

THE EUROJUST JOINT SUPERVISORY BODY'S CONTRIBUTIONS TO THE DEVELOPMENT OF PROCEEDINGS BEFORE EU BOARDS OF APPEAL

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*The European idea is . . . the slow-ripened
fruit of a more elevated way of thinking.*¹

I. INTRODUCTION

The Joint Supervisory Body of Eurojust examines appeals lodged by data subjects against decisions of Eurojust on the processing of their own personal data. It must objectively determine facts and make findings on the basis of those facts to render its decisions. Its actions may in consequence remedy a situation and affect the legal rights and duties of parties to the proceedings.²

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1. STEFAN ZWEIG, MESSAGES FROM A LOST WORLD: EUROPE ON THE BRINK 115–16 (2016) (reprinting *The Unification of Europe* (1934)).

2. Cf. Martin Ekvad, *The Functioning of the Community Plant Variety Office Board of Appeal in INTELLECTUAL PROPERTY AND THE JUDICIARY* 308, 311–12 (Christopher Geiger, Craig A. Nard & Xavier Seuba eds., 2018) [hereinafter IP AND THE JUDICIARY] (describing the structure and composition of the Community Plant Variety Office Board of Appeal, and characterizing it as a quasi-judicial body).

The nature of the Joint Supervisory Body is specialised since it supervises the protection of personal data in the specific area of judicial co-operation in criminal matters. Regarding its role, the Joint Supervisory Body is entrusted with second-tier, last fact-finding, and final decisionmaking with a remedial function.³ Its appeal decisions involve the determination of disputes between data subjects and Eurojust as a body of the EU.

II. THE LEGAL NATURE OF THE JOINT SUPERVISORY BODY

Like the Boards of Appeal of both the Community Plant Variety Office⁴ and the EU Intellectual Property Office,⁵ the Joint Supervisory Body forms an integral part of Eurojust which means that it does not have its own legal personality pursuant to the Eurojust Decision.⁶ The Joint Supervisory Body is, however, above Eurojust in the organisational structure.

The case law of the Court of Justice to determine whether a body of the EU may be characterised as quasi-judicial is well established. The Court of Justice takes into account a non-

3. Luca Bolzonello, *Independent Administrative Review Within the Structure of Remedies Under the Treaties: The Case of the Board of Appeal of the European Chemicals Agency*, 22 EUROPEAN PUB. L. 569, 569 (2016) (describing the EU's administrative review procedures as "formal procedures for reviewing whether complex administrative decisions of . . . EU law are legal and well founded," explaining that these administrative reviews "are conducted by [the] independent organ of the relevant authority," and pointing out that they "have become increasingly frequent in the European legal order").

4. Gert Würtenberger, *The Position of the Board of Appeal in the Legal Protection System for Community Plant Variety Rights in IP AND THE JUDICIARY*, *supra* note 2, at 328, 331.

5. Case T-163/98, *Procter & Gamble Co. v. OHIM*, 1999 E.C.R. II-02383 ¶ 37, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61998TJ0163&from=EN>; Case T-110/01, *Vedial v. OHIM*, 2002 E.C.R. II-05275 ¶ 19, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62001TJ0110>; Case T-107/02, *GE Betz v. OHIM*, 2004 E.C.R. II-01845 ¶ 33, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62002TJ0107>. The EU Intellectual Property Office is referred to throughout the remainder of this article as EUIPO.

6. Council of the European Union, Council Decision 2009/426/JHA, on the Strengthening of Eurojust and Amending Council Decision 2002/187/JHA Setting Up Eurojust with a View to Reinforcing the Fight Against Serious Crime, recital 1, 2009 O.J. (L138/14) 1 (acknowledging that Eurojust was "set up . . . as a body of the European Union with legal personality"); Council of the European Union, Council Decision 2002/187/JHA Setting up Eurojust with a View to Reinforcing the Fight Against Serious Crime, art. 1, 2002 O.J. (L 63/1) (providing that "Eurojust shall have legal personality") [hereinafter the Eurojust Decision].

exhaustive list of factors such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law, and whether it is independent.⁷ Applying this non-exhaustive list of factors to the Joint Supervisory Body,

- it is established by law,⁸
- it is permanent,⁹
- its jurisdiction is compulsory because data subjects may appeal against the decisions of Eurojust on the processing of their own personal data only before the Joint Supervisory Body,¹⁰
- its procedure is *inter partes* since the appellant and Eurojust both make submissions before the Joint Supervisory Body,
- the Joint Supervisory Body applies rules of law, and
- the Joint Supervisory Body is independent of Eurojust,¹¹ just as the Boards of Appeal of the EUIPO are independent of the EUIPO itself.¹²

The Joint Supervisory Body is therefore a quasi-judicial body of the EU,¹³ just as the Boards of Appeal of the EUIPO are

7. Case C-54/96, Dorsch Consult Ingenieurgesellschaft mbH v. Bundesbaugesellschaft Berlin mbH, 1997 E.C.R. I-04961 ¶ 23, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61996CJ0054>; Joined Cases C-110/98 to C-147/98, Gabalfrija & Others v. AEAT, 2000 E.C.R. I-01577 ¶ 33, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61998CJ0110>; Case C-195/98; Österreichischer Gewerkschaftsbund v. Republik Österreich, 2000 E.C.R. I-10497 ¶ 24, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61998CJ0195>; Case C-516/99, Schmid, 2002 E.C.R. I-04573 ¶ 34.

8. Eurojust Decision, *supra* note 6, art. 23(1).

9. *Id.* art. 23(2).

