Mechanism, Analysis and Evolution of Jurisprudence on the Judicial Protection of European Union Agencies

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Abstract: The study of the judicial protection profiles of the agencies deserves to be addressed starting from an analysis of the evolution of the discipline, which, in the silence of the Treaties, has long been dictated by the courts of Luxembourg until the final and most recent act, or the constitutionalization by the Lisbon Treaty of the principles contained in a fundamental arrest of the Court of Justice of the European Union (CJEU). The present work is important because has as a main scope to analyse the judicial profile of EU agencies according to CJEU jurisprudence. The present paper is based on a original, personal research of CJEU jurisprudence using some articles of the Lisbon Treaty and it gives light to a sector (EU agencies) that until now the doctrine has been very limited and general attributing with precise way to the evolution of EUlaw.

Keywords: European Union Agencies; agencification, CJEU; Ombdusman; good administration

1. Introduction

The judicial approach and the investigation of agencies in European Union law is necessary both to understand the real motivations underlying the innovations produced by the Treaty of Lisbon on jurisdictional protection, also fundamental for the analysis of the admissibility of the delegation of powers to the agencies (Mendez, 2013, pp. 207ss; Costa, 2016, pp. 69ss; Simoncini, 2018)[2], in order to understand the possibilities of control of the acts of the agencies of the former third pillar that, still for a few, are subject to the discipline previously in force.

The evolution of agencies and the express attribution to the latter of binding decision-making powers has led to the provision of internal recourse commissions to offer to the possibly injured parties the possibility of challenging the work of the agencies.

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[2] See the case: T-123/00, Dr. Karl Thomae GmbH v. Commission of the European communities of 10 December 2002, ECLI:EU:T:2002:307 II-5193.

This has certainly helped to limit the onset of problems, but has not been able to avoid it altogether, since all the other agencies of European Union, without a means of internal recourse, were nevertheless expanding bodies, equipped with their own legal personality, active autonomously in fields such as personnel management, the call for tenders and, more generally, the administrative procedures within which they assisted the European Commission (EC), even if formally with advisory only powers (Everson, Monda, Vos (eds.), 2014; Vos, 2010, pp. 152ss).

In the case of the drug evaluation procedure, for the first time the problem of the agency's decision-making has been posed: at this juncture the final decision is still up to the EC, while the initial decision, aimed at checking that the applicant respects all the criteria set by the standard are the sole responsibility of the European Medicines Agency. Called to decide on the legality of this administrative decision, in a case brought against the EC and not against the agency, the Court of Justice of the European Union (CJEU) ruled the complainant charging, in fact, for the EC the responsibility for a decision of others[1]. Therefore, the first method of solving the problem was to identify another responsible party, evidently included in the group of subjects in the list of passive legitimates of the cancellation action. This approach was confirmed when such an action was carried out by citing both the EC and the agency: in fact, the CJEU accepted the action only against the former, rejecting the one against the latter, on the reason that it did not appear between the institutions mentioned in the then art. 230 TCE (Chamon, 2016, pp. 330ss; Lenaerts, Maselis, Gutman, 2014, pp. 133ss)[2].

This approach, however, could not apply to all fields, because it would lend the EC the responsibility of all the bodies of the Union gravitating around her, in spite of their respective responsibilities and the same evolution of the Union agencies. For this reason, in 2008 the Court of First Instance (General Court with Lisbon Treaty) applied the reasoning held by the CJEU in the *Les Verts* sentence (Saurer, 2009, pp. 1022ss; Craig, 2015, pp. 367ss)[3] to the agencies (in particular, to the European

[1] See the order in case: T-133/03, Schering-Plough v. Commission and EMEA of 4 December 2007, ECLI:EU:T:2007:365, not published, par. 22.
[2] CJEU, C-294/83, Parti écologiste "Les Verts" v. Parliament of 23 April 1986, ECLI:EU:C:1986:166, p. I-01339.
[3] CJEU, C-294/83, Parti écologiste "Les Verts" v. Parliament of 23 April 1986, op. cit., T-411/06, Sogelma v. European Agency of Reconstruction (AER) of 8 October 2008, ECLI:EU:T:2008:419, II-02791, made in conclusion of a proceeding concerning an application for annulment of the EAR decisions on public procurement. In particular, in paragraphs 36-37, the Judge, comparing the situation of the Community bodies endowed with the power to adopt acts intended to produce legal effects vis-à-vis third parties to that which gave rise to the judgment in Les Verts. and sharing its reasoning, has

Agency for the Reconstruction of the former Yugoslavia) stating that, by that judgment, "the general principle that any act adopted by a Community body intended to produce legal effects towards third parties must be subject to judicial review"[1],can not be deduced from the fact that in the sentence *Les Verts* the CJEU only mentioned the european Institutions, among which the agency in question was evidently not included.

A similar reasoning to the one described above had been invoked a few years earlier, from an Advocate General (Birkinshaw, Varney, 2010, pp. 100ss; Busuioc, 2013, pp. 208ss. Cloots, 2015, pp. 93ss)[2],in an appeal for annulment brought by Spain against Eurojust for the annulment of a decision by the latter concerning the recruitment of staff, vitiated by an alleged violation of the principle of non-discrimination on the basis of certain choices on the requirements for choosing candidates (in particular, the problem lay in a breach of the principle of multilingualism). The CJEU, however, did not follow the conclusions of the Advocate General, stating rather that the challenged acts were not among those on which the CJEU could exercise its legitimacy control; the combined provisions of art. 41 and 35 TEU then in force (Hartkamp, Siburgh, Devroe, 2017, pp. 282ss; Lenaerts, Maselis, Gutman, 2014, pp. 133ss; Wierzbowski, Gubrynowicz, 2015; Türk, 2010; Woods, Watson, 2017, pp. 37ss; Barnard, Peers, 2017, pp. 788ss; Berry,Homewood, Bogusz, 2013; Conway, 2015; Nicola, Davies, 2017; Usherwood, Pinder, 2018),in fact, greatly restricted the competences of the CJEU in the field of police and judicial cooperation in criminal matters. Moreover, in this case the candidates could have challenged the ban which was considered illegitimate under the legislation laid down in the Staff Regulations, without the general principle of full and effective judicial protection being considered to be harmed.

enshrined the general principle under which any act adopted by a Community body intended to produce legal effects vis-à-vis third parties must be subject to judicial review, finding it unacceptable, in a european of law, that such acts sorts can escape judicial control. Principle also enshrined in relation to acts of the EFDO agency, as attributable to the decision-making power of the Commission and, therefore, subject to judicial review, in case: T-369/94, DIR International Film and others v. European Commission of 19 February 1998, ECLI:EU:C:1998:39, II-00357, par. 55.

[1] See the conclusions of the Advocate General M. Poiares Maduro in case C-160/03, Spain v. Eurojust of 16 December 2004, ECLI:EU:C:2004:817, I-02077.

[2] CJEU, C-160/03, Spain v. Eurojust of 15 March 2005, ECLI:EU:C:2005:168, I-02077.

2. The Lisbon Treaty: A General and Residual Protection

Firstly, the agencies of the former third pillar, because of the known, complete, communitarization of that sector, are now equated with the European agencies; however, pursuant to Protocol no. 36 annexed to the Treaties, the acts adopted on the basis of titles V and VI of the TUE (Barnard, Peers, 2017) prior to the entry into force of the Treaty of Lisbon which have not been subsequently amended continue to follow the previous framework which, as seen above with *Spain v. Eurojust* (Groussot, Peturson, 2015; Sànchez, 2012, pp. 1566ss; Tridimas, 2014, pp. 364ss; Von Der Groeben, Schwarze,Hatje, 2015, pp. 820ss; Stern, Sachs, 2016, pp. 756ss; Peers et al. (eds.), 2014, pp. 1523-1538; Meyer (ed.), 2014, pp. 813-826**),** without allow full control of the CJEU. The transitional period, however, is about to end, running out five years after the entry into force of the Reform Treaty. The agencies operating in the Common Foreign and Security Policy (CFSP) sector, however, continue to follow the discipline of that sector and, therefore, to escape from the control of the CJEU, pursuant to art. 275 TFEU (Da Cruz Vilaça, 2014; Folsom, 2017, pp. 278ss; Geiger, Khan, Kotzur, 2016; DECHEVA, 2018). Excluding these sectoral specificities, EU agencies are now explicitly mentioned within many mechanisms of direct control of the legitimacy of acts and behaviors. The action of non-contractual liability, on the other hand, does not explicitly mention the agencies; the CJEU is nevertheless competent to know the causes related to the agencies, by express provision of the deeds establishing the same, within the limits that will be seen later. Furthermore, the fact that the agencies are covered by the exception of invalidity deserves special prominence, since this implies that the legislator has not ruled out that these bodies may issue binding acts of general application. In this regard, moreover, it should be noted that, faced with acts of agencies with general scope, another amendment introduced by the Lisbon Treaty assumes importance for the agencies, and in particular the introduction of "regulatory acts" (Berström,2014, pp. 484ss; Thorson, 2016, pp. 106ss) as acts susceptible to appeal against conditions favored by non-privileged applicants. In fact, the decisions issued by the bodies in question, when they have general scope, seem to be able to fully embrace this category.

The agencies are also mentioned in the provision for a preliminary ruling (article 267 TFEU) (Böttner, Grinc, 2018, pp. 35ss; Barnard, Peers, 2017, pp. 586ss; Foster, 2016; Thies, 2013; Edward, Lane, 2013), which is the culmination of a very significant recognition process. To the picture outlined there are also some provisions that emerge from the Statute of the CJEU, under which the agencies now have the

possibility to intervene in the pending judgments both ad adiuvandum (article 40) and ad opponendum (art 42); in the first case, however, the agencies are not equivalent to the institutions of the Union, having to show an interest in the resolution of the dispute submitted to the CJEU, but not even to natural and legal persons, well being able to intervene even in cases between privileged applicants. Finally, the agencies are also treated as institutions in the burdens, the CJEU being able to request them to provide "all the information it deems necessary for the process" (article 24) (Barnard, Peers, 2017).

Furthermore, the agencies were equally included, and in this case also fully assimilated to the Institutions of the Union, in the provision of some general principles of administrative action that no body of the Union can harm; these are provided for in art. 298, par. 1, TFEU, which states that "in carrying out their tasks the institutions, organs and bodies of the Union are based on an open, effective and independent European administration" (Barnard, Peers, 2017; Nicola, Davies, 2017), as well as art. 41 Charter of Fundamental Rights of the European Union (CFREU) (Groussot, Petursson, 2015; Sànchez, 2012, pp. 1566ss; Tridimas, 2014, pp. 364ss; Von Der Groeben, Scwarze,Hatje, 2015, pp. 820ss; Stern, Sachs, 2016, pp. 756ss; Peers et al. (eds.), 2014, pp. 1523-1538; Meyer (ed.), 2014, pp. 813-826), which also explicitly links the agencies to respect the right of citizens of the Union to good administration.

Ultimately, the reform of the Treaties has therefore extended, in broad and general terms, to the jurisdictional protection offered by the CJEU on the acts and behaviors of the agencies, almost equating them to the institutions of the Union; only two aspects could be underlined which could be taken into consideration for future changes.

