

<p><b>MINUTES</b></p> <p><b>Board of Appeal meeting</b></p> <p><b>Wednesday, 28 June 2017, 14.00 – 17.00</b></p> <p>Ljubljana</p>
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**Present:**

Member	<b>Walter Boltz</b>
Member	<b>Yvonne Fredriksson</b>
Vice-Chair	<b>Jean-Yves Ollier</b>
Chair	<b>Andris Piebalgs</b>
Member	<b>Mariusz Swora</b>
Alternate	<b>Viorel Alicus (via teleconference)</b>
Alternate	<b>Nadia Horstmann</b>
Alternate	<b>Erik Rakhou</b>
Alternate	<b>Dominique Woitrin</b>
Alternate	<b>Mariano Bacigalupo Saggese (via teleconference)</b>
Invited guest	<b>Ernst Tremmel (ACER) only for Agenda item 3.</b>
Registrar	<b>Andras Szalay</b>

1. **Mr Andris Piebalgs**, Chair of the Board of Appeal, welcomed the Board of Appeal members and alternates present in the meeting room or over the conference line and opened the 11<sup>th</sup> Board of Appeal meeting.

2. The Board of Appeal approved the Agenda as follows:

Agenda items	BoA decision
1. Opening of the meeting	no
2. Report on the recent appeal cases and overview on the proceedings before the General Court	no
3. Cooperation between the Agency and the BoA in drafting the defence before the General Court	no
4. Internal discussion	yes
5. Modification of the Rules of Procedure and other procedural documents	yes
6. Any other business	no

### 3. Discussion of the items of the Agenda

#### ***Agenda item n° 2. – Report on the recent appeal cases and overview on the proceedings before the General Court***

**Mr Andras Szalay**, Registrar summarized the appeal cases submitted as A-001-2017 to A-004-2017, later merged as A-001-2017 (consolidated). The Registrar distributed the attached background document to sum up the workload and the administrative burden linked to these appeals.

The Registrar also summarized the current legal proceedings before the General Court of the European Union (summary attached). He highlighted that on the day after the Board of Appeal meeting, 29 June 2017, the Court will publish its decision in the case T-63/16 concerning BoA Decision A-001-2015.

***Agenda item n° 3. – Cooperation between the Agency and the BoA in drafting the defence before the General Court***

The Board of Appeal invited **Mr Ernst Tremmel**, Legal advisor at the Agency's Electricity Department, to sum up the strategy to be followed in drafting the defence before the General Court in cases T-332/17 and T-333/17 (action brought against BoA decision A-001-2017 (consolidated) ). The Legal adviser observed that the actions contain pleas about 'lack of reasoning' in the BoA decision. The Agency is not in the position to know what served as a basis of the BoA decision to apply the test of manifest error in its decision. For that reason he asked the Board of Appeal to contribute to the draft in clarifying the Board's motivation and background reasoning of the approach applied in the BoA decision. About the deadlines he notified the Board that by 22 August 2017 at latest the Agency shall submit its defence but in practical terms the defence should be ready a month before, by 23 July 2017.

Then, the invited legal advisor left the meeting.

***Agenda item n° 4. – Internal discussion***

After detailed discussion on the BoA's and the Agency's role in the defence in the court proceeding, the Board reached a consensus that for the future cases the Registry of the Board of Appeal should be the centre of coordination of the defence with special regard to the cases where the Agency and the BoA opinion is not in line with each other. Upon the analysis of the case, the Board should decide whether internal or external legal resources are needed to provide a timely defence of good quality.

To achieve this ambition, a modification in the Administrative arrangement, an overview of the administrative workflow within the Agency (receiving court documents, registration etc.) as well as a reconsideration of the use of the available internal and external resources is necessary.

Then, the Board of Appeal reached the following decision:

**BoA Decision 1./28.06.2017**

**The Board of Appeal gives a mandate the Chairman to initiate a discussion with the Director of the Agency concerning the above mentioned.**

The Board of Appeal declared that its official communication to the Agency concerning the strategy followed in the drafting of the BoA decision should restrict to the main line of argumentation and to remain succinct. The Registrar may attach further case law references or explanations to the communication.

**BoA Decision 2./28.06.2017**

**The Board of Appeal instructs the Registrar to draft the short official communication to be sent to the Agency in order to facilitate the defence before the General Court as well as to prepare and discuss with the Agency's legal advisor the corresponding case law.**

The Board of Appeal declared as well that it should comment or make remarks to the drafts of the Clean Energy Package, independently from the Agency.

Then, the Board of Appeal reached the following decision:

**BoA Decision 3./28.06.2017**

**The Board of Appeal invites Mr Walter Boltz to elaborate possible comments and remarks from the perspective of the future functioning of the Board of Appeal to the drafts of the Clean Energy Package.**

*Agenda item n° 5. – Modification of the Rules of Procedure and other procedural documents*

**Mr Andras Szalay**, Registrar introduced the shortcomings of the Rules of Procedure and the other procedural documents in the light of the recent appeal cases. According to these experiences the rules on

- Intervention,
- Statement in support (relevance of procedural documents) and
- Consolidation of cases

are begging for certain modifications.

After discussion on legal risk attached to the various options applied in the RoP as well as in the procedural documents of other EU Agencies' Board of Appeals, the Board of Appeal reached the following decision:

**BoA Decision 4./28.06.2017**

**The Board of Appeal instructs the Registrar to draft the modification of the rules on intervention taking into consideration the relevant practice and case law of the Court of Justice of the European Union which suggests that only 'direct' and 'existing' interest can be a relevant basis of applications for intervention. The Board of Appeal accepted the suggested modifications concerning statement of support and consolidation of cases in order to streamline the appeal proceeding. The Board of Appeal will decide via written procedure on the finalized text of the Rules of Procedure and other procedural documents.**

*Agenda item n° 6. – Any other business*

The Board of Appeal discussed the possibilities to better use the available internal resources. The Board declared that the competences and capacity of the alternate members should be much better exploited. It is crucial also with a view to the growing discussions on the Board of Appeals' mission, whether they should pursue a legal or a

legal and technical review. Currently, the appeal cases cannot be discussed with the alternates since the Rules of Procedure provides only an access to them to the case documents. In the event of special technical expertise among the alternates, this knowledge cannot be currently used. This question is linked to the use of the external and internal resources in the future and to the corresponding budgetary considerations.

After Mr Bacigalupo broke the line, the Board of Appeal discussed his new obligation as a member of the Spanish Market and Competition Authority. The Board declared that this position is in line with the spirit of Article 18(1) of the ACER Regulation, according to which the BoA shall be comprise from, among others, current staff of competition authorities. Therefore, general conflict of interest is not invoked in the issue at hand and the conflicting interest must be assessed on a case-by-case basis.

Then the meeting was adjourned and the Board of Appeal joined to the Administrative Board of the Agency to participate in a common meeting.

*For the Board of Appeal:*

*Andris Piebalgs*

*Chairman*