10. *Id.* arts. 19(8), 20(2), 23(7).

11. *Id.* art. 23(1).

12. Stefan Martin, *The Boards of Appeal of the European Union Intellectual Property Office: An Alien Within the Landscape of European Administrative Law!* in IP AND THE JUDICIARY, *supra* note 2, at 337, 339 (pointing out by analogy that boards of appeal are “separate entit[ies]” and not merely departments of their offices).

quasi-judicial bodies.¹⁴ This implies that the Joint Supervisory Body plays the role of a Board of Appeal with procedures and powers that resemble those of a court.

III. COMPOSITION OF THE JOINT SUPERVISORY BODY

The composition of Boards of Appeal depends on the particular tasks of each. In the case of the Joint Supervisory Body, the Eurojust Decision distinguishes between appointees and permanent members.

A. Appointees to the Joint Supervisory Body

The Eurojust Decision provides that each Member State must appoint for at least three years a judge who is not a national member of Eurojust or “if its constitutional or national system so requires a person holding an office giving him sufficient independence.”¹⁵

B. Permanent Members of the Joint Supervisory Body

The Joint Supervisory Body is itself composed of three permanent members.¹⁶ Their function as members is a part-time occupation. Like members of, for instance, the Community Plant Variety Office Board of Appeal, they must juggle their primary professional activities with their functions as members of the Joint Supervisory Body. In addition, members of the Joint Supervisory Body work *pro bono* which ensures that no budgetary reason would impede its independence.¹⁷

The composition of the Joint Supervisory Body must remain identical for the duration of an appeal procedure even if

13. See Xavier Tracol, *Legal Risk Management in EU Organizations*, 20 EUROPEAN PUB. L. 711, 719 (Nov. 2014); cf. Case T-133/08, Ralf Schröder v. CPVO, ¶ 137, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62008TJ0133> (characterising the Board of Appeal of the Community Plant Variety Office as “a quasi-judicial body”).

14. Martin, *supra* note 12, at 341, 345 (discussing quasi-judicial nature of Boards).

15. Eurojust Decision, *supra* note 6, art. 23(1).

16. *Id.* at 23(2).

17. See, e.g., Ekvad, *supra* note 2, at 313–14, 327 (discussing independence of the Community Plant Variety Office Board of Appeal, which operates much as does the Joint Supervisory Body).

the permanent members have reached the end of their terms of office before it concludes.¹⁸ The permanent member in his or her third year of mandate after elections chairs the Joint Supervisory Body.¹⁹

1. The Joint Supervisory Body Should Assist in Specifying Criteria for Assignment to Boards of Appeal

a. Substantial Experience as Appellate Lawyers

Substantial experience should be the main criterion of assignment to Boards of Appeal in light of the specificities of the judicial technique and of appeal proceedings. In practice, members of Boards of Appeal are likely to be experienced appeal lawyers although this background is not legally required. The Eurojust Decision contains general prescriptions on the composition of the Joint Supervisory Body. Members of the Joint Supervisory Body are merely required to be judges or members with an equal level of independence.²⁰

As of this writing, the Chairperson of the Joint Supervisory Body is a Presiding Judge of a Chamber at the Court of Appeal of Luxembourg, member of the Constitutional Court of Luxembourg, and Data Protection Officer of the Court of Appeal. Another is a judge in The Hague Criminal Court of Appeal. The third is a professor of administrative law at the University of Ljubljana whose field of expertise includes the law of personal data protection.²¹ It is therefore striking to see that

18. Eurojust Decision, *supra* note 6, art. 23(5).

19. *Id.* art. 23(3).

20. *Id.* art. 23(1).

21. See *Assermentation au ministère de la Justice [Swearing In at the Ministry of Justice]*, GOV'T OF LUX. (5 July 2019), https://gouvernement.lu/fr/actualites/toutes_actualites/communiqués/2019/07-juillet/05-braz-assermentation.html (reporting home-country positions of the Chairperson of the Joint Supervisory Body) (available only in French); Wilbert Tomesen, *Statement of the Chair of the Joint Supervisory Body of Eurojust to the College at the Occasion of the College Plenary Meeting on September 22, 2015*, EUROJUST (22 SEPT. 2015), <http://www.eurojust.europa.eu/doclibrary/Eurojust-framework/jsb/meetingsStatement%20of%20Chair%20of%20JSB%20to%20College%202015-09-22/Statement%20of%20Chair%20of%20JSB%20to%20the%20College%20of%20Eurojust%20of%2022-09-2015.pdf> (describing home-country positions of another member of the Joint Supervisory Body); Rajko Pirnat, *PhD, Professor*, UNIV. OF LJUBLJANA,

the majority of the Joint Supervisory Body is not only composed of appeal lawyers, but appeal judges. The fact that the Joint Supervisory Body is mainly composed of experts—persons who have or are deemed or claimed to have “extensive skill or knowledge in a particular field”²² and are “part of a wider group consisting of persons holding similar expertise”²³—with judicial experience corresponds to the specific needs of Eurojust. Indeed, this is to be expected, as Eurojust processes personal data coming from domestic judicial authorities that goes back to them afterwards.²⁴

b. Balance Between Domestic Legal Systems

The assignment process should also include criteria designed to ensure that members of Boards of Appeal gained their substantial professional experience in a diversity of domestic legal systems. A variety of legal cultures in its members’ professional backgrounds encourages and facilitates the recourse to comparative law if need be. Members of Boards of Appeal may then seek guidance and inspiration in their own domestic legal systems or in other domestic legal systems with

<http://www.pf.uni-lj.si/en/faculty/teachers/rajko-pirnat-phd-professor/> (describing home-country position of another member of the Joint Supervisory Body).