The regulation of non-contractual liability does not mention the agencies, but only the institutions and agents (article 340 TFEU) (Barnard, Peers, 2017; Nicola, Davies, 2017): This reflects the legislator's desire to have a free hand in regulating specific cases even without the attribution of powers to the CJEU, circumstance that has been recorded in rather rare cases and that for reasons of uniformity and clarity of the institutional location of the agencies, it could be overcome. The agencies are not in any way included among the legitimates active in the action for annulment, having therefore to place themselves within the category of non-privileged applicants. At the moment, this can still be explained by the fact that they did not want to fully express the potential of delegating executive powers to agencies, as happened on the national level; if this were to happen, the granting of a semi-privileged status similar

to that enjoyed by the European Central Bank and the Committee of the Regions could be necessary to protect the prerogatives of the agencies and make them responsible for defending their powers.

It should be emphasized that the legislation introduced with the reform of the Treaties has a residual nature, because it has been grafted into a situation in which, at the level of secondary legislation, other mechanisms of judicial protection had already been foreseen, which the new legislation does not repeal but on the contrary, it supports, by providing rules of primary rank that guarantee a (high) minimum standard of jurisdictional control. In other words, the provisions just examined constitute a clause for the closure of the system of judicial protection from the acts of the agencies, which aims at avoiding the occurrence of situations in which those who have suffered an injury remain unprotected. Not by chance, in fact, art. 263, par. 5, TFEU (Nowak, 2011; Chalmers, Davies, Monti, 2014; Tilltson, Foster, 2013; Horspool, Humphreys, 2012, pp. 552ss), expressly states that "the acts setting up the organs and bodies of the Union may provide for specific conditions and procedures relating to actions brought by natural or legal persons against acts of such organs or bodies intended to produce legal effects on them" (Barnard, Peers, 2017; Nicola, Davies, 2017).In the rest of the analysis we will analyze in detail the additional protection tools that can be activated with some agencies.

3. The Special Provisions Contained in the Acts establishing the European Agencies

A general examination of the agency's founding acts reveals a rather fragmented context, as was expected, given the particular nature of the interventions. In most cases, there is simply no indication of any possibility of checking the legitimacy of the agencies' work: In all these cases, therefore, the only applicable rules will be those contained in the Treaties. In two circumstances, on the other hand, the possibility of referring the CJEU to censure the actions or behaviors held by the agency deemed illegitimate is explicitly referred to. This, evidently, is a legacy of the situation (and of the uncertainties) prior to the entry into force of the Lisbon Treaty and can only be found in the founding regulations of the European Union Agency for Fundamental Rights (FRA)[1] and the European Aviation Safety Agency

[1] Art. 27, par. 3, of founding regulation of FRA.

(EASA)[1].

In the first case, the CJEU expressly decided to give the power to hear appeals for annulment and inadequacy presented to the agency, under the conditions envisaged by the Treaties: It is probable that, in this situation, the value of the Politics of the agency's field of operation, which was intended to explicitly confirm, at the time in a manner not entirely tautological, the controllability by the courts of Luxembourg.

The second case, on the other hand, is more interesting because the Aviation Safety Agency is also equipped with an internal appeals commission to hear complaints from sector operators (Buess, 2014, pp. 96ss) against the agency's decisions; this specification of a parallel possibility of direct appeal before the CJEU is rather particular, because it is attributed only to the Member States and to the institutions of the Union. Before the entry into force of the reform of primary law, this provision opened interesting scenarios on the possibility of a more incisive control of the work of the agency by privileged applicants; to date, in truth, it does not seem to attribute any more possibility that is not already foreseen by the Treaties themselves (Busuioc, 2013, pp. 199-200).

In another case, related to the European Medicinal Agencies (EMA) (Vos, 2012, pp. 370ss; Groenleer, 2012, pp. 136ss), it is possible to request an internal body of the agency to re-examine its position (Hoffmann, Morini, 2012, pp. 422ss). A similar situation is thus outlined, but not framed in the more complex mechanisms of preventive protection that will soon be examined; in this case, in fact, there is a possibility of internal auditing of the agency by the same body that has already adopted the deed. In particular, in the authorization procedure for the placing on the market of medicinal products, a scientific committee within the agency itself issues an opinion, which is then transmitted to the EC which in fact confines itself to validating its content assuming formal responsibility for the act. If the committee's opinion is negative, it may be re-examined by the committee itself. The applicant must provide detailed reasons for the review request (Hoffmann, Morini, 2012)[2], which will then be carried out by a rapporteur, and a possible co-rapporteur, other than those appointed for the initial opinion, but always internal to the committee. The review procedure will cover only those points of the opinion identified by the applicant and can only be based on scientific data that were available at the time of the adoption of the initial opinion by the Committee. The most important and

[1] Art. 51 of founding regulation of EAS.
[2] Art. 9, par. 2, of founding regulation EMA.

emblematic cases of the mechanisms of preventive protection contained in the instruments establishing the agencies are, however, others, which concern the possibility of a re-examination by a Board of Appeal within the agency, or an administrative appeal before the EC (Busuioc, 2012, pp. 720ss).

In both cases, which can also coexist in the same agency, then emerge a plurality of forms of protection that significantly amplify the possibilities for the individual to obtain justice. The second instrument was born with the first agencies of 1975 and then was replicated in a few other cases; now it seems, in truth, to have fallen into disuse. The former, on the other hand, can be considered a standard measure that is adopted whenever the agency is expressly endowed with binding decision-making powers towards natural or legal persons. It has been argued that the granting of quasi-judicial powers to internal commissions "should constitute the ordinary system of administrative protection towards the satellite administration"; this does not seem to be entirely acceptable, since this option has been mentioned during the inter-institutional debate on the setting of agencies and not in the last of 2008[1]. Furthermore, it has not been qualified in the main or subordinate mechanisms of administrative protection, as also emerges from the recent joint declaration, where the EU legislator has limited itself to dictating certain commitments to improve their functioning[2].

It should also be noted that no other administrative or para-judicial appeal has ever been mentioned in the interinstitutional debate, not even the existing one of the administrative appeals to EC (Egeberg, Trondal, Vestlund, 2015, pp. 611ss). Furthermore, the EU legislator has drawn a clear parallel between the conferral of decision-making powers to agencies and the provision of internal commissions for the review of the exercise of the same. It does not seem possible to say that the Union legislator has obliged to provide an internal commission with any agency with binding powers and, consequently, it does not seem possible to affirm that this protection mechanism must constitute the ordinary system of protection in respect of acts of the agencies. In any case, it should be noted that, in fact, the legislator has

[1] See the Commission Communication COM (2002) 718 final of 11 December 2002, setting up of regulatory agencies, in particular p. 11 and 14, as well as the draft interinstitutional agreement on the framework for regulatory agencies, presented by the Commission on 25 February 2005, COM (2005) 59 final, in particular p. 17. There is no indication, however, in the Communication from the Commission to the European Parliament and the Council on the future of the European agencies of 11 March 2008, COM (2008) 135 final.

[2] Joint Declaration by the European Parliament, the Council of the European Union and the European Commission on Decentralized Agencies, 19 July 2012, in particular in par. 21; not published.

always followed this practice, but also extends it to agencies that are not expressly endowed with such powers.

4. The Peculiar Nature of the Boards of Appeal.

By virtue of the aforementioned parallelism between the provision of binding powers and the establishment of a Board of Appeal, the agencies endowed with the latter are those competent in the fields of trademarks, designs and patents (European Union Intellectual Property Office-OHIM), plant varieties (Community Plant Variety Office (CPVO)), European Chemicals Agency (ECHA), Air Safety (EASA), Energy (European Union Agency for the Cooperation of Energy Regulators (ACER); In addition, the three agencies: European Banking Authority (EBA), European Agency and Occupational Pensions Authority (EIOPA) and European Securities and Markets Authority (ESMA) (Georgosouli,2016; Wymeersch, 2012; Iglesias-Rordìguez,2018, pp. 590ss)[1] (with European Space Agency (ESA)) have a joint Board of Appeal (Ossege, 2016).

Europol and Eurojust, while not having binding powers towards individuals, collect a series of personal information during their duties in the field of transnational crime (Herwig, Hofmann, Rowe, Türk, 2018, pp. 163ss); therefore, each has its own common supervisory authority (the rather ambiguous adjective refers to the fact that the members of these are appointed by each Member State (Dammann, 2004)[2], competent to monitor the processing of personal data by the agency within which it

[1] Respectively established through the adoption of the regulations already cited in num. 52, or the EU regulations of the European Parliament and of the Council of 24 November 2010: n. 1093/2010 which establishes the European Banking Authority (EBA); n. 1094/2010 establishing the European Insurance and Occupational Pensions Authority (EIOPA); n. 1095/2010 establishing the European Securities and Market Authority (ESMA). As emphasized by the doctrine, however, "(...) the regulations of the 2010 did not intervene on the national allocation of the supervisory, information and inspection, and have invested the regulatory profile by formally giving the new authorities (the European Banking Authority and its sector counterparts: ESMA and EIOPA), established on the ashes of the old third-level committees of the Lamfalussy procedure, an important function of collaboration with the European Commission in the preparation of the legal rules of non-legislative status (meaning, according to the systematic sources of the TFEU) intended to complete-depending on the case, through delegated acts or implementing acts pursuant to art. 290 and 291 TFEU- the framework regulatory framework designed, in its founding elements, by the legislative provisions of the Council and of the European Parliament (...)".

[2] An interesting analysis, as it is transversal, of the work of the committees of appeal of the various agencies can be found in the detailed sheet no. 10, Boards of appeal, p. 3. An independent work, not linked to the negotiations of the joint declaration, is instead that of Dammann which, unfortunately, is limited to the analysis of the only two Boards of Appeal then present, or those of OHIM and CPVO.

is constituted[1]. This choice was not followed in all the agencies exposed to the processing of a large quantity of personal data, since other agencies like Frontex do not have a para-judicial body but an internal office, despite the attention shown in the regulation establishing the same agency to protect them[2].

The nature of the committees of appeal is difficult to frame, since it is characterized in part by some choices of independence that characterize the activity in a quasi-jurisdictional sense and, in other part, for strong peculiarities that betray a persistent belonging to the internal dimension of the agency itself. Generally speaking, however, it should be stressed that it does not seem possible to state that they are genuine independent judicial bodies located in the various agencies, but rather internal bodies with the same, however, considerable independent and jurisdictional duties.

The GCsi is clearly expressed in this sense, in relation to OHIM's appeal commissions, identifying and welcoming the presence of a "functional continuity" (Schuibhne, Gormley, 2012)[3] between the agency and the Boards of Appeal, which are part of the former and contribute to the implementation of the Regulation establishing this[4]. Again with regard to the same Boards of Appeal, GC itself acknowledged that the latter cannot be classified as "court". Consequently, the appellant cannot validly claim a right to a fair "trial" before the Boards of Appeal of the Office for the Harmonization of the Internal Market[5].

The function of the committees of appeal within the agencies is framed within the adjudication activity, particularly known to some administrative courts of the common law systems (Harris, 1999, pp. 44ss), which consists of "a re-evaluation of the legal and substantial effectiveness and of the acceptability of the original decision by a body that is not part of the structure of the primary decision maker" (Blair, 2013, pp. 170ss). In relation to the Joint Board of Appeal of the three financial supervisory authorities, the doctrine expressed a similar position, stating that it is not a

[1] Note that this choice is most likely inspired by the structure of INTERPOL, where one is planned: Commission de contrôle des fichiers d'INTERPOL disciplined from Règlement relatif au contrôle des informations et à l'accès aux fichiers d'Interpol.
[2] See art. 11-13 of founding regulation of FRONTEX.
[3] See the case: T-163/98, The Procter & Gamble Company v. OHMI of 8 July 1999, ECLI:EU:T:1999:145, II-2383, par. 38; T-252/04, Caviar Anzali SAS v. OHMI of 11 July 2006, ECLI:EU:T:2006:199, II-2115, par. 29.
[4] See, T-163/98, The Procter & Gamble Company v. OHMI of 8 July 1999, op. cit., par. 37.
[5] See, T-63/01, The Procter & Gamble Company v. OHMI of 12 December 2002, ECLI:EU:T:2002:317, II-5255, par. 23

supervisory or policy making committee. It is an appeal board with an adjudicative function. It will approach its task according to the type of decision under appeal" (Baratta, 2011, pp. 297ss; Rosas, 2012, pp. 105ss; Lock 2011, pp. 576ss; Lenaerts, Maselis, Gutman, 2014, pp. 552ss; Parish, 2012, pp. 143ss; Orellana Zabalza, 2012, pp. 62ss; Cremona, Thies, Wessel, 2017; Baratta, 2011, pp. 298ss)[1].

