

The role and scope of review of Boards of Appeal:

One size fits all?

EUIPO - IPCLConference

Alicante, 5 May 2016

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Outline

1. Powers and scope of review of Boards of Appeal ('BoAs')
 - Functional continuity (de novo review)
 - Annul and remit for further action to the Office/Agency
2. Application by analogy to other BoAs?
3. How to strike a balance? The experience of the ECHA BoA
4. Question for debate

Powers and scope of review of BoAs:

Functional continuity (in brief)

- 'Continuity in terms of functions' between certain BoAs (at least OHIM/EUIPO, EASA) and their examining units
- Purpose of appeal proceedings (EASA): (i) to enable the BoA to hear an application that has been refused by other units of the agency and, (ii), where the BoA upholds that refusal, to clarify the factual and legal grounds so that the judicature is in a position to review the legality of the refusal decision (T-102/13, *Heli-Flight v EASA*, para. 27)
- Decisions of these BoAs '*substitute themselves to the decisions initially adopted*' by the agency (C-61/15 P, *Heli-Flight v EASA*, para. 84).

Powers and scope of review of BoAs:

De novo review

- Approach based on certain provisions in relevant basic Regulations:
 - 'The Board of Appeal may exercise any power which lies within the competence of the Agency or remit the case to the competent body of the Agency for further action', or similarly worded provisions, in many Regulations (ACER, CPVO, EASA, ECHA, EUIPO, etc.)*
- BoAs *'are therefore called upon to carry out a new, full examination of the merits [of a decision], in terms of both law and fact'* (C-29/05 P, OHIM v Kaul, para. 56-57).

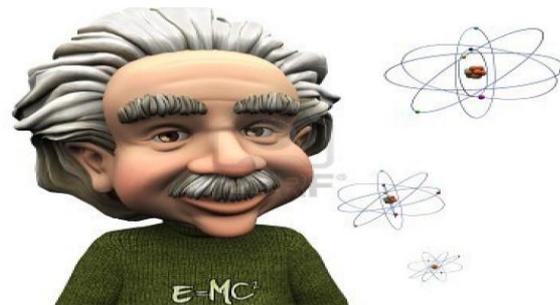
Application by analogy to all BoAs?

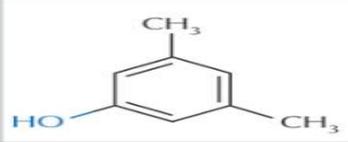
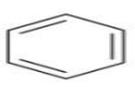
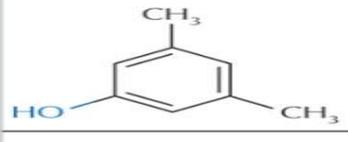
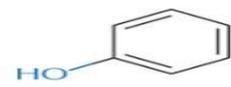
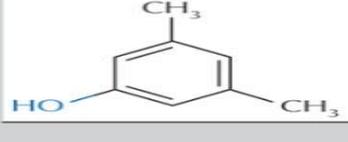
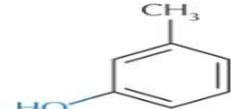
- Some BoAs cannot 'exercise any power which lies within the competence of the Agency', but only remit the case for further action (e.g. {EBA-EIOPA-ESMA} joint Board of Appeal; SRB)
- Moreover, some BoAs may have difficulties with *de novo* review for certain kinds of decisions under their scope. E.g. ECHA BoA:

Application by analogy to all BoAs?

Possibility to 'exercise any power' of ECHA, but:

- Highly complex and contentious subject-matter (is there a 'right' scientific opinion?)



Substance 1	Substance 2	Similarité
		51%
		62%
		75%

Application by analogy to all BoAs?

- Composite decision-making process within Agency, involving 28 Member State Competent Authorities in the 'Member State Committee'

- Rules of procedure based on General Court procedure; e.g. requirement to put forward pleas in Notice of Appeal, adversarial procedure (Decisions are based on the evidences provided by the parties during the course of the proceedings)

How to strike a balance?

The experience of the ECHA BoA

- Is it appropriate for the ECHA BoA (i.e. 1 Technically Qualified Member) to substitute its assessment to that of ECHA?
- Practice:
 - Review based on legal pleas (breaches of the REACH Regulation, breaches of general principles of EU law, errors of assessment, etc.)
 - But: more detailed scientific assessment in the context of reviewing the agency's exercise of administrative discretion (e.g. manifest errors of assessment, manifest inappropriateness to achieve the objective pursued).

Question for debate:

- May there be different types of BoAs, with different powers/scope of review? E.g. *de novo* vs. plea-based (legal) review?
- If so, how to they fit into the system of remedies? What should the respective role of the General Court and BoAs be?

For reading our decisions see our website:

- <http://echa.europa.eu/about-us/who-we-are/board-of-appeal/decisions>

Thank you