22. Monika Ambrus, Karin Arts, Ellen Hey & Helena Raulus, *The Role of “Experts” in International and European Decision-Making Processes: Setting the Scene* in *THE ROLE OF “EXPERTS” IN INTERNATIONAL AND EUROPEAN DECISION-MAKING PROCESSES* 1, 12 (Monika Ambrus, Karin Arts, Ellen Hey & Helena Raulus eds., 2014).

23. *Id.*

24. See *Third Opinion of the Joint Supervisory Body of Eurojust About the Data Protection Regime in the Proposed Eurojust Regulation* § 1, (May 6, 2015) (Carlos Campos Lobo, Chair, JSB), http://eurojust.europa.eu/doclibrary/Eurojust-framework/jsb/opinions/Third%20Opinion%20on%20the%20data%20protection%20regime%20in%20the%20proposed%20Eurojust%20Regulation%2c%202015/3rdOpinionJSB_on-data-protection-in-proposed-Eurojust-Regulation_2015-05-06_EN.pdf (also advocating for consideration of “judicial expertise and experience” in choosing membership of the Cooperation Board and emphasizing the “judicial nature” of Eurojust’s work); see also Xavier Tracol, *Le rôle d’Eurojust dans l’échange de données par l’intermédiaire des agences dans l’espace de liberté, de sécurité et de justice de l’Union européenne* [*The Role of Eurojust in the Exchange of Data through Agencies in the Area of Freedom, Security and Justice of the European Union*] in *L’ÉCHANGE DES DONNÉES DANS L’ESPACE DE LIBERTÉ, DE SÉCURITÉ ET DE JUSTICE DE L’UNION EUROPÉENNE* [THE EXCHANGE OF DATA IN THE AREA OF FREEDOM, SECURITY AND JUSTICE OF THE EUROPEAN UNION] 239–57 (Constance Chevallier-Govers ed., 2017) (available only in French).

which they are also familiar.²⁵ Although this diversity in professional backgrounds is not legally required, it is desirable. For instance, current members of the Joint Supervisory Body come from Slovenia, Luxembourg, and the Netherlands, where the legal systems substantially differ.²⁶

The Joint Supervisory Body's rules of procedure provide that

[i]f no member of the Member State from which the personal data that form the object of the appeal originate is represented in the Joint Supervisory Body, the person appointed by this Member State in accordance with Article 23(1) to (3) of the Eurojust Decision shall act as ad hoc judge in the Joint Supervisory Body for the duration of the examination of this appeal.²⁷

This provision has been implemented only once. An ad hoc judge was appointed in accordance with its provisions for the duration of the case.²⁸

c. Mastery of Substantive Area and Technical Knowledge

The composition of Boards of Appeal should also depend on matching candidates with each board's selected jurisdiction and the technical knowledge that its substantive specialisation requires.²⁹ The specialised composition of Boards of Appeal

25. Haris Tagaras, *Comparative Law and the European Union Civil Service Tribunal*, in *COURTS AND COMPARATIVE LAW* 187, 194 (Mads Andenas & Duncan Fairgrieve eds., 2015).

26. See text accompanying note 21, *supra*.

27. Act of the Joint Supervisory Body of Eurojust of 23 June 2009, art. 12(1); see 53 OFFICIAL J. E.U. C 182/3–10 (7 July 2010), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_2010.182.01.0003.01.ENG&toc=OJ:C:2010:182:TOC (reprinting official text of rules) [generally cited hereinafter as J.S.B. R. P. art. ___].

28. Appeal No. 16/01 (30 May 2016), <http://www.eurojust.europa.eu/doclibrary/Eurojust-framework/jsb/appealdecisions/Appeal%20Decision%202016-05-30/JSB-Appeal-Decision-2016-05-30-EN.pdf> (noting agreement to appoint ad hoc judge “for the duration of the case”); see also Appeal No. 16/02 (20 Jan. 2017), <http://www.eurojust.europa.eu/doclibrary/Eurojust-framework/jsb/appealdecisions/Appeal%20Decision%202017-01-20/JSB-Appeal-Decision-2017-01-20-EN.pdf> (noting that the Joint Supervisory Body appointee for Greece had been asked to act as an ad hoc judge, but declined because his mandate had expired).

29. Paola Chirulli & Luca de Lucia, *Specialised Adjudication in EU Administrative Law: The Boards of Appeal of EU Agencies*, 40 EUROPEAN L. REV. 832, 838–39, 842 (2015) (discussing benefits of specialised technical knowledge among members of Boards

positively impacts the quality of their review and decisionmaking powers.³⁰ For instance, the specific jurisdiction of the Joint Supervisory Body deals with the compliance by Eurojust with the applicable provisions on the protection of personal data.³¹ In practice, its current chairperson is the Data Protection Officer of the Court of Appeal of Luxembourg whilst another member of the Joint Supervisory Body was a Commissioner and Vice-President of the Dutch Data Protection Authority.³² The Joint Supervisory Body thus has the technical skills required to perform its functions.