More specifically, the role of the Boards of Appeal seems to vary hand in hand with the scope and the incisiveness of the powers attributed to the agencies, while remaining always attached to the characteristic of the first referee of the legitimacy of the work of the same. The reasons for this border-line nature, not entirely jurisdictional but not even clearly administrative, are evidently found in the need to have an organism that is at the same time a high technical competence, a deep knowledge of the internal mechanisms of the agency and jurisdictional capacity, remaining independent from the agency itself but not totally unrelated to its logic: All needs that, obviously, can be realized differently according to the individual agencies.

From the analysis of the committees of internal recourse to the agencies, a parallel phenomenon seems to emerge, perhaps even alternative to the creation of specialized courts within the CJEU, that is the fragmentation of the jurisdictional competences of the Union within its administrative dimension (which, in turn, constitutes another tendency for the more general fragmentation of jurisdictional functions in the Union to the advantage of the national and international level, as taught by the experience of the Unified Patent Court (Hilty, Jaeger, Lamping, Ullrich, 2012, pp. 12ss; Lamping, 2011; Troncoso, 2013, pp. 232ss; Ullrich, 2013, pp. 589-610; Pila, Wadlow, 2015; Storey, Pimo, 2018; Rosati, 2013; Barnard, 2016; Cloots, 2015; Andersen, 2012; Bradley, Travers, Whelan, 2014, pp. 178ss; Ilardi, 2015, pp. 146ss; Tilmann, Plasmann, 2018, pp. 210ss)[2].

[1] CJEU, Opinion 1/09 (Unified Patent Litigation System) of 8 March 2011, ECLI:EU:C:2011:137, I-01137.

[2] Council Regulation (EU) No1260/2012 of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements, OJ L 361, 31.12.2012, p. 89-92. The agreement, in fact, not only concerns the jurisdiction in disputes concerning European patents and European patents with unitary effect, but also contains various rules of a substantive nature that would have found a more rational positioning within the regulation. CJEU, C-235/87, Matteucci of 27 September 1988, ECLI: EU:C:1988:460, ECR 05589, para. 22. C-478/07, Budějovický Budvar National Corporation v. Rudolf Ammersin GmbH of 8 September 2009, ECLI:EU:C:2009:521, ECR I-07721, para. 44. CJEU, C-121/85, Conegate Limites v. HM Customs & Excise of 11 March 1986, ECLI:EU:C:1986:114, ECR I-01007. CJEU, Joined cases C-241/91P and C-242/91P, Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v. European Commission of 6 April 1995, ECLI:EU:C:1995:98, ECR I-00743. C-351/15P,

In fact, although a decade ago the EC had advocated a system of judicial protection based on the coexistence of internal commissions and specialized courts[1] and although in the margins of the signing of the Treaty of Nice the Luxembourg government had declared not to claim the headquarters of the Boards of Appeal of OHIM in case they had become specialized courts of the CJEU, leaving therefore to intend a path of evolution from an internal dimension to the administration to a properly independent one, to today can be affirmed how, in fact, the committees of appeal have replaced specialized courts, never established to a greater degree than that specialized in the matter of the public function.

This phenomenon certainly raises the technical level of the judgments, but it must be kept under control so as not to risk undermining the general coherence of EU law. In this regard, the fact that the GC constitutes a substantial degree of "appeal" (the decisions of the Boards of Appeal are, in fact, challengeable before the CJEU of the European Union) offers a guarantee of uniformity of inestimable judgment, which however certainly implies a significant expenditure of energy by the judges of Luxembourg, who see themselves invested with a considerable number of very technical causes. At the same time, it can not fail to underline how the decision not to evolve the boards of appeal in real specialized courts, understandable for the aforementioned needs of an autonomous controller but expert in the internal dynamics of the agency, leads as a corollary a lowering of guarantees impartiality for the applicants. In fact, the committees of appeal, also because of their very nature, do not meet the requirements of independence in the appointment, in the status of judges and in the composition of the judicial panel guaranteed by the CJEU, in its various forms.

In any case, the solution of not evolving the committees of appeal in real specialized courts still seems valid, precisely because it guarantees that intermediate level between administrative protection and judicial protection that, to the detriment of some guarantees of third party, recovered thanks to the subsequent appeal in Luxembourg, allows a first litigation connoted by an incisive technical-scientific control on the merits of the decisions of the agency, difficult to achieve within a truly

European Commission v. Total and Elf Aquitaine of 18 January 2017, ECLI: EU: C: 2017: 27, published only in the electronic Reports of cases. C-434/13P, European Commission v. Parker Hannifin Manufacturing and Parker-Hannifin of 18 December 2014, ECLI: EU: C: 2014: 2456, published only in the electronic Reports of cases. T-747/15, EDF v. European Commission of 16 January 2018, ECLI: EU: T: 2018: 6, published only in the electronic Reports of cases. C-473/93, European Commission v. Luxembourg of 2 July 1996, ECLI: EU: C: 1996: 263, I-3207.

[1] Communication from the Commission COM (2002) 718 final, op. cit.

european jurisdiction such as the CJEU. Surely, however, a system that multiplies the levels of protection would raise many doubts, providing for an appeal to a specialized court following a first action before the Board of Appeal: In this case, in fact, a system characterized by four or five levels of appeal, which seems frankly excessive.

5. The Dispute before the Boards of Appeal and the Relations with the CJEU

Apart from the specificity of the Joint Supervisory Authorities of Europol and Eurojust, competent to control the legitimate management and holding of personal data by the two agencies, the Boards of Appeal are usually responsible for monitoring binding decisions issued by the agencies. These decisions can be detrimental to both private and public interests; the first case is the most frequent and dating back in time, the second is due to the binding powers attributed to agencies operating in the financial and energy sectors, which can also be exercised against national authorities, who also have the right to challenge the decision to them addressed. However, it is hardly necessary to point out how, at this juncture, national authorities are treated as equivalent to the other recipients, under private law, of the agencies decisions, without enjoying a privileged status similar to that assigned to the Member States under article 263, par. 2, TFEU, consistent with the practice that does not extend these privileges to the decentralized articulations of the same, different from the government structure (*Barnard, Peers, 2017; Nicola, Davies, 2017*)[1].

Almost all of the Boards of Appeal have internal rules of procedure, with the sole exception of CPVO, whose founding regulation, however, contains a rather detailed framework of procedure before the Board of Appeal[2]. These procedural rules, however, are not contained in legal sources of the same value: In the case of OHIM[3] and ECHA (Chamon, 2014, pp. 328ss)[4] these are Commission regulations, while in

[1] Commission Regulation (EC) No 216/96 of 5 February 1996 laying down the rules of procedure of the Boards of Appeal of the Office for Harmonization in the Internal Market (Trade Marks and Designs), OJ L 28, 6.2.1996, p. 11-13.
[2] Art. 67-82 of founding regulation of CPVO.
[3] Regulation (EC) n. 771/2008 of the Commission of 1 August 2008, in GUUE L 206 of 2 August 2008, p. 5.
[4] For ACER, this is the decision n. 1/2011 of the Board of Appeal of 1 December 2011; for EBA, ESMA and EIOPA of Decision No 2/2012 of the Board of Appeal; for EASA, to be precise, it is both the regulation (CE) n. 104/2004 of the Commission dated 22nd January 2004, in OJ, L 16 of January 23rd

all other cases of the decisions of the Boards of Appeal themselves (or, for Eurojust[1] and Europol[2], of the joint supervisory authorities). In both cases, this is a derivative right of the Union (which, in the case of the decisions of the Boards of Appeal of the agencies, is characterized by strong atypical features) and for what the founding regulation of the agency is in any case intended. Faced with a source of the same hierarchical level, having an interpretative precedence, as a general source that dictates the principles regarding appeals, there remains a significant difference between the different agencies that deserves to be underlined and taken into account by the interpreter.

All internal committees of appeal have the power to suspend the effects of the contested act[3]; the same cannot be said for the joint supervisory authorities of Eurojust and Europol, probably because the complaints relating to the protection of personal data do not have the same precautionary requirements as those relating to the decisions of the other agencies.

The founding regulations of the agencies usually attribute to the knowledge of the Boards of Appeal (and, therefore, allow the appellants to challenge) only specific decisions; the Plant Variety Office also provides for the possibility that certain of its decisions are appealed to the CJEU[4], while several other agencies expressly provide that the decisions which cannot be challenged before the Board of Appeal are open to appeal before the courts of Luxembourg, conditions dictated by the Treaties, as a rule to close the system to safeguard judicial protection[5]. These cases are attributable to explicit attributions of competence to the CJEU which, following the entry into force of the Lisbon Treaty, are tautological. Rather, it should be noted that the two offices of vegetable varieties and brands, designs and models do not provide for such rules, since they are endowed with a peculiar mechanism of a more administrative type.

2004, p. 20, which dictates some general rules, both of a decision of the Board of Appeal of which, however, the details were not disclosed, which instead contains the detailed rules of the procedure.

[1] Act of the Joint Supervisory Authority of the Eurojust of 23 June 2009, in OJ, C 182 of 7 July 2010, p. 3.

[2] Act No. 29/2009 of the Europol Joint Supervisory Authority of 22 June 2009, in GUUE C 45 of 23 February 2010, p. 2.

[3] Art. 58 of the regulation establishing OHIM; art. 67 of the founding regulation of CPVO; art. 44, par. 2, of the regulation establishing EASA; art. 91, par. 2, of the founding regulation of ECHA; art. 19, par. 3, of the regulation establishing ACER; art. 60, par. 3, of the regulations establishing ESAs.

[4] Art. 74 of founding regulation of CPVO.

[5] Article 94 of the founding regulation of ECHA; art. 61 of the regulations establishing ESAs; art. 20 of the regulation establishing ACER; art. 51 of the regulation establishing EASA.

Some criticism has been raised about the contestable decisions before the Board of Appeal of the Chemicals Agency (Chamon, 2014), since the regulation establishing the latter would limit the possibilities for appeal, leaving out some decisions which, on the other hand, can be extremely important for operators in the sector. Consider, for example, the decision that denies the company that wants to register a chemical substance to present certain information separately from other competing companies that register the same substance, risking revealing its industrial secrets to the former; or, decisions regarding access to the so-called "Substance Information Exchange Fora" (Bartosch, 2010, pp. 442ss), a system through which preparatory work for the registration of new substances is carried out; or again, the decision to reject the petition for the confidential treatment of certain data (Bartosch, 2010).

In all these cases, which cannot be challenged before the Boards of Appeal, the appellant can now bring an appeal before the CJEU, which make internal remedies committees of the basic rules for obtaining a detailed review of the technical and scientific choices of the agency guaranteed by the reform of the primary right to challenge. Every act of production of legal effects before the CJEU should not justify some gaps in the internal audit system of the agencies. It seems most appropriate to leave the judges of Luxembourg with a nomofilattico function and, at the same time, to avoid depriving the sector operators of a judge with extensive technical and scientific expertise and not limited, in his analysis, to the simple control of flawed errors of rating.

