

Draft Chapter in the ongoing project on the Boards of Appeal (forthcoming, version June 2021)

The historical development of Boards of Appeal of EU agencies

By Eva Pander Maat (City University of London) and Miroslava Scholten (Utrecht University)

Abstract.

Agencification phenomenon in the EU has led to concerns about controls over EU agencies' actions. As the quantity and 'quality', i.e., strength of de jure powers, of EU agencies have grown in the last decades, so does the system of control over agencies show its development. The controls over all EU agencies with the de jure decision-making powers as well as the European Central Bank within the Single Supervisory Mechanism have been supported with the establishment of Boards of Appeal, which count 9 entities. Like with the agencification phenomenon however, the establishment and characteristics of the Boards vary greatly from agency to agency without clear indications as to why the differences (should) exist and what exact role and how much discretion (should) be given to the Boards. As this unclarities put the legitimacy of the system of controls of EU agencies under pressure, an attempt to build a common system of review of agency action by the Boards seems desirable. To contribute to this ultimate goal of our study