IV. PROCEDURE BEFORE THE JOINT SUPERVISORY BODY

The procedure before the Joint Supervisory Body is simple, effective, quick, and inexpensive. A data subject who requests a second assessment of his or her case may lodge an appeal against a decision of Eurojust before the Joint Supervisory Body within thirty days of receiving Eurojust's decision.³³

A. *Establishment of a Screening Mechanism*

Boards of Appeal like the Joint Supervisory Body should consider the admissibility of appeals and the grounds of appeal filed by parties at the beginning of the appeal procedure. This sort of screening may contribute to procedural economy and the efficient functioning of the Boards of Appeal. As one Board of Appeal has noted, “[a]ppel proceedings . . . are not an opportunity simply to reiterate the many, and sometimes abstruse, scientific points previously discussed and addressed

of Appeal and recognizing that their expertise “cannot be equalled by the generalist Administrative Court”).

30. *Id.* at 842.

31. See DIANA ALONSO BLAS, DATA PROTECTION AT EUROJUST: A ROBUST, EFFECTIVE AND TAILOR-MADE REGIME 31 (Feb. 2014) (characterizing the Joint Supervisory Body as “an independent external supervisor” and discussing its role and operation).

32. See text accompanying note 21, *supra*.

33. J.S.B. R. P. art. 15(1), *supra* note 27; see also Appeal No. EJ-JSB-18/01 (24 Sept. 2018), [http://www.eurojust.europa.eu/doclibrary/Eurojust-framework/jsb/appealdecisions/Appeal%20Decision%202018-01%20\(September%202018\)/JSB-Appeal-Decision-2018-01_1_EN.pdf](http://www.eurojust.europa.eu/doclibrary/Eurojust-framework/jsb/appealdecisions/Appeal%20Decision%202018-01%20(September%202018)/JSB-Appeal-Decision-2018-01_1_EN.pdf) (noting filing dates).

during the course”³⁴ of the proceedings that led to the impugned decision. If Boards of Appeal are composed of more than two members, a Bench of at least two members of the Board of Appeal can be provided with the power and authority to rule on the admissibility of appeals and grounds of appeal before the substance of any appeal is considered. For instance, the Joint Supervisory Body’s rules of procedure require appellants to outline their grounds of appeal.³⁵ The Joint Supervisory Body initially considers the admissibility of the appeal and rules on it.³⁶ The Joint Supervisory Body may find that the appeal is partly admissible.³⁷

The advantages of an initial screening mechanism are fourfold:

- At least two members of a Board of Appeal rule on the admissibility of appeals and the grounds of appeals without mobilising all the members of that Board;
- The collegiality of the decision is preserved since more than a single member of a Board of Appeal rules on the admissibility of appeals and grounds of appeals;³⁸

34. Decision of the Board of Appeal of the European Chemicals Agency, Case No. A-018-2014, BASF Grenzach GmbH ¶ 133 (Dec. 2016), <https://echa.europa.eu/documents/10162/b4c50a57-0bab-d13b-7acf-e975939bb155>.

35. J.S.B. R. P. art. 15(2), *supra* note 27.

36. *See, e.g.*, Appeal No. 16/01, *supra* note 28 (concluding that “the appeal met the requirements to be considered admissible”); Appeal No. 16/02, *supra* note 28 (same); Appeal No. EJ-JSB-18/02 (18 Sept. 2018), [http://www.eurojust.europa.eu/doclibrary/Eurojust-framework/jsb/appealdecisions/Appeal%20Decision%202018-02%20\(September%202018\)/JSB-Appeal-Decision-2018-02_EN.pdf](http://www.eurojust.europa.eu/doclibrary/Eurojust-framework/jsb/appealdecisions/Appeal%20Decision%202018-02%20(September%202018)/JSB-Appeal-Decision-2018-02_EN.pdf); Appeal No. EJ-JSB-18/01, *supra* note 33.

37. Appeal No. EJ-JSB-19/01 (6 June 2019), [http://www.eurojust.europa.eu/doclibrary/Eurojust-framework/jsb/appealdecisions/Appeal%20Decision%202019-01%20\(June%202019\)/JSB-Appeal-Decision-2019-01_EN.pdf](http://www.eurojust.europa.eu/doclibrary/Eurojust-framework/jsb/appealdecisions/Appeal%20Decision%202019-01%20(June%202019)/JSB-Appeal-Decision-2019-01_EN.pdf).

38. Yet the REACH regulation dated 18 December 2006 provides that “the Chairman of the Board of Appeal shall examine whether the appeal is admissible within 30 days of the appeal being filed.” Commission Regulation 1907/2006 of 18 Dec. 2006, Concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), Establishing a European Chemicals Agency, Amending Directive 1999/45/EC and Repealing Council Regulation (EEC) No. 793/93 and Commission Regulation (EC) No. 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC, 2006 O.J. (L. 396) 1, art. 93(2). Regarding applications of this provision, see, for instance, the Decisions of the Chairman

- Boards of Appeal rule on the admissibility of grounds of appeals filed by parties at the beginning of the procedure and not in the final decision after the parties have made written submissions and have fully developed their arguments in their appeal briefs and hearings if applicable;³⁹ and
- An initial screening mechanism may expedite appeal proceedings that take a long time although it is sometimes unjustified.⁴⁰

The establishment of a screening mechanism by Boards of Appeal of the admissibility of appeals and grounds of appeal filed by parties at the beginning of the appeal procedure may thus assist in substantially expediting it.

B. Intensity of Review by Boards of Appeal

Intensity of review is linked to the composition of the Boards of Appeal and the subject matter of the impugned decisions that come before them. Boards that specialise—those whose cases are limited, for instance, to specific areas—and whose members have advanced technical skills in the relevant area are as a practical matter able to review impugned decisions with great care even if they do not review them *de novo*.