The structure of the dispute within the agencies can be divided into two categories, depending on whether or not there is a prior check on the appeal before the Board of Appeals.

The first model, used in the cases of Europol, Eurojust, of the Agency for the Cooperation of National Energy Regulators and of the European Financial Supervision Authorities, is of the two-phase type, because it provides that the decision of the agency is directly challenged by the recipient before the Board of Appeal (or, in the first two cases, to the Joint Supervisory Authority). In this typology the Community Plant Variety Office may also be included, where however a mechanism of interlocutory revision is foreseen, such that the service of the Office that prepared the decision can decide to rectify it, following the appeal before the internal commission if it considers that the appeal is admissible and well founded.

The second model, instead, which is found in the three remaining cases, presupposes a mid-term review of the agency's decision, usually carried out either by the same

office that issued it[1], or by the executive director[2], which must necessarily precede any appeal. In fact, it is only at a later stage that it will be possible to challenge the confirmation of the decision before the Board of Appeals: For this reason, it can be defined as three-phase. The decisions of the internal commissions are, then, always challengeable before the Court, competent to know the related appeals by virtue of the well-known system of distribution of powers among the judges of Luxembourg; in all cases, in fact, there is a clause providing that the agency will comply with the decision of CJEU[3]. The possibility of challenging the decisions of the internal committees is particularly important not only to guarantee a second degree of justice, as well as a general consistency and uniformity with EU law, but also because the judges of Luxembourg are nevertheless given powers unknown to the commissions of appeal: Above all, the power to order the agency to pay compensation for damages caused to the claimant and to take into account in the decision of the dispute also the possible illegality of acts of general application, through the experiment of an exception of illegitimacy pursuant to art. 277 TFEU by the economic operator to whom the agency decision is based (Chamon, 2014).

Before examining in more detail some specificities of the appeal to the CJEU, it should be noted that this form of preventive protection does not seem to be circumvented by a direct appeal to the courts of Luxembourg. In the single case of the Air Safety Agency, this is explicitly stated[4]; in other cases, such an interpretation seems to be supported by the CJEU jurisprudence (in particular in the Keeling case[5])and by the spirit of the agency's founding acts, which, as discussed above, provide for direct action before the Luxembourg courts as an exceptional hypothesis residual, in the absence of the possibility of bringing an action before the internal commissions. A similar conclusion, however, can also be found in relation to the opinions of the scientific committee within the Medicines Agency, which is also mentioned here if, as will be remembered, it is a form of preventive protection not exactly framed in the form of protection now under consideration, being provided

[1] Art. 70 of founding regulation of CPVO.
[2] It's the case of OHIM (art. 61 and 62 of founding regulation).
[3] It's the case of EASA (art. 47 of founding regulation) and ECHA (art. 93 of founding regulation). See also: art. 73 of the founding regulation of CPVO; art. 65 of the regulation establishing OHIM; art. 50 of the regulation establishing EASA; art. 94 of the founding regulation of ECHA; art. 61 of the regulations establishing ESAs; art. 20 of the regulation establishing ACER.
[4] Art. 50, par. 2, of founding regulation of EASA.
[5] See the order: T-148/97, David T. Keeling v. OHIM of 8 June 1998, ECLI:EU:T:1998:114 II-2217, par. 33. In this sentence, in short, it does not open to the possibility of a direct revision of the Office's acts precisely because of the fact that the regulation establishing the same already provides for other mechanisms (namely, the use of internal commissions, then appealed before the CJEU).

by the same office that issued the contested act[1].In this case, in fact, the failure to launch an internal appeal at the same office that adopted the contested opinion would be an acceptance of the technical assessment of the agency, which would seem to prevent a subsequent censorship of the legal act (Busuioc, 2012, pp. 208ss).

The only two cases in which there is a special regulation for the use of CJEU are those of the two Offices for plant varieties and for trademarks and designs: In both cases, with an almost identical rule, it is specified that the Court can either to annul or to reform the decision of the Board of Appeal and limits the possibility of recourse to specific legal grounds (overlapping with those listed in article 263, paragraph 2, TFUE (Nowak, 2011. Chalmers, Davies, Monti, 2014; Tillotson, Foster, 2016; Horspool, Humphreys, 2012) and to certain persons. Among the persons entitled to take action at the CJEU, the only difference between the two offices emerges, since in the first case only those who have been partially unsuccessful can act in court, while in the second case such eventuality is not taken into consideration. The result that the review by the Luxembourg courts seems open only in the event of a total loss.

In all other cases, however, reference should be made directly to the discipline dictated by art. 263 TFEU, except for the Air Safety Agency, whose founding regulation does not provide for an ad hoc discipline, nor does it refer to the Treaties, which however can certainly be called into question to fill the gap (Busuioc, 2013).

The decisions of the internal common control authorities of Eurojust and Europol, on the other hand, deserve to be dealt with separately, both in relation to the possibility of a direct appeal, by circumventing the preventive protection offered by the internal offices to the agencies, as to the possibility of challenge the decisions of the latter before the CJEU of the European Union. It should be recalled that the joint supervisory authorities do not have the power to suspend the activity of preservation, processing and use of personal data by Eurojust and Europol pending the review process. This point deserves to be highlighted because of the importance of precautionary protection in the European litigation system as a fundamental instrument for a full guarantee of the right to an effective remedy enshrined in art. 47 CFREU (Saffian, Düsterhau, 2014, pp. 3ss; Mak, 2012; Lebrun, 2016, pp. 433ss), although, obviously, the protection of personal data is an area where the precautionary needs are less marked. Therefore, it can not but be noted that the individual can not be subtracted from the right to see his position protected pending

[1] Article 23, par. 8, of the decision establishing the Eurojust and art. 34, par. 8 of the Europol decision.

resolution of the dispute and, consequently, directly challenge before the Luxembourg courts the act of Europol or Eurojust in which to realize an illegitimate management of personal data capable of causing immediate and deserving injuries of urgent measures.

On the second aspect, namely the possibility of challenging the decisions of the Joint Supervisory Authorities before the Luxembourg courts, it should be noted that this was not provided for in the decisions establishing the agencies, due to specific political choices by the Member States to avoid being obliged to provide sensitive data.

It may be questioned whether, due to the residual legal protection explicitly confirmed by the Lisbon Treaty, a decision of the joint supervisory authority can not be challenged as a productive act of legal effects towards third parties. The answer seems to depend on the interpretation that we want to give to art. 263, par. 5, TFEU (Oppermann, Classen, Nettesheim, 2016; Schütze, Tridimas, 2018; Barnard, Peers, 2017, pp. 288ss), which can be read in two ways: On the one hand, it could be argued that this provision expressly recognizes the possibility that the legislator, by means of secondary legislation, lays down specific rules to regulate appeals concerning certain agencies in particular way, even going so far as to exclude the possibility of checking the legitimacy of the acts adopted by the agencies in terms of decisions taken through these specific rules. On the other hand, however, it could be noted that art. 263, par. 5, TFEU simply provides for the possibility of identifying specific conditions and modalities for the individual sectors, such as the prior submission to an internal appeal committee, without however these modalities or conditions come to deny the very possibility of having recourse to the CJEU. The second interpretation certainly seems more in line with the spirit of the reform and with the general context of the Treaties.

Given this general classification of the dispute before the Boards of Appeal, it is appropriate to examine in more detail the rules concerning their composition. In fact, the mechanisms for appointing committee members, the subjective requisites required of them, their subsequent status, as well as the choices relating to the composition of the judicial colleges reflect the peculiarities of these forms of preventive protection and have a significant impact on the level of judicial protection offered to operators in the sector.

6. Procedure of Appointment of the Members of the Commissions

The procedure for appointing the members of the Boards of Appeal is not the same in all cases and, on the contrary, presents some differences. In the case of EASA, ECHA and ACER, it follows that provided for the executive director: The EC then draws up a list of names, from which the agency's board of directors chooses and appoints the winning candidates. The same procedure also applies in the case of the three European Financial Supervision Authorities (ESA), which have a single Joint Board of Appeal (where, however, the Executive Director is named differently). In the case of ECHA, ACER and the ESAs, it is specified that the EC must draw up the list following a public call for expressions of interest published in the Official Gazette (Harlow, Rawlings, 2014, pp. 341ss)[1] (and "in other media and websites"[2], further specifies the founding regulation of ECHA), while nothing similar is stated in the case of EASA[3]. The boards of directors of ACER and the ESAs must first consult the respective plenary bodies formed by the national independent authorities; that in the latter case, given that the Board of Appeal is a joint body of the three authorities, each board of directors will appoint one third of the members.

It is interesting to note that, demonstrating the "internal" nature of the body in question, it was possible to raise one or more members of the Board of Appeal from carrying out their functions if "serious reasons" are not specified. As regards ACER and the ESAs, this power has been attributed to the board of directors, always following consultation with the Regulators Committee and the Board of Supervisors[4]; in EASA and ECHA case, however, the same procedure is not followed exactly for the appointment of the same members, since any exemption is decided by the EC, having heard the opinion of the board of directors[5].

In the OHIM (Grynfogel, 2011, pp. 129ss) and CPVO cases, the first agencies of the Union in which appeals committees were set up, the mechanism for appointing members is slightly different, since conceptually it is necessary to separate the appointment of the Chairman of the Board of Appeal (in case of OHIM, of the Boards of Appeal, since this agency is the only one to have five different commissions in

[1] See art. 18, par. 2 of the ACER settlement regulation; art. 58, par. 3, of the three different founding regulations of EBA, EIOPA and ESMA; for ECHA.
[2] See art. 89, par. 3, of founding regulation of ECHA.
[3] Cfr. art. 41, par. 3, of founding regulation of EASA.
[4] See art. 18, par. 3, of the regulation establishing ACER; art. 58, par. 5, of the ESA founding regulations.
[5] See art. 90, par. 4 of the ECHA founding regulation and art. 42, par. 4 of the regulation establishing EASA.

place of one) by the appointment of the other members of the committee.

In the first case, the Chairman is appointed according to the same procedure as the Executive Director, then with a Board decision based on a list of at least three candidates prepared by the agency's board of directors[1]. The members of the various boards of appeal and their substitutes are then appointed by the board of directors (Busuioc, 2013)[2]; over the years a practice has been established, to which neither the founding regulation of the agency nor the statute of the Boards of Appeal mention, so that the decision of the board of directors is anticipated by the consultation of an ad hoc committee set up by the same board of directors and usually composed of the President or Vice-President of the Agency, the Chairman of the Boards of Appeal, the Chairman of the Agency's Board and the Budget Committee, as well as national representatives up to a number of 6 or 7 members, making a pre-selection of candidates, increasing the impartiality and independence of the candidates who will be subsequently appointed[3].

Even in CPVO case, the Chairman of the Board of Appeal (currently only one, although the founding regulation of the agency admits that more than one can be established[4])is appointed by the Council, on the basis of a list proposed by the Commission and not by the agency's board of directors (which must, however, have to be consulted by the EC)[5]. This procedure was considered extremely effective in assuring the independence of the candidate, but also "time-consuming and administratively very heavy to handle"[6]. The other members of the Board of Appeal are then appointed by the President, on the basis of a list drawn up by the Board of Directors which in turn acts on the basis of a proposal from the Bureau Agency[7].

