Università di Genova | DIGI DIPARTIMENTO DI GIURISPRUDENZA

HARD QUESTIONS, SMALL TIME: WHO IS BRAVE ENOUGH TO SIT IN A BOARD OF APPEAL?

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The views expressed herein are those of the author, strictly academic, and should not be attributed to the ESAs or its Board of Appeal.

The legal framework for the suspension of administrative decisions

Rules on suspension are often dealt with in very synthetic provisions.

At the ESA’s BoA applicants have three months to appeal against decisions that are addressed to them or are of direct and individual concern to them.

The Board of Appeal then has three months to make a decision. At the end of the day, a period of six months.

An increased risk arises from the appeal procedure in cases where the application of the ESA's decision leads to results that cannot be easily reversed.

A case in point is …
the withdrawal of an authorization

Suspensions are allowed only when the two traditional conditions are met:

(i) they must not appear prima facie unfounded (*fumus boni iuris*); and

(ii) they must be aimed at avoiding an irreversible damage before a decision is taken on the merits (*periculum in mora*).

Redress is always on the background as a general remedy that can restore the applicant's rights in case the appeal is upheld on the merit.

The ESA's Board of Appeal follows the approach of the Court of Justice.

A case in point is …
the withdrawal of an authorization

The traditional case law of the Court may be sometimes too narrow. Redress may not “always” be a *panacea* to mend possible flaws in the challenged decisions.

This risk is not the same for all the ESAs decisions, of course. For instance, compliance with administrative sanctions does not lead to specific issues later on, in case the Board adjudicates in favour of the applicant.

However, risks are higher when two conditions occur simultaneously:

(i) complying and undoing compliance with the ESAs decision is expensive; (ii) the application date of the ESAs decision is likely to fall before the Board’s decision on the merits of the case.

A case in point is …
the withdrawal of an authorization

In this case, the Board may be particularly rigorous when scrutinizing whether the appeal provides arguments that appear, *prima facie*, not unreasonable.

As the *fumus boni iuris* will be subject to close scrutiny, it becomes crucial that the ESAs pay the utmost attention to some fundamental issues concerning the proper conduct of the administrative proceedings.

Boards often deal with incredibly important issues such as fundamental rights, but they must do so within the short timeframe not just of the whole appeal procedure, but of the suspension phase alone.

The role of fundamental rights in the quasi-judicial review

Recently, the ESAs Board had to deal with matters pertaining to the right of those involved in an administrative proceeding to be heard by the administrative authority, and to the obligation of that authority to give reasons for its decisions.

Fundamental rights are at the core of the EU legal architecture, and they should not be subject to any compression.

At the same time, there is no doubt that a Board should be able to tell cases where a substantive violation occurred form others where there is no material harm for the applicant, so that the appeal does not deserve to be upheld on this matter.

The role of fundamental rights in the quasi-judicial review

The duty to provide reasons in an administrative decisions cannot be satisfied by a mere repetition of the wording of the law that defines the purpose of the ESAs' powers.

How far the Board should go after these initial statements, particularly as regards the ability of the appeal procedure to compensate for such violations?

What about the reasons given during the appeal procedure (for instance in the ESA's response)?

Are they able to compensate for the lack of adequate reasoning in the administrative decision?

To conclude: Is there a functional continuity between the ESAs and the Board?

Boards are normally established in the interests of procedural economy.

Therefore, the explanations provided by the ESA in the course of the appeal should be able to compensate for the lack of sufficient reasoning in the contested decision.

As to the right to be heard, similar questions arise when the applicant that was not heard before the Authority does not bring, during the appeal, any material information.

To conclude: Is there a functional continuity between the ESAs and the Board?

Remittal of the decision to the ESA for the sole purpose of amending its wording to incorporate information already provided to the appellant during the appeal procedure would not improve the protection of the appellant.

This would just determine a postponement of the final decision, with no benefit for anyone. Remitting the case back to the ESA, when there is no rational ground to believe the decision can be revised, does not seem to improve the protection of the party.

However, such an approach may expose the Board's decision itself to the risk of being challenged, if one believes there is no way to compensate the original lack of grounds with information the ESA provided during the appeal.

To conclude: Is there a functional continuity between the ESAs and the Board?

Functional continuity might facilitate a review where substance prevails over form.

Even when it appears that a violation occurred on a formal basis, there is some room to reconsider the point before the Board and to mend the loopholes of the administrative proceeding in that regard.

Vice-versa, one can expect that the Board may not be satisfied of formal compliance when the substance is not met.

At the end of the day, what a difficult choice!

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