Conversely, Boards of Appeal that are mainly composed of members with no technical knowledge do not have the practical

of the Board of Appeal of the European Chemicals Agency in Case No. A-019-2015 and Case No. A-20-2015 (25 Sept. 2015), both executed by Mercedes Ortuño, then Chairman of the Board of Appeal of the European Chemicals Agency.

39. Decision of the Board of Appeal of the European Chemicals Agency, No. A-013-2014 ¶ 45 (7 Dec. 2016), <https://echa.europa.eu/documents/10162/54b57277-2af3-eee3-3db7-5e67a95704cf> (setting out appellant's claim).

40. The Rules of Procedure of the Court of Justice provide that

[w]here the appeal or cross-appeal is, in whole or in part, manifestly inadmissible or manifestly unfounded, the Court may at any time, acting on a proposal from the Judge-Rapporteur and after hearing the Advocate General, decide by reasoned order to dismiss that appeal or cross-appeal in whole or in part.

R.P. of the Ct. of J., 2012 O.J. (L 265) 1, art. 181. The Court of Justice has been routinely dismissing meritless appeals by reasoned order pursuant to this provision.

means to intensely review impugned decisions even if doing so is part of their tasks. They should accordingly limit the scope of their review to a corrective process. Boards of Appeal mainly composed of members with no technical knowledge should accordingly examine whether the procedure complies with fundamental rights such as the principle of good administration,⁴¹ including the right to be heard⁴² and the duty to state reasons,⁴³ as well as the principle of proportionality;⁴⁴ whether the impugned decisions contain errors such as errors of procedure, errors of law, errors of fact and (manifest) errors of assessment;⁴⁵ whether organisations of the EU wrongly exercised their broad discretion in making findings;⁴⁶ as well as determine the degree of seriousness of such errors and their possible impact on the impugned decisions.⁴⁷

The Eurojust Decision provides for the tasks of the Joint Supervisory Body, such as examining the compatibility of a decision taken by Eurojust—or the processing of data by Eurojust—with the Eurojust Decision.⁴⁸ The Joint Supervisory Body should carry out a strict control of compliance since it reviews impugned decisions which involve the fundamental right to the protection of personal data provided for in Article 8

41. ECHA Appeal No. A-018-2014, *supra* note 34, ¶ 111 (pointing out that “[t]he right to sound administration is enshrined in . . . the Charter of Fundamental Rights of the European Union”).

42. Decision of the Board of Appeal of the European Chemicals Agency, No. A-014-2014 ¶ 73 (1 Aug. 2016), <https://echa.europa.eu/documents/10162/c127c14f-260d-4360-8075-829b8f1a23b3>; ECHA Appeal No. A-013-2014, *supra* note 39 ¶ 58.

43. ECHA Appeal No. A-018-2014, *supra* note 34, ¶¶ 70, 71, 216 (referring to required statement of reasons).

44. *Id.* ¶¶ 87, 96; ECHA Appeal No. A-013-2014, *supra* note 39, ¶ 127.

45. ECHA Appeal No. A-014-2014, *supra* note 42, ¶¶ 27, 35, 38, 43–45, 63; Decision of the Board of Appeal of the European Chemicals Agency, No. A-003-2015 ¶¶ 32, 43, 50, 51 (1 Aug. 2016), <https://echa.europa.eu/documents/10162/e550e584-9b0b-4255-ab66-dc4076d30e1f>; Decision of the Board of Appeal of the European Chemicals Agency, No. A-005-2015 ¶¶ 64, 71, 73–74, 79–80, 82, 84, 85 (23 Aug. 2016), <https://echa.europa.eu/documents/10162/340ec917-9eb2-40c9-a002-cfe5aa68c3e0>; ECHA Appeal No. A-013-2014, *supra* note 39, ¶ 136.

46. ECHA Appeal No. A-013-2014, *supra* note 39, ¶ 74; ECHA Appeal No. A-018-2014, *supra* note 34, ¶ 134.

47. Ekvad, *supra* note 2, at 324–25 (discussing analogous responsibilities of the Community Plant Variety Office Board of Appeal).

48. Eurojust Decision, *supra* note 6, art. 23(7).

of the Charter.⁴⁹ To review the impugned decision made by Eurojust and assess its compliance with the applicable provisions on the protection of personal data, the Joint Supervisory Body must verify its correctness from the legal, factual, and technical points of view. To do so, the applicable provisions combine both adversarial proceedings, which place the appellant and Eurojust—of which the Joint Supervisory Body is part—on an equal procedural footing, and inquisitorial proceedings.

1. Adversarial Proceedings

The Joint Supervisory Body's rules of procedure require appellants to outline their grounds of appeal and to include any available supporting documentation with their appeals.⁵⁰ The Joint Supervisory Body must then disclose a copy of the appeal to Eurojust which may submit observations within four weeks.⁵¹ In practice, the College of Eurojust submits the required observations, which may respond to the grounds of appeal and contain arguments and authorities for each ground of appeal.⁵²

The rules of procedure also provide that “[b]efore reaching a final decision, the Joint Supervisory Body shall invite all parties to submit final comments.”⁵³ This provision sets out a legal obligation for the Joint Supervisory Body to offer the

49. Grand Chamber, Joined Cases No. C-293/12 (*Digital Rights Ireland v. Minister for Communications, Marine & Natural Resources*, et al.) & No. C-594/12 (*Seitlinger*, et al.) ¶ 48 (8 Apr. 2014); Grand Chamber, Case C-362/14, *Maximilian Schrems v. Data Protection Comm'r* ¶ 78 (6 Oct. 2015); see also Xavier Tracol, *Legislative Genesis and Judicial Death of a Directive: The European Court of Justice Invalidated the Data Retention Directive (2006/24/EC), Thereby Creating a Sustained Period of Legal Uncertainty About the Validity of National Laws Which Enacted It*, 30 *COMPUTER L. & SEC. REV.* 736 (Nov. 2014) (discussing *Digital Rights Ireland* and *Seitlinger*.); Xavier Tracol, *“Invalidator” Strikes Back: The Harbour Has Never Been Safe*, 32 *COMPUTER L. & SEC. REV.* 345 (Apr. 2016) (discussing *Schrems*).