The procedure for exempting some members of the commissions from carrying out their functions in these two cases is extremely different from the one described above, since in these cases the decision is taken by the CJEU, activated by a request from the EC following the advice of the Administrative Council (in CPVO case[8]), or by the board of directors acting on the proposal of the Chairman of the Boards of Appeal (in the case of OHIM, if the President is to be exonerated, the CJEU is

[1] See the combined provisions of Articles 136 and 125 of the founding regulation of OHIM.
[2] Art. 136, par. 2, of founding regulaton of OHIM.
[3] Joint Board n. 10, Boards of appeal, op. cit.,
[4] Art. 46 of founding regulation of CPVO.
[5] Art. 47, par. 1, of founding regulation of CPVO.
[6] Joint Board n. 10, Boards of appeal, op. cit., p. 4.
[7] See the combined provisions of articles 46, par. 2, and 47, par. 2, of the regulation establishing CPVO.
[8] Art. 47, par. 5, of founding regulation of CPVO.

referred to the Council[1]).

Given the delicacy of the interests at stake, the role of protection of the right attributed to CJEU by art. 19 TEU and that of the protection of the general interest of the Union assigned instead to the EC by art. 17 TEU, the mechanism envisaged in CPVO case seems undoubtedly preferable, especially in comparison with the procedures implemented for the most recent, far less guaranteeing committees of appeal, despite the greater political relevance of the decisions that they may make (think, to example, to complaints against the decisions of the Financial Supervision Authorities).

Lastly, as regards Eurojust and Europol, the appointment of the members- as the name of the bodies in question, the "joint supervisory authorities" already suggests- is extremely more intergovernmental, with each Member State holding a power to appoint one (Eurojust[2])or two (Europol[3])members, as well as their substitutes, in accordance with their national laws. While in the first case it is explicitly stated that the same Member States may also revoke the appointment, and not for the "serious reasons" envisaged for the other agencies on the basis of revocation principles applicable under the domestic law of the Member State of origin, the decision establishing Europol does not cover this possibility.

7. Subjective Requirements for the Appointment of Members of the Boards of Appeal and their Subsequent Status

Although the nomination procedures are quite different, in all cases the members of the Boards of Appeal must meet a general requirement of independence, affirmed in all the founding regulations[4] of the agencies and always accompanied by the explicit provision of their freedom from any type of education or constraint. Only in the case of Eurojust is there a difference, since the requirement of independence is stated in a less direct way, asking that the Member States, according to the rules provided in the respective laws, appoint a judge or a person "who performs functions that give it

[1] Art. 136, par. 1 and 3 of founding regulation of OHIM.
[2] Art. 23, par. 1, of founding decision of Eurojust.
[3] Article 34, par. 1, of the decision establishing Europol. It is emphasized that, in this case, the members of the joint control authority are chosen from among the members of the independent national supervisory authority, governed by art. 33 of the same source.
[4]art. 18, par. 3, of the regulation establishing ACER; art. 136, par. 4 of the regulation establishing OHIM; art. 47, par. 3, of the regulation establishing CPVO; art. 42, par. 2, of the regulation establishing EASA; art. 90, par. 2, of the founding regulation of ECHA; art. 59, par. 1, of the founding regulations of the three ESAs; art. 34, par. 1, of the decision establishing Europol

an adequate independence"[1].

The biggest differences are recorded on two fronts: Firstly, on the explicit request for technical expertise in the field of operation of the agency. This requirement is only found in the founding regulations of ACER[2] and the European Financial Supervision Authorities (where it is expressed in great detail)[3]. Secondly, less marked differences are found with respect to another requirement (rectius: to a corollary of the general title of independence), ie the prohibition to perform other duties within the agency.

This principle is not stated, at the level of the decision establishing the agency, for the members of the common control authorities of Europol and Eurojust; however, it is mentioned in the statute of the two authorities[4]. It should be emphasized that in any case it would have been substantially implicit, especially in the case of Europol, where the members must come from independent national supervisory authorities and, consequently, will be persons who are obviously not included in the agency staff; in the second case, however, the clarification is of greater importance, in particular in relation to the more general requirement, just examined, of a person "who exercises functions that confer an adequate independence"[5]. Vice versa, in the founding regulations of all the other agencies, it is stated that "the members of the Boards of Appeal can not perform other functions in the agency"[6];in some cases, however, it is added that "members of the Board of Appeal may be employed on a part-time basis"[7], probably because in some cases the Boards of Appeal have a workload that allows ad hoc meetings. An example in itself and particularly interesting is that of OHIM, where the principle under consideration is affirmed in a less incisive way. The relevant founding regulation, in fact, does not state a general prohibition, but an exclusion from certain positions: "the chairman of the Boards of Appeal, as well as the chairmen and members of the individual Boards of Appeal can not be examiners or members of the opposition divisions, of the legal and

[1] Art. 23, par. 1, of the founding decision of Eurojust, par. 3.
[2] Art. 18, par. 1, of founding regulation of ACER.
[3] Art. 58, par. 2, of the founding regulations of ESA.
[4] Article 3, par. 4 of the Joint Supervisory Authority Act of 23 June 2009, cited above; art. 4, par. 2, of the Joint Supervisory Authority Act of June 22, 2009, op. cit.
[5] Art. 23, par. 1, of the founding decision of Eurojust.
[6] Article 90, par. 3, of the founding regulation of ECHA; cfr. also art. 18, par. 3, of the regulation establishing ACER and art. 59, par. 1, of the founding regulations of the three ESAs, which express the same concept with different words.
[7]Art. 42, par. 3, of the regulation establishing EASA; analogy, art. 47, par. 4 of the regulation establishing CPVO.

administrative division of European trade marks and models or cancellation divisions"[1].

This point is particularly interesting given that, precisely in relation to OHIM, during the negotiations of the joint declaration concerns were raised that many members of the Boards of Appeal had previously worked within the agency itself, also in of numerous difficulties encountered in recruiting sufficiently qualified personnel but without previous ties with other agency administrative offices[2].

In this regard, the joint declaration stated that "the recruitment of members of the boards of appeal between the staff of the agency and/or the members of the board of the agency dealt with very cautiously and (without) putting in discussion of the aforementioned principles of impartiality and independence"[3]. The terms used are not without doubt the strongest, but we must also consider that, even with regard to the experience of OHIM, there have not yet been any problems of poor impartiality[4].

This is due to the presence of detailed rules that further regulate the independence, transparency and possible conflicts of interests of the members of the Boards of Appeal, as well as the possibility of their abstention and recusal by the applicants (the latter, however, not provided for in the joint control authorities of Eurojust and Europol). It is hardly necessary to point out, as a further demonstration of the hybrid nature of these commissions, that these provisions are not, however, accompanied by the attribution to the members of the commissions of a status comparable to that of the CJEU judges: In particular, the strengthening the immunity of jurisdiction that members of the Boards of Appeal derive from their membership of the agency's staff (and thus, consequently, from the application of Protocol no. 7 on the privileges and immunities of the European Union) (Harlow, Rawlings, 2014), and which, however, in the absence of specific provisions, remains without the ad hoc discipline envisaged, in the case of the Luxembourg courts, by art. 3 of the Statute of the CJEU. The members of the Boards of Appeal therefore merely benefit from "functional" immunity, like any other Union official, and not from full immunity from civil and criminal jurisdiction, which is reserved for the courts of Luxembourg.

[1]Art. 136, par. 5, of the dounding regulation of OHIM.
[2]Joint Board n. 10, Boards of appeal, cit., p. 6.
[3]Joint Declaration by the European Parliament, the Council of the European Union and the European Commission on Decentralized Agencies, 19 July 2012, cited above, point II.21
[4]Detail From n. 10, Boards of appeal, cit., p. 6.

8. Composition of the Boards of Appeal

Usually, the boards of appeal are made up of three members (one president, two members and their substitutes): This scheme is found in the committees of ECHA[1], EASA[2] and CPVO[3].

In the case of OHIM, the three-member commission is the standard situation; however, if the questions of law are particularly complex or particularly important cases, the possibility of assigning the appeal to an extended committee, made up of nine members, is also envisaged. This solution was devised to reduce the risk of jurisprudential contrasts between the individual commissions (in fact, it is recalled that OHIM is the only agency to have more than one appeal committee); however, the appeal to the enlarged commission was extremely sporadic, officially due to the desire not to lengthen the procedure, so that today the problem can not be considered completely solved[4]. On the contrary, for the solution of questions of law or of fact that do not raise particular difficulties, or when the cause is of limited importance, a single-judge judge is competent.

In Eurojust, the situation is slightly different, since the joint supervisory authority is made up of three permanent members, to which one or more ad hoc members should be added, solely for the duration of the examination of an appeal concerning personal data from the Member State that appointed them. The other agencies devolve from the general composition to three members; specifically, the common supervisory authority of Europol is formed, as already mentioned[5], by at least two representatives to each Member State, to which the respective substitutes must be added. Unlike the homologous body of Eurojust, there is no system of three fixed members, but rather a committee formed by half the members of the authority (ie one representative per Member State, with the respective substitute)[6]. The Board of Appeal of ACER and the joint Board of the three Financial Supervision Authorities are instead composed

[1] Art. 89 of the founding regulation of ECHA. See also from Ombusman the FDecision in case 1606/2013/AN on how the European Chemicals Agency applies rules concerning animal testing of 11 September 2015

[2] Art. 41 of the founding regulation of EASA.

[3] Article 46 of the founding regulation of CPVO; note well that, pursuant to par. 3 of the same article, in case of need the committee can also avail of two additional members (that is, the two substitutes).

[4] Detail From n. 10, Boards of appeal, cit., p. 3.

[5] Art. 23 of the dounding decision of Eurojust, par. 4.

[6] Article 34, par. 8 of the Europol decision establishing the company, as well as articles 12 and ss. of the rules of procedure of the joint supervisory authority, adopted by act no. 29/2009 of the Europol Joint Supervisory Authority of June 22, 2009.

of six members, plus their respective substitutes.

The mandate of all members of the Boards of Appeal and of the Joint Supervisory Body of Europol is five years; for the Eurojust homologous body, however, the term of office is three years (for fixed members) and at least three years (for all others)[1]. It is always renewable, and only in the case of the joint commission of the Financial Supervision Authorities is specified for a single time[2].

Finally, with regard to voting, special rules are provided in only two cases: In the Joint Supervisory Authority of Eurojust, since with the entry of an ad hoc judge the body can be composed of four members, in case the vote of the president[3] is decisive; in the Joint Board of Appeals of the ESAs, the majority must include at least one of the two members appointed by the respondent authority[4].

9. (Follows) What about the Administrative Appeal before the European Commission?

The second modality of access to forms of preventive protection for the appeal before the CJEU consists in an "administrative appeal" (as defined in the founding regulation of one of the agencies that provide it[5]), presented before the EC. Unlike the Boards of Appeal, whose function can be framed in the paradigm of adjudication, in the case under consideration the EC exercises rather a role of implementation of the agencies' decisions, especially in cases-in truth, marginal-in which it enjoys power to amend the contested act (Craig, 2018, pp. 65ss; Żurek, 2011, pp. 253ss; Weismann, 2016; Basakić, Božina Beroš, 2017, pp. 1746ss)[6]. For this reason, the administrative appeal does not seem to be framed among the "specific conditions and modalities" that, pursuant to art. 263, par. 5, TFEU can be contained in the agencies' institutional deeds to accompany the appeals for annulment proposed by natural and legal persons. Rather, it seems to be due to the principle of good administration consecrated to art. 298 TFEU, being a mechanism that-although not explicitly referred to by the law-contributes to the pursuit of the objectives of

[1] Art. 23, par. 1 and 3 of the founding decision of Eurojust.
[2] Art. 58, par. 4, of the founding regulations of ESA.
[3] Art. 23, par. 6, of the founding decision of Eurojust.
[4] Art. 58, par. 6, of the founding regulations of ESA.
[5] Art. 28, par. 4, of the founding regulation of European Centre for Disease Prevention and Control (ECDC).
[6] Art. 22, par. 3 of Council Regulation (EC) No 58/2003 of 19 December 2002 laying down the statute for executive agencies to be entrusted with certain tasks in the management of european programmes, OJ L 11, 16.1.2003, pp. 1-8.

opening, effectiveness and independence of the European administration (Harlow, Rawlings, 2014.).

