult or important, or when special circumstances justify it.
4 To determine which specific cases fall under the authority of a single member, account should be taken of the lack of difficulty of the legal or factual matters raised, the limited importance of the individual case or the absence of other specific circumstances.
The founding regulation of ACER foresees a voting system, whereas in other cases voting conditions are determined in the implementing rules or by the Commission.

**Former 3rd pillar agencies**

In two former 3rd pillar agencies - EUROJUST and EUROPOL - operates the Joint Supervisory Body (JSB), responsible in certain cases for appeals in relation to access to or correction of personal data processed by the two agencies. However, serving as board of appeal is not the only activity of the JSBs. In fact, they also monitor collectively the activities of EUROJUST and EUROPOL, in order to ensure that the processing of personal data is carried out in accordance with the respective founding regulations.

Details on the composition and functions of the two JSBs are provided below.

The JSB of EUROJUST consists of 3 permanent members and ad hoc judges. Each member State, acting in accordance with its legal system, appoints a judge who is not member of EUROJUST or, if the constitutional or national system so requires, a person holding an office giving him sufficient independence, for inclusion on the list of judges who may sit on the Joint Supervisory Body as members or ad hoc judges. The appointment should be for no less than 3 years. The Joint Supervisory Body examines appeals submitted to it and monitors collectively the EUROJUST activities in order to ensure that the processing of personal data is carried out in accordance with the Decision establishing EUROJUST. The decisions taken by the JSB are final for all parties concerned. The JSB does not deal with acts that are not related to data processing, and there are no other provisions in the EUROJUST's decision providing for a possibility of appeal against acts which are not related to data processing.

The Joint Supervisory Body of EUROPOL is composed of not more than two members or representatives, where appropriate assisted by alternates, of each of the independent national supervisory bodies having the necessary abilities and appointed for five years by each Member State. The JSB is independent. Its task is to ensure that the rights of the individuals are not violated by the storage, processing and utilization of the data held by EUROPOL, and to monitor the permissibility of the transmission of data originating from EUROPOL. The Joint Supervisory Body is also competent to examine questions relating to the implementation and interpretation as regards the processing and use of personal data. This includes examining the appeals of individuals who have requested access to their information but who are not satisfied with Europol’s response to a request for check, access, correction or deletion. In practice, individual appeals are treated by the responsible Committee of the JSB, the Appeals Committee, set up under the Europol Council Decision. The decisions taken by the JSB are final for all parties concerned. As for EUROJUST, the JSB of EUROPOL does not deal with acts that are not related to data processing.
2) **Critical analysis of the issue at hand**

**Work carried out by Boards of appeal**

Overall, the assessment concerning the work carried out by Boards of Appeal is rather positive, as no major problems have been detected so far. A limited number of boards' decisions were appealed to the Court of First Instance, and the large majority of the appealed decisions were confirmed by the Court. An analysis of the performance of individual Boards of Appeal follows.

It can be considered that the OHIM's Board of Appeal lives up – to a large extent – to the expectation of a quality focused, efficient and effective appeal body. It has been able to manage an increasing number of appeals. As to the quality of its decisions, the Board's decisions may be subject to the scrutiny of the Court of First Instance (CFI). Currently, the appeal rate before the CFI amounts to 10% of Board's decisions; about 80% of the appealed decisions are confirmed by the Court. There are some areas which would require further improvement. These are (1) swiftness of the appeal procedure which encounters some unnecessary delays and (2) consistency of decisions. To diminish the latter risk of inconsistent decisions, a possibility to refer a case to an enlarged Board of Appeal (called Grand Board) was put in place as of 2004\(^5\). As a matter of fact, however, only few cases have been referred to the Grand Board so far, with the pretext of avoiding delays in the procedure which would otherwise arise due to the lengthy discussion before the Grand Board. Consequently, the Grand Board has not been able yet to prove to be an efficient mechanism to ensure consistency of Board's decisions.

The CPVO Board of appeal has been performing well. It is worthwhile to mention that only a limited number of its decisions were appealed to the Court of First Instance (CFI). So far, the CFI has only delivered two judgements and confirmed the CPVO Board of Appeal decision.

It can be considered that the Joint Supervisory Body of EUROJUST has been working correctly, by ensuring a quick decision-making process in a non-bureaucratic and cost-effective way.

No specific complaints have been raised so far on the functioning of the Joint Supervisory Body of Europol. However, it is worthwhile to mention that, since the decisions of the JSB are final, there is no possibility, in principle, to continue the administrative procedure in the form of an administrative dispute before a Court.