50. J.S.B. R. P. art. 15(2), *supra* note 27.

51. *Id.* art. 16(2).

52. *Id.* art. 16(3) (providing that “the Joint Supervisory Body may request the College of Eurojust to nominate a representative for the appeal”); see also Appeal No. 16/01, *supra* note 28 (noting that Joint Supervisory Body forwarded appeal to College of Eurojust and that College replied with observations); Appeal No. 16/02, *supra* note 28 (same); Appeal No. EJ-JSB-18/02, *supra* note 36 (same); Appeal No. EJ-JSB-18/01, *supra* note 33; Appeal No. EJ-JSB-19/01, *supra* note 37.

53. J.S.B. R. P. art. 21, *supra* note 27.

option of making a closing statement to all parties. They are then free to avail themselves of this option. Appellants may thus file comments in reply which help to crystallise the issues that they initially raised. In addition, final comments do not necessarily delay appeal proceedings if all parties are required to file final comments within a short time limit after the date on which the appellant's comments in response are filed. The appropriate balance can therefore be maintained between the efficiency of proceedings and the right to a fair trial which includes the right to an expeditious appeal decision.

2. *Inquisitorial Proceedings*

The Joint Supervisory Body may also decide to investigate on location at Eurojust,⁵⁴ appointing a rapporteur from among its members on a proposal from the chair.⁵⁵ It may then acquire and examine all the relevant evidence by hearing witnesses and experts.⁵⁶

The Joint Supervisory Body may thus carry out a *de novo* review of the legal and factual compatibility of the impugned decision taken by Eurojust (or the processing of data by Eurojust) and make a new full examination of the merits of the matter in terms of both law and facts, as is the practice of the EUIPO Boards of Appeal.⁵⁷ This *de novo* review of new evidence by the Joint Supervisory Body may lead to a change in the assessment of the case. The specialised review, which offers both expeditiousness and informality, has been implemented once and a member of the Joint Supervisory Body was appointed as rapporteur in that case to carry out an on-site investigation at Eurojust.⁵⁸

In addition, the submissions of the parties do not legally bind the Joint Supervisory Body. It once raised a plea *ex officio*. Although the two parties did not base both their oral and written submissions on Article 19(4) of the Eurojust Decision, the Joint

54. *Id.* art. 17(2).

55. *Id.* art. 5(4).

56. *Id.* art. 20.

57. *See, e.g., OHIM v. Kaul*, Case C-29/05 ¶ 57 (13 Mar. 2007); *see also* Martin, *supra* note 12, at 353.

58. *See* Appeal No 16/01, *supra* note 28.

Supervisory Body legally based its decision on this very provision.⁵⁹

Last, the Joint Supervisory Body once successfully played the role of neutral arbiter between two parties, gently encouraging them to amicably settle a request for access to personal data.⁶⁰ This conciliation led to the closure of the case without any need for the Joint Supervisory Body to adjudicate the matter.

C. Hearings

Oral hearings are optional before the Joint Supervisory Body, but parties to the appeal proceedings have the right to request an oral hearing and the Joint Supervisory Body bears the legal obligation to inform them of this right.⁶¹ The Joint Supervisory Body may then grant the request “to the extent deemed necessary for the examination of the case.”⁶²

Boards of Appeal may consider the applicable provisions and practices of both the Court of Justice and the Appeals Chamber of the UNICTY to conduct their own hearings. The Court or the Judge-Rapporteur may also send letters inviting parties to answer questions in writing before the hearing or orally at the hearing.⁶³ In practice, the Court of Justice used to request parties to reply orally to questions during the hearing although it now poses questions before the hearing and requests written replies.⁶⁴ The questions of the Court of Justice are, however, confidential as long as the judicial proceedings remain

59. Decision of the Joint Supervisory Body of Eurojust Regarding the Appeal Filed on Behalf of Mr A ¶¶ 1, 4, 6, 7 (18 March 2013), <http://eurojust.europa.eu/doclibrary/Eurojust-Eurojust-framework/jsb/appealdecisions/Appeal%20Decision%202013-03-18/JSB-Appeal-Decision-CaseMrA-2013-03-18-EN.pdf>.

60. Appeal No. EJ-JSB-18/01, *supra* note 33.

61. J.S.B. R. P. art. 19(1), *supra* note 27.

62. *Id.*

63. *See Practice Directions to Parties Concerning Cases Brought Before the Court*, 2014 O.J. 12 (L 31) ¶ 50.