Unlike what is observed in relation to the Boards of Appeal, the experiment of the administrative appeal before the EC seems not to be understood as *a conditio sine qua non* of the possibility of syndicating the same act or conduct before the CJEU. It is true that, on the one hand, the role attributed at this juncture to the EC indicates a precise hierarchical and functional relationship that deserves to be respected and not bypassed, especially in light of the fact that the decision of the EC is, however, challengeable in front of the CJEU. On the other hand, however, it should be noted that in these cases the EC does not have the power to suspend the execution of the acts of the agencies considered to be harmful, instead expressly provided in the similar case of the executive agencies. Therefore, given the already mentioned importance of precautionary protection in the system of European litigation, it seems to be possible to claim that the applicant can legitimately apply directly to the CJEU of the European Union in order to avoid jeopardizing his situation pending the administrative procedure.

Returning to the examination of the administrative appeal, which in fact consists of a hierarchical administrative appeal, it should be noted that it was proposed according to three different models. The first is curiously provided for only a few agencies, all with consultative and informative powers, but not even the most incisive: The European Center for the Development of Vocational Training, the European Agency for Safety and Health at Work, the Foundation European Union for the Improvement of Living and Working Conditions and the European Center for Disease Prevention and Control. The second one, totally overlapping with that foreseen for the executive agencies[1], can be found in the cases of the two European Offices for plant varieties and for brands, designs and models. The third one, which together presents some fundamental characteristics of the first two, can be found in relation to the European Food Safety Authority.

According to the first model, the active legitimates are the Member States, the members of the Board of Directors and the third parties directly and individually concerned; these subjects are therefore entitled to refer before the EC any act of the agencies, explicit or implicit, with a view to checking its legitimacy. The deadline is

[1] See the art. 18 of the regulation establishing CEDEFOP; art. 22 of the founding regulation of European Agency for Safety and Health at Work (EU-OSHA); art. 22 of the founding regulation of European Foundation for the Improvement of Living and Working Conditions (EUROFOUND).

always fifteen days, starting from the day on which the complainant became aware of the contested measure. The EC then makes a decision within a month; the lack of decisions within this deadline is to be considered as an implied rejection decision. It should be noted that the EC can not request changes to the act, but only cancel it or confirm it in full, in order to protect the independence of the agencies[1].

The European Center for Disease Prevention and Control diverges partially from this scheme, thus constituting a variant to the first model, for two reasons. The first is that its founding regulation expressly states that the explicit or implicit decision to reject the administrative appeal by the EC can be challenged by annulment before the CJEU, pursuant to art. 263 TFEU[2].This specification, however, does not really seem to imply a different situation from that of the other three agencies, since even in those cases it is unlikely that the decision of the EC will be held to be contestable by the CJEU, since it constitutes a clearly productive act of legal proceedings for the appellant[3].

Rather, a slightly different situation between the Center and the other agencies seems to be created due to the second reason for divergence, namely due to the fact that, to be precise, the regulation of the first includes, among the legitimated assets, those third parties "directly and personally concerned"[4]. The adverb "individually", clearly borrowed from art. 263, par. 4, TFEU, has therefore been replaced by "personal" (Harlow, Rawlings, 2014; Basakić, Božina Beroš, 2017): The difference is certainly slight, but, moreover, according to the well-known Plaumann jurisprudence, the concept of "individually" is able to identify a sphere of subjects slightly larger than that of those who personally received the act[5]. It seems therefore possible to argue that, in the case of the Center alone, the administrative appeal can be experienced by a slightly more limited category of subjects than that of those to whom such a remedy is granted in the cases of other agencies.

In any case, the possibility of appeal to the CJEU would not seem to undergo significant changes. The only difference would be that, in the case of the Center, the appeal should be experienced directly against the agency's act, by all those excluded from the possibility of administrative appeal; in the case of the other agencies, however, the appeal would be made by directly challenging the decision of implied

[1] Art. 28, par. 4, of founding regulation of ECDC.
[2] CRAIG, 2010, pp. 94ss.
[3] Art. 28, par. 4, of founding regulation of ECDC.
[4] CJEU, 25/62, Plaumann und Co. v. Commission of the EEC of 15 July 1963, ECLI:EU:C:1963:17, I-00199.
[5] Art. 122 of founding regulation of OHIM.

or explicit rejection of the EC. The second model of administrative appeal to the EC is that foreseen for OHIM[1] and for the European Plant Variety Office, which, as discussed above, are already equipped with an internal appeal board which acts as the first filter before a possible appeal at the CJEU. In both cases, EC is given a residual power to check the legitimacy of the acts carried out by the President of the Office for which European law does not provide for control of legitimacy by another body, as well as the acts of the committee of balance. Thus a model of administrative appeal is decidedly different from that already described, also in its variants, in relation to the four agencies mentioned above.

In fact, at this juncture the EC has a coercive power over the most marked agencies, being able to demand not only the revocation, but also the modification of the deeds considered illegitimate. Furthermore, this power of control can also be exercised ex officio by the EC, or referred to it by any Member State or by any person directly and individually concerned. In the case of the Plant Variety Office alone, the members of the board of directors are among the legitimates who are active in the appeal. In any case, the person concerned must refer the EC within one month (in the case of the Trade Mark Office, designs and models) or two months (in the case of the Office of Plant Varieties), starting from the day on which it became known of the act in question. The EC takes a decision within, respectively, three or two months; the lack of a decision within this deadline is to be considered as an implied rejection decision.

Lastly, the European Food Safety Authority, only in certain cases, is subject to a form of administrative review by the Commission which mixes the fundamental characteristics of the two models examined so far. In this case, first of all, there is a fundamental difference whereby the regulation establishing the authority does not provide for explicit forms of revision by the EC, this possibility being instead envisaged in other derivative legislation. To be precise, these are the regulations governing two specific procedures in which the authority is involved, namely those for assessing the safety of additives for animal feed[2] and genetically modified food and feed (Craig, Hofmann, Schneider, 2017; Lodge, Wegrich, 2012, pp. 268ss)[3].

[1] Art. 122 of founding regulation of OHIM.
[2] Art. 19 of Regulation (EC) No 1831/2003 of the European Parliament and of the Council of 22 September 2003 on additives for use in animal nutrition, OJ L 268, 18.10.2003, p. 29-43.
[3] Art. 36 of Regulation (EC) No 1829/2003 of the European Parliament and of the Council of 22 September 2003 on genetically modified food and feed OJ L 268, 18.10.2003, p. 1-23; Regulation (EC) No 298/2008 of the European Parliament and of the Council of 11 March 2008 amending Regulation (EC) No 1829/2003 on genetically modified food and feed, as regards the implementing powers

In both of these cases, decisions or omissions of actions by virtue of the powers conferred on the authority may be reviewed by the EC on its own initiative (as in the second model) or following a request from a Member State or any person directly and individually interested. For the purpose presented a request to the EC within two months from the day on which the interested party became aware of the act or omission in question: Also the time limit for the appeal, therefore, is borrowed from the second model of administrative review. The EC, which takes a decision within two months, can however ask the authority only to withdraw its decision or to remedy the omission, without being able to oblige the latter to make simple changes, thus taking up the approach described in the first model.

10. Details of Additional Rules Relating to the Regulation of Contractual and Extra-Contractual Liability

Before concluding the analysis of the particular provisions contained in the individual founding acts, it is appropriate to briefly describe the situation concerning the contractual and extra-contractual responsibility of the agencies. Almost all the agencies answer for both, while some answer only for one or the other, with only the European Police College that does not provide, in its decision establishing, the possibility to answer for either of them. The contractual liability of the agencies is always governed by the law of the contract in question; only the instruments establishing the Agency for the Cooperation of National Energy Regulators, the Body of European Regulators of Electronic Communications, the three Financial Supervision Authorities and, of course, the European Police College do not provide for it. In all other cases, when foreseen, the CJEU is always called to know the relative causes, except in a few cases where this possibility is not expressly foreseen[1]. The referral to the courts of Luxembourg, however, takes place through arbitration clauses, which are usually mandatory, except in some cases, where the presence of such a clause (and therefore, consequently, the competence of the CJEU) is given only as probable[2]. In addition to the College of Police, all three agencies operating

conferred on the Commission, OJ L 97, 9.4.2008, p. 64-66.

[1] See art. 21 of the Regulation (CE) n. 58/2003, op. cit., as well as ETFs (Article 22 of its Founding Regulation), EUISS (Article 16 of its Establishment Act), EUSC (Article 18 of its Establishment Act), Eurojust (Article 27c of its Establishing Decision) and Europol (Article 53 of his founding decision).

[2] The referral of the dispute concerning contractual liability to the CJEU is only possible in the cases of ECHA (Article 101 of its Founding Regulation), EDA (Article 27 of its Establishing Decision), EFCA (Article 21 of its Founding Regulation), EMSA (Article 8 of its founding regulation), ERA (Article 34 of its founding regulation).

in the CFSP sector are not liable for non-contractual liability. However, all the other agencies of the European Union do; non-contractual liability is always governed, according to the classical expression of art. 340 TFEU, "in accordance with the general principles common to the Member States"; only in the cases of Europol and Eurojust it is dictated "by the laws of the Member States"[1]. This difference seems, in truth, more of form than of substance, but it is nevertheless indicative of the more intergovernmental nature of these organs, which are the only ones that provide for an extra-contractual responsibility not to belong to the former European pillar. As further evidence of their specificity, Europol and Eurojust, this time accompanied by the Agency for the Cooperation of National Energy Regulators[2], are the only cases in which the CJEU's competence to know the causes of liability is not expressly provided for non-contractual activity of the agencies.

11. Some Unresolved Problems: Control of Non-Binding Documents

The Lisbon Treaty has solved many problems relating to the possibility of challenging the acts of binding agencies. Agencies often influence the decision-making process of the Union through soft-law acts (Maggetti, Gilardi, 2014, pp. 1294ss), with respect to which the breadth of control powers attributed to the CJEU is drastically reduced, especially when the claimant is a natural or legal person. In this regard, bearing in mind the categories of soft-law acts, it is noted that the most problematic issues arise in relation to semi-binding opinions and to the so-called "comply or explain guidelines"[3].

As far as the former are concerned, a problem can be posed of the effectiveness of judicial review: In this context, in fact, the economic operators challenge the final act of the procedure, which is the decision adopted by the EC addressed to them. The content of the latter, however, is strongly influenced by the opinion of the agency, which is its logical and scientific basis. The opinion, however, may not be subject to the control of the judicial authority, since it is an endoprocedimental act or because of its formally non-binding nature. This situation, which has occurred in the procedure of authorization of drugs but could also arise in relation to other semi-

[1] Art. 27 of the founding decision of Eurojust and art. 53 of the Europol ruling.
[2] Art. 29 of founding regulation of ACER.
[3] Joined cases T-74/00, T-76/00, T-83/00, T-84/00, T-85/00, T-132/00, T-137/00 and T-141/00, Artegodan GmbH and others v. Commission of 26 November 2002, ECLI:EU:T:2002:283, II-04945, parr. 199-200.

binding opinions, could thus give rise to a problem of amplitude of the judicial review, which may greatly limit the possibilities for applicant to challenge the logical and scientific basis of the contested measure.