The Board of Appeal of ECHA has been set up and is functioning, but so far it had to treat only one appeal. It is therefore not possible to draw any meaningful conclusions yet.

In the case of EASA, until now there were two cases brought to the Board of Appeal, but none of them went to the end of the procedure due to different reasons. Thus, at this stage there is not enough experience on this agency's Board of Appeal.

Finally, the Board of appeal of ACER was not constituted yet.

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\(^5\) Cases may be allocated to the Grand Board if this is justified by their legal difficulty, importance of the case or by special circumstances, for example, if the Boards of Appeal have issued diverging decisions on a point of law raised by that case. A case shall also be referred to the enlarged Board if the Board in charge believes that it must deviate from an interpretation of the relevant legislation given in an earlier decision of the Grand Board.
Selection procedures

Selection procedures concerning members of the Boards of Appeal vary between agencies and sometimes they differ from rules applying to members of staff within the same agency.

Overall, it can be considered that selection procedures were carried out in a transparent and effective way, and that they were successful in providing qualified candidates on short lists, although in a number of cases procedures were rather long.

The current selection processes for the Chairperson, the Vice-Chairperson and the members of the CPVO Board of Appeal ensure a total independence of the Board. It is worthwhile to underline that, however, the administrative procedures to recruit the Chairperson and the Vice-Chairperson of the CPVO Board of appeal are time-consuming and administratively very heavy to handle; in fact they are the same procedures as for the recruitment of the President and the Vice-President of the agency.

Also in the case of OHIM the President and Chairpersons of its Boards of Appeal are selected following the same procedure as foreseen for the President and Vice-President of the Office. Despite these formal requirements, the OHIM and its Administrative Board have been managing selections in an efficient and effective way. As a matter of established practice the Administrative Board sets up a pre-selection committee which ensures impartiality of the selection procedure and thus contributes to the independence of the Boards.

Regarding the composition of the Joint Supervisory Body of EUROJUST, a new selection procedure was introduced at the end of 2008 in order to offset a number of drawbacks of the previous system. This new procedure intended to contribute to a more permanent structure, thus avoiding too frequent changes of members.

In the case of EUROPOL, the Joint Supervisory Body is composed of representatives appointed directly by the Member States. With regards to independence, it has to be noted that in the performance of their duties, the members of the JSB shall not receive instructions from any other body.

For ECHA, the selection procedure follows the Guidelines for the appointment of agencies' Directors. Once the Commission has adopted a shortlist of suitably qualified candidates, this is sent to the Management Board. It thereafter makes a selection itself, through the use of a group of people nominated by the Management Board to interview assess and propose suitable candidates from the shortlist. Although this 2-step process is very long (11 months), overall the selection procedure has been successful in proving suitably qualified candidates on the short list to ECHA, who are very aware of the independent status of the Board of Appeal.

In the case of EASA, the basic act gives the possibility to create more than one board of appeal within the Agency, while following the same selection procedure. In 2005, the chairman and the members as well as their alternates were selected following a procedure very similar to those followed by the Commission for higher management staff and very similar to that followed for the selection of the executive director and other senior officials of the Agency. The qualification requirements of the chairman and the members of the board of appeal, their powers and the voting conditions were established through implementing rules.

In the case of ACER, selection procedures are still under discussion.

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6 This committee may be composed of President or Vice-President of the Office, President of the Boards of Appeal, Chairpersons of OHIM Administrative Board and Budget Committee as well as representatives of Member States or the Commission (usually 6 to 7 members).
Staff of agencies and Membership of Boards of Appeal

In relation to the selection process and the composition of the Boards of Appeal, the question may arise whether it is appropriate and/or desirable to recruit Board members from among the staff of the agency. In the case of OHIM, many members of OHIM Boards worked previously in agency's core business, which is also a result of the difficulty to hire Board members from outside the agency. This raises the question of the independence of the member of the Board of Appeal from the administration of the Office where he/she was previously engaged. Even though the independence of the members of the Board of Appeal has not been contested so far, it should be reflected whether it would not be more appropriate to recruit them only from outside the agency in order to guarantee even more their impartiality.

The ECHA Board of Appeal is independent from the agency itself, although for staff issues (salaries etc.), it relies on the agency. This independence is intended to guarantee its very ‘raison d’être’, and should be closely guarded against conflicts of interests on nominated staff to the Board of Appeal, from wherever they originate.