64. Request for an Opinion submitted by the European Parliament, Draft EU-Canada PNR Agreement, Opinion 1/15 (26 July 2017), Hearing of the Court of Justice of 5 April 2016. *See* Opinion of Advocate General Mengozzi ¶ 30 (8 Sept. 2016); Opinion 1/15 of the Grand Chamber ¶ 45 (26 July 2017); *see also* *Ministerio Fiscal*, Case C-207/16, Opinion of Advocate General Saugmandsgaard Øe ¶ 29 (3 May 2018).

pending.⁶⁵ Once the Court has rendered its final opinion or decision in the relevant case, the public may access procedural documents from that case.⁶⁶

The Appeals Chamber of the UNICTY issues scheduling orders or sends memos to all parties to the proceedings about a month before the date of the hearing. In those scheduling orders or memos, the Appeals Chamber of the UNICTY has started the practice of inviting the parties to address specific issues during their oral submissions. The Appeals Chamber sometimes asks questions to both parties or to one of them only.⁶⁷ The scheduling orders and memos of the Appeals Chamber are all available to the public.⁶⁸

D. Final Decisions of the Joint Supervisory Body

The Joint Supervisory Body shall, once it has decided an appeal, refer the matter “to Eurojust, which shall accept the decision of the JSB.”⁶⁹ It also specifies that “[d]ecisions of the JSB shall be final and binding on Eurojust.”⁷⁰ The Joint

65. BART DRIESSEN, *TRANSPARENCY IN EU INSTITUTIONAL LAW: A PRACTITIONER’S HANDBOOK* 93–97 (2012).

66. See generally, e.g., European Data Protection Supervisor, *Written Replies to Questions in Procedure: Opinion 1/15* (3 Mar. 2016), [http://www.europarl.europa.eu/RegData/publications/divers/2015/0001/TIERS_DV\(2015\)0001\(PAR11\)_XL.pdf](http://www.europarl.europa.eu/RegData/publications/divers/2015/0001/TIERS_DV(2015)0001(PAR11)_XL.pdf); Conseil de l’Union Européenne, *Réponses Écrites Présentées* (3 Mar. 2016), [http://www.europarl.europa.eu/RegData/publications/divers/2015/0001/TIERS_DV\(2015\)0001\(PAR10\)_XL.pdf](http://www.europarl.europa.eu/RegData/publications/divers/2015/0001/TIERS_DV(2015)0001(PAR10)_XL.pdf).

67. See, e.g., Scheduling Order, *Miroslav Bralo v. The Prosecutor*, No. IT-95-17-A, Appeals Chamber 3, ¶ 1(c) (10 Jan. 2007); Scheduling Order for Preparation of Appeal Hearing, *Prosecutor v. Enver Hadžihasanović & Amir Kubura*, No. IT-01-47-A, Appeals Chamber ¶ 1 (14 Nov. 2007); Memorandum from the Senior Legal Officer of the Appeals Chamber, *Prosecutor v. Pavle Strugar*, No. IT-01-42-A ¶ 2 (20 Mar. 2008); *Bralo*, *supra* this note, at 3, ¶¶ 1(a)–(b), 2; *Hadžihasanović & Kubura*, *supra* this note, 1 ¶ 2, 3; *Strugar*, *supra* this note ¶ 1.

68. See *ICTY Court Records*, UNITED NATIONS (n.d.), <http://icr.icty.org/default.aspx?e=uvdkrszcn1lcob45xox2p2n5>.

69. Eurojust Decision, *supra* note 6, art. 23(7). Anonymised appeal decisions of the Joint Supervisory Body are all published on the Eurojust website. See *Appeal Decisions of the Joint Supervisory Body*, EUROJUST, <http://eurojust.europa.eu/about/structure/jsb/Pages/appeals.aspx> (collecting Joint Supervisory Body opinions under *Appeal Decisions of the Joint Supervisory Body* heading).

70. Eurojust Decision, *supra* note 6, art. 23(8). Article 8 of Eurojust’s rules of procedure is to the same effect, so that the decisions of, for instance, the boards of appeal of the European Patent Office are also final. See, e.g., Cees Mulder & Marcus Müller, *The Procedural Rules in Appeal Proceedings Before the European Patent Office in IP AND THE JUDICIARY*, *supra* note 2, at 289, 289.

Supervisory Body thus expresses its own final position and not that of Eurojust.⁷¹ The experts who compose the Joint Supervisory Body need not account for their decisions to the Court of Justice.

Regarding remedies, the Joint Supervisory Body may reject the appeal and confirm the impugned decision by finding that “Eurojust correctly applied the provisions of the Eurojust Decision”⁷² or more precisely that the impugned decision “is in conformity with Article 19 of the Eurojust Decision”⁷³ on the right of access to personal data. If the Joint Supervisory Body conversely considers that a decision taken by Eurojust (or the processing of data by Eurojust) is incompatible with the Eurojust Decision, the Joint Supervisory Body must remit the decision back to Eurojust and refer the matter to Eurojust for reconsideration.⁷⁴

This has been done by, for instance, the Community Plant Variety Office Board of Appeal⁷⁵ under the principle of “administrative continuity,”⁷⁶ which also applies to the Boards of Appeal of the EUIPO.⁷⁷ The Joint Supervisory Body may also partly reject the appellant’s request and partly uphold the impugned decision of Eurojust.⁷⁸ In practice, the Joint Supervisory Body sometimes adds that “Eurojust is required” to take specific actions.⁷⁹ At the end of its life span, the Joint

71. Chirulli & de Lucia, *supra* note 29, at 848.

72. Decision of the Joint Supervisory Body of Eurojust Regarding the Appeal Filed on behalf of Mr X and Ms Y (14 Nov. 2013), <http://eurojust.europa.eu/doclibrary/Eurojust-framework/jsb/appealdecisions/Appeal%20Decision%202013-11-14/JSB-Appeal-Decision-CaseMrXMsY-2013-11-14-EN.pdf>.