With regard to the opinions issued by the aforementioned European Medicines Agency, the GC solved the problem in 2002, in the Artegodan case, stating that "the European judicature may be called upon to exercise its control, on the one hand, on the extrinsic legitimacy of the scientific advice (from the European Medicines Agency) and, secondly, on the exercise by the EC of its discretionary power"[1]. However, "the court can not substitute its own assessment for that of the European Medicines Agency". In fact, judicial review is exercised only on the regularity of the work (of the European Medicines Agency), as well as on internal consistency and on the grounds of its opinion, with regard to the latter aspect, the court is only entitled to check whether the opinion contains a statement of reasons enabling an assessment to be made of the considerations on which it is based and whether it establishes a comprehensible link between medical examinations and science and the conclusions reached[2].

This restriction of the field of cognition of the judicial body, typical of all the systems related to the revision of discretionary administrative acts connoted by strong elements of technical or scientific specificity, is also explained by the already described internal review system of the opinion of the agency (rectius: of the internal scientific committee) which allows the interested party to obtain a second opinion from a different rapporteur. This mechanism that guarantees a double pronunciation is "one of the most suitable protection tools" and "plays a compensatory role compared to the limited extent of the European judge's union on technical issues" (Birkinshaw, Varney (a cura di), 2010).

An equally limited union is also found in other sectors where the opinion review system is not more hierarchical-administrative than technical, involving the EC: This is what happens, for example, in food, according to the third model of administrative appeal, already described above. In this area the review of the opinions of the Food Safety Agency seems to have never been in question, since the CJEU submits them to its control as "conducting a scientific assessment of the risks as comprehensive as

[1] See, joined cases T-74/00, T-76/00, T-83/00, T-84/00, T-85/00, T-132/00, T-137/00 and T-141/00, Artegodan GmbH and others v. Commission of 26 November 2002, op. cit.
[2] See, joined cases T-74/00, T-76/00, T-83/00, T-84/00, T-85/00, T-132/00, T-137/00 and T-141/00, Artegodan GmbH and others v. Commission of 26 November 2002, op. cit. In the same orientation see also the case: T-326/99, Nancy Fern Olivieri v. Commission and EMEA of 18 December 2003, ECLI:EU:T:2003:351, II-6053.

possible, on the basis of scientific advice based on the principles of excellence, transparency and independence, constitutes a relevant procedural guarantee in order to ensure the scientific objectivity of the measures and to avoid the adoption of arbitrary measures"[1].However, the judges themselves stated that "it is not for the court to assess the merits of one or the other scientific position defended before it, or to substitute its own assessment for that of the European Institutions to which that task has been assigned exclusively from the Treaty"[2].

The situation of the agencies now referred to be not so different from what has already been analyzed in relation to other semi-binding opinions, in particular those of the European Financial Supervision Authorities for the adoption of delegated and implementing acts by the EC (Busuioc, 2013)[3]. However, by constituting acts with a more general content and not taken position with respect to individual requests, they do not provide for mechanisms of preventive appeals by third parties. Consequently, given the general heterogeneity between the various EU agencies, it is difficult to say to what extent the approach taken in the above cases can be applied in other areas of EU law. Surely, it constitutes a precedent that deserves to be recalled whenever the logical-scientific bases of an act escape from the scrutiny of the judge as contained in a formally non-contestable act; moreover, it seems that the depth of this scrutiny must be greater the more they are missing, during the procedure of adoption of the opinion, the instruments that would allow the interested parties to assert their position.

However, it should also be pointed out that requiring the Luxembourg courts to have a detailed control of the semi-binding opinions of the agencies could prove counterproductive, because they do not have the specific technical skills required for the individual sectors necessary to fully assess the correctness of the logical process followed by the agency. In this sense, therefore, the provision of internal review mechanisms or prior consultation of the interested parties would seem to be a fundamental aspect to be added to the possibility of judicial review, in order to

[1] See, T-13/99, Pfizer Animal Health v. Council of 11 September 2002, ECLI:EU:T:2002:209, II-03305, par. 172.
[2] T-13/99, Pfizer Animal Health v. Council of 11 September 2002, op. cit.
[3] The forecast of a penetrating control by commissions of experts other than those who have adopted the opinion challenged and independent of the agency of reference, even though hinged on it, it seems that it could also resolve the objection raised by Busuioc: "(...) while experts are sitting in the chair of the decision-makers, neither the Commission nor the Court is in a position to scrutinize the measures they adopt". In fact, from the vicious circle pointed out by the author seems to be able to get out only by offering the possibility of further technical-scientific control, of merit, however appealable for reasons of law before the CJEU.

guarantee better protection of the interested parties (Senden, Van Der Brink, 2012).

On the other hand, as regards the "comply or explain" guidelines, the problems of judicial protection are upstream of the magnitude of the judges' union, since only the admissibility of an action for their annulment is problematic. In fact, these deeds are not transposed into a binding document and must therefore be challenged independently. As is known, no clear jurisprudence has yet been formulated by the CJEU regarding the appealability of soft-law proceedings; in particular, the interpretation of art. 263 TFEU and the fact that the contestability should be guaranteed only for acts intended to produce legal effects (through a literal interpretation) or to all those who actually produce them, regardless of whether they have been designed or not for that purpose (Senden, 2004, pp. 112ss). Obviously, the second option would allow to extend the judicial review also to protect those legal situations created by soft law acts which, as such, are contained "in instruments that have not been attributed legally binding force as such"[1].

In this regard, it is interesting to underline once again a particular situation, again related to the European Medicines Agency, which presents an interesting starting point: Its Board of Directors has defined the guidelines issued by the agency as "soft law" (with a) non-legally binding but almost binding character that can derive from the legal basis when the guideline intends to specify how to fulfill legal obligation[2]. In a sense, it seems to be recognized by the agency itself as the purpose of its guidelines to produce legal effects, at least in the case where there is a close relationship between them and an obligation already enshrined in a binding legal instrument. This recognition could therefore increase the chances of admissibility of an appeal against a guideline of the Medicines Agency.

In any case, it should be remembered that to date there has been no recourse against acts of the second category. This is probably explained by the fact that the applicants prefer to wait for a binding decision (it is good to remember that both the European Financial Supervision Authorities and the European Aviation Safety Agency can also issue binding individual decisions) that oblige them to take a specific course of action, rather than immediately bring an action which the EU judicature would probably declare inadmissible.

[1] European Medicine Agency, Procedure for European Union Guidelines and Related Documents within the Pharmaceutical Legislative Framework, 18 March 2009, Doc. Ref. EMEA/P/24143/2004 Rev. 1 corr.p. 4.
[2] European Medicine Agency, Procedure for European Union Guidelines and Related Documents within the Pharmaceutical Legislative Framework, 18 March 2009, op. cit.

12. The Activity of Control over the Acts and Behavior of the Agencies by the European Ombudsman

We need to look at the protection guaranteed by the European Ombudsman; it can also be invoked against the work of the agencies and, although it does not have a jurisdictional nature, it constitutes an instrument of control that should not be underestimated.

Before the entry into force of the Treaty of Lisbon, the discipline now provided for by art. 228 TFEU was the main form of protection in relation to those agencies for which no control mechanisms had been established for internal committees or the EC. The control of cases of maladministration by the European Ombudsman (Vogiatzis, 2017, pp. 38ss) has been, since the beginning of the institution, extended not only to the European Institutions, but also to the organs formed by the latter through acts of secondary law (as evidenced by the letter of article 138 E of the Maastricht Treaty) (Vogiatzis, 2017). In any case, the powers of the Ombudsman are however significantly less incisive than those of the CJEU, since it simply has the possibility of facilitating a consensual resolution of the problem by investing the body complained of by the applicant and leaving the first 3 months for communicate your opinion on the problem; if not satisfied by the opinion received from the administration concerned, the European Ombudsman can only, as extrema ratio, send a report to the European Parliament, which may also contain ad hoc (non-binding) recommendations for the resolution of the case, also copying the complainant and the body involved[1]. However, the Ombudsman tried not to inflict the use of this power (Hofmann, Ziller, 2017), using only in cases where the Parliament had an effective power of persuasion on the body complained of, to avoid the political importance of this instrument of pressure (Busuioc, 2012, pp. 228ss).

In the concept of "mal administration" (Kristjàndòttir, 2013, pp. 238ss; Ashagbor, Countouris, Lianos, 2012; Jones, Menon, Weatherill, 2012; Hofmann, Ziller, 2017; Mir Puigpelat, 2010, pp. 150ss), which essentially limits the scope of the Ombudsman, it should be understood "tant des actes ou comportements illégaux que des actes ou comportements simplement inopportuns qui, sans violer de règles juridiques, ne répondent pas aux critices de transparence et d'efficacité" (Simoncini, 2018). Therefore, this instrument of protection can well be seen as a parallel and

[1] Art. 8, par. 4 of the European Parliament Decision with which the European Ombudsman adopts the implementing provisions, 8 July 2002, subsequently amended by decision of the Ombudsman himself on 3 December 2008.

complementary remedy to those examined above: Parallel, because it allows to unify any illegal acts or behaviors carried out by the agencies, with powers certainly less incisive than those attributed to the courts of Luxembourg but at the same time, much more easily operated by individuals, since the complaint to the Ombudsman does not know the strict limits set by art. 263, par. 4, TFUE (Kaczorowska-Ireland, 2016; Martucci, 2017; Scholten, 2014, pp. 1227ss); complementary, precisely because it makes it possible to expand the meshes of the control of the lawfulness of the agencies' work and, at the same time, offers a protection tool also against those acts or behaviors that are fully legitimate from a formal-juridical point of view, but not from the substantial-social one (Weiler, 1988, pp. 333ss; Van Raepenbusch, 2016; Lavergne, 2018).

The European Ombudsman dealt with EU agencies, especially with regard to complaints about staff management; however, a number of cases also concerned issues relating to access to documents or work documents of the agency (Busuioc, 2012, pp. 228ss). To a lesser extent, the Ombudsman also addressed complaints relating to the work of the agencies in their respective sectors: For example, against the European Aviation Safety Agency, the Ombudsman made a complaint for an alleged lack of legal basis for a decision on the certification of airworthiness of aircraft[1] and in another concerning a proposal for a navigability directive[2]. In both cases, the cases were closed after the agency had withdrawn or changed the act challenged by the complainant and the subject of the Ombudsman's request for an opinion.

The Ombudsman also dealt with the issue of fundamental rights, in particular by appealing to Frontex (on his own initiative, not on complaint) (Rijpma, 2012, pp. 87ss; Peers, 2011) the lack of an internal mechanism for handling complaints of alleged fundamental rights injuries in the performance of his duties[3]. This decision is particularly interesting because it has been the subject of a report to the European Parliament, called to operate that mechanism of political persuasion to which the Ombudsman usually uses only a few cases[4]. The one just mentioned is not the only case in which the Ombudsman has investigated agencies even on his own initiative

[1] Decision of the European Ombudsman on complaint 1103/2006/BU against the European Aviation Safety Agency, 1 August 2007.
[2] Decision of the European Ombudsman on complaint 407/2010/(FS) BEH against the European Aviation Safety Agency, 23 November 2010.
[3] Draft recommendation of the European Ombudsman in his own initiative inquiry OI/5/2012/BEH-MHZ against FRONTEX, 9 April 2013.
[4] Decision of the European Ombudsman in his own initiative inquiry OI/1/99/IJH to Europol, 12 July 2000.

and not on behalf of third parties: In particular, this has happened in order to make access to documents more efficient and transparent[1], the regulation concerning age limits in the selection of personnel and the adoption of the Code of Good Administrative Behavior[2]. This latest survey has also led to the drafting of a special report for the European Parliament[3], similar to what has recently happened with Frontex. Among other things, a further investigation is currently under way by the Ombudsman of his own interest, addressed to all the agencies and still in the interlocutory phase, which deals with the practices of the latter in relation to public disclosure of the names of the members of the Staff Selection Committees (Busuioc, 2012, pp. 242, 243)[4].