73. Appeal No. 16/01, *supra* note 28; Appeal No. 16/02, *supra* note 28.

74. Württenberger, *supra* note 4, at 336 (discussing boards of appeal in general).

75. *Id.*

76. Ekvad, *supra* note 2, at 320 (articulating the “principle of ‘administrative continuity’”).

77. Case T-163/98, *supra* note 5 ¶ 38 (not annulled on this ground by the Court of Justice in *Procter & Gamble v. OHIM*, Case C-383/99 P (20 Sept. 2001)).

78. Appeal No. EJ-JSB-19/01, *supra* note 37.

79. Appeal on Behalf of Mr A, *supra* note 59 (noting that “Eurojust is required . . . to provide Mr A with a copy of the required security certificate as it is held by Eurojust”); Decision of the Joint Supervisory Body of Eurojust Regarding the Appeal Filed on Behalf of Mr T (7 Apr. 2011), <http://eurojust.europa.eu/doclibrary/Eurojust-framework/jsb/appealdecisions/Appeal%20Decision%202011-04-07/JSB-Appeal-Decision-CaseMrT-2011-04-07-EN.pdf> (noting that Eurojust is “required . . . to provide Mr T a clear and unambiguous answer as to the fact that no personal data on him are possessed by Eurojust”).

Supervisory Body finally became more assertive and once found that an impugned decision did “not comply with Article 19(4) of the Eurojust Decision.”⁸⁰ It therefore decided that “Eurojust must provide” a confirmation that a European Arrest Warrant “is in the possession of Eurojust, as well as a copy of it.”⁸¹

V. CONCLUSION

The purpose and added value of Boards of Appeal in general and the Joint Supervisory Body in particular are to provide a specialised review as a safety net. Such purpose and value are thus linked to the specialised members who compose Boards of Appeal. The specialised composition of the Joint Supervisory Body explains why it has sometimes been interpreting the applicable law differently from Eurojust itself. The fact that this different interpretation is applied to the protection of personal data, which includes a strong IT component, is noteworthy. IT programmes are designed to always replicate identical operations to various (personal) data. Such identical replication goes against the spirit of differently interpreting the same applicable law which is at the root of appeal proceedings.⁸² The latter however ensure a strict control of the decision rendered by Eurojust on the processing of

80. See Appeal No. EJ-JSB-18/02, *supra* note 36.

81. *Id.* The reasoning of the Joint Supervisory Body is also notable. It relied on Decision No. 10/02 of the Appeals Committee of the Joint Supervisory Body of Europol dated 14 March 2012 in the Appeal of Mr. A, and noted that the three cases in which access to personal data shall be denied provided for in Article 19(4) of the Eurojust Decision are applicable only

if, and to the extent to which, the interests of Eurojust or third parties outweigh the interest in exercising the right of access. The principle of proportionality implies that a decision on the right of access requires an assessment on a case by case basis. Refusing access is only possible when necessary for the purposes referred to in the exemptions. The word “necessity” implies that Eurojust is obliged to explain why an exemption is used. Simply referring to a more general fear is not sufficient for demonstrating the necessity of using an exemption. Eurojust should determine, and be able to explain, that the communication could specifically and effectively undermine the protected interest. The risk of the protected interest being undermined with the communication should be reasonably foreseeable and not purely hypothetical.

Id.

82. ANTOINE GARAPON & JEAN LASSÈGUE, JUSTICE DIGITALE: RÉVOLUTION GRAPHIQUE ET RUPTURE ANTHROPOLOGIQUE 177 (2018).

personal data. The Joint Supervisory Body has successfully been adjudicating appeals against decisions of Eurojust about the processing of personal data. The priority of relevant EU organisations should however be the prevention of errors made in impugned decisions rather than their subsequent correction by Boards of Appeal.⁸³

The Joint Supervisory Body will cease to exist when the regulation on Eurojust starts applying on 12 December 2019.⁸⁴ Data subjects will then have a right to lodge a complaint with the European Data Protection Supervisor if they consider that the processing of operational personal data by Eurojust does not comply with the Eurojust regulation or regulation 2018/1725.⁸⁵ The contribution of the Joint Supervisory Body to the development of proceedings before Boards of Appeal of EU organisations will then become part of its legacy to EU law.



83. See Tracol, *supra* note 13, at 731–38 (discussing ways in which to “prevent, manage and ensure better control of legal risks”).

84. Regulation (EU) 2018/1727 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for Criminal Justice Cooperation (Eurojust), and Replacing and Repealing Council Decision 2002/187/JHA 2018 O.J. (L 295/138) art. 82(2) (indicating that regulation “shall apply from 12 December 2019”).

85. Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the Protection of Natural Persons with Regard to the Processing of Personal Data by the Union Institutions, Bodies, Offices and Agencies and on the Free Movement of Such Data, and repealing Regulation (EC) No. 45/2001 and Decision No. 1247/2002/EC, 2018 O.J. (L 295/39) recitation ¶ 79 (providing that “[e]very data subject should have the right to lodge a complaint with the European Data Protection Supervisor, and the right to an effective judicial remedy before the Court of Justice”). The latter regulation provides for this right regarding the processing of administrative personal data. *Id.* art. 63 (providing that “[w]ithout prejudice to any judicial, administrative or non-judicial remedy, every data subject shall have the right to lodge a complaint with the European Data Protection Supervisor”).