Finally, the analysis of the mechanisms of control of the Ombudsman's work deserves a brief mention of the recent practice, started in 2011, of the visit to the agencies. This control tool, which is not yet structured, allows the Ombudsman to control "the field" the work of the agencies and can be seen as an activity connected both to the analysis of private complaints, which prodromica to the initiation of independent investigations.

13. The Uncertainties about the Future of the Agencies and the Need for a Multi-Agent Model

The competences recognized by the EC in the execution of Union law imply that these discretionary powers must nevertheless be placed within precise limits (Egeberg, Trondal, 2017, pp. 680ss)[5] which, although in the course of implementing acts could also be less penetrating than those recorded so far, do not appear however allow agencies to exercise that regulatory role by several parties required.

Nevertheless, in many areas of EU law, the agencies have been given a very significant level of incisiveness on the decision-making process, which raises many doubts of compatibility with the Treaties and which can also be taken as a sign of the

[1] Decision of the European Ombudsman in his own initiative inquiry OI/2/2001/(BB) OV, 27 June 2002. Decision of the European Ombudsman closing the inquiry into complaint 1561/2014/MHZ against the European Banking Authority (EBA) of 06 July 2015.
[2] Decision of the European Ombudsman in his own initiative inquiry OI/1/98/OV, 5 February 2002.
[3] Special Report by the European Ombudsman to the European Parliament in his own initiative inquiry OI/1/98/OV, 11 April 2000
[4] OI /4/2013/CK survey on the initiative of the European Ombudsman, started on 12 August 2013.
[5] As we can see in the case from CJEU: C-270/12 UK v. Parliament and Council of 22 January 2014, ECLI:EU:C:2014:18, published in the electronic Reports of the cases.

future will of the legislator to expand the role of agencies.

There are other signs that seem to go in the latter direction, but not so much related to the agencies as such, but related to the broader scale of renewal that seems to affect the governance of the Union as a whole (Rittberg, Wonka, 2013, pp. 132ss). The strengthening of the agencies, in fact, also requires a strengthening of the political component of the Union executive: The regulatory agencies, by their nature, imply the presence of a strong political power, because otherwise they would degenerate into a bypass of the democratic method and in an excessive fragmentation of executive power; vice versa, political authorities also need agencies, to intercept technical and scientific expertise and, according to the still prevailing doctrines of New Public Management, to allow the adoption of unpopular political choices and make administration more efficient (Rittberg, Wonka, 2013).

The main example of the reform trends of existing institutional balances, which could benefit from a parallel development of the agencies, is that related to the change in the role of the EC. In fact, there is a slow tendency towards politicization of the latter: In addition to the mechanisms of trust with the Parliament already introduced by the Maastricht Treaty and the practices of the auditions of individual Commissioners by the competent committees of the Parliament , the Treaty of Lisbon has now added that the President of the EC should be chosen "taking into account the elections of the European Parliament" and be "elected" by the latter (article 17, paragraph 7, TEU) (Rittberg, Wonka, 2013). Furthermore, the political parties of the European Parliament have committed themselves to "appointing their respective EC presidential candidates sufficiently in advance of the elections so as to enable them to organize a meaningful European-wide campaign focusing on European issues based on the program of the party and on that of the EC presidential candidate proposed by the party"[1].

The problem, however, is that these signs of reform of the governance of the Union are not at all unique. In fact, the Lisbon Treaty itself has also strengthened the role of the European Council, endowing it with a stable President and, above all, explicitly stating that it has powers of direction and definition of the Union's guidelines and its general political priorities (article 15, par. 1, TEU), "contaminating", even officially, the EC monopoly in the legislative initiative

[1] European Parliament resolution of 4 July 2013 on improving practical arrangements for the 2014 European elections, 2013/2102 (INI), par. 5.

(Ponzano, Hermanin, Corona, 2012).Furthermore, in response to the current financial crisis, clearly intergovernmental logic was followed, as demonstrated, for example, by the experience of the European Stability Mechanism, which gave the Board the decision-making powers to manage it.

Thus, there is certainly a process of reform of the governance of the Union, even if it is still unclear whether a strong political center will be created and what will be this center; the perspective seems to be that of a persistent fragmentation of the European executive. To date it is difficult to take a position on the possibilities of a future strengthening of the Union agencies, because the margins of development of these organisms depend strongly on the forms, modalities and the very possibility of a more political characterization of the Union. For the moment, therefore, it should be noted that the current situation is characterized by a strong confusion regarding the limits of the powers conferred to the agencies and the methods of control of the same. The current challenge, waiting for the indecision on the future of European governance to resolve, seems to be to harmonize the plurality of actors involved in the implementation of EU law.

The relationships arising from a delegation of powers between two or more subjects are usually traced back into the so-called "principal-agent theory", a doctrine originally born in the economic sciences to explain (rectius: organize) the contractual relations "between two (or more) parties when or as the representative of the principal" (Ross, 1973, pp. 134ss.). This theory, then applied also in political and juridical sciences, has also been widely used in the European Union's legal system (Maher, Billiet, Hodson, 2009, pp. 410ss; Kassim, Menon, 2003, pp. 122ss), which by its nature is based on opposing interests and on the attribution of powers by sovereign subjects to subordinate subjects.

In the context under review, not so much to control the work of the agencies (Dehousse, 2008, pp. 790ss)[1], but to effectively organize the relations between these and the other subjects of the Union executive, it seems necessary to identify a model that takes into account the plurality of agents and, in particular, the presence of a super agent, the EC, to which the Treaties recognize-in particular following the reform signed in Lisbon-a pre-eminent role in the implementation of Union law. Indeed, it seems absolutely necessary to bring order to the dense network of relations

[1] A multi-principals model has been proposed for the purpose of improving the accountability of the Union agencies, with which the model proposed here is not intended to contrast, being specifically aimed not at the control of the agencies, but to the management of decision-making processes relating to the implementation of Union law.

between the various actors of the Union executive to prevent the functions and the related responsibilities of each body hiding behind similar competences attributed to others, making the decision-making process less transparent and probably even less effective.

An example in this sense derives from all those procedures that see EC simply confirm-because in most cases the EC does not add anything of its-the decisions taken by the agencies through formally non-binding acts, which however can be modified by the EC only in exceptional circumstances. In these cases, in fact, there is an overlap of functions between agencies and EC, which makes the decision-making process opaque and, with particular regard to the issuing of delegated acts, dilutes that virtuous circuit between legislator and executive that was created for the protection of the democratic principle.

It seems that the issue has also been raised in the inter-institutional debate on the future of decentralized agencies; in the preparatory works, in fact, we read that "it seems to be the benefit of an overall clarification and, if necessary, the harmonization of its various powers towards both agencies and the other actors concerned, while preserving agencies' autonomy. The Commission should be clearly accountable for activities over which it has authority, but can not be accountable for work over which its influence is heavily diluted" (Rittberg, Wonka, 2013). Unfortunately, however, the joint declaration was not expressed on this point.

Moreover, it can not be overlooked that even greater problems seem to emerge from those situations in which this overlapping of functions occurs with agencies formed by independent national authorities, whose autonomy from the respective national governments is perhaps the expression of precise European obligations. In these cases, the possibility of activating-in addition to an overlapping of functions-a democratic short circuit between the national and the EU levels seems extremely relevant and deserves to be underestimated. The national authorities that form these agencies, in fact, are protected at national level by specific regulations that establish their independence, sometimes even of European origin; at the same time, they aggregate at a supranational level to compete together in defining the policies of the Union, enjoying a degree of autonomy that is nevertheless significant and, above all, of certainly incisive powers. Since these authorities are already independent at national level and, at the European Union level, there is already an actor called to pursue the general interests independently of the Member States (this is, of course, the EC), it would seem appropriate, pending clear changes to the institutional status quo, identify penetrating forms of control of their work, not to damage the

prerogatives of the latter. Otherwise, the risk is that many different centers of power are formed that are competent on individual sectors, to the detriment of the possibility of democratically controlling the work of the same: The popular sovereignty, in fact, needs to express a fullness and centrality of powers.

Paradoxically, the indecisions about the future of the agencies and of the EC itself seem to have created a system that weakens the EC but also prevents agencies from developing fully. Pending a review of the Treaties, a multi-agent model that takes into account the fact that the EC is one of the principals of the agencies, contributing to the creation, but above all still results the first agent of Member States, Council and Parliament, could harmonize the relationships between this and the agencies and, above all, would help to outline a more efficient decision-making process.

Although, as outlined above, the Treaties are quite clear in identifying relevant prerogatives for the EC, national administrations and, in part, for the Council, this does not imply that this multi-agent model should always lead to the centralization of skills under the EC, to the detriment of the agencies. As argued above, in fact, even the latter can be attributed greater powers, avoiding duplication of functions with the EC, through the definition of precise limits to their work. Among these, for example, para-jurisdictional mechanisms could also appear as a hierarchical administrative appeal to the EC itself: This mode of quasi-jurisdictional protection, oddly present only for a few and incisive agencies, could instead allow the EC to express itself on the merits of choices, at this point, left entirely to the agencies, whenever they were to be judged detrimental to the interests of a party. Such a system would open to sector operators the possibility of highlighting the most questionable discretionary choices made by the agencies, helping the EC to exercise its political role, and highlight the overarching position of the EC while increasing the operating margins of the agencies.

14. Concluding Remarks

In conclusion, we can not fail to notice how, in perspective, an incisive and consistent reform of the governance of the Union, with a clear identification of a strong political center, would mitigate the need for a multi-agent model, clearly linked to the current situation of the executive Union. However, recent trends seem to show that the fragmentation of the Union executive and its anti-hegemonic structure will still be a characteristic feature of the process of European integration for a long time. At this juncture, a clear delimitation of the competences and responsibilities of each person is fundamental in order not to complicate the decision-making process. Ultimately, although the Lisbon Treaty has widened the margins of development of the bodies examined, they will hardly exert, at least up to the next revision of primary law, that role of independent market regulators, invoked in recent decades by the doctrine and by some political-institutional spheres (Rittberg, Wonka, 2013). The process of reforming the governance of the Union is still too immature and, to date, such a development would still seem too contrasting with some of the prerogatives guaranteed by the EC treaties.

The current situation, therefore, is characterized by a sensitive fragmentation of the Union executive, with frequent overlapping of competences between ECs and agencies (Ruffing, 2015, pp. 1110ss), so that it would seem appropriate to abandon the ambition to increase the powers and independence of the agencies, focusing rather organization of work between the various players of the Union executive. Given the centrality of the EC in issuing detailed legislation, confirmed if not reinforced by the Lisbon Treaty, a multi-agent model that takes into account that the EC is, at the same time, one of the principals of the agencies and, above all, the first agent of Council and Parliament (Rittberg, Wonka, 2013), could help to better define the functions of the agencies and the EC, to the benefit of transparency and efficiency in the decision-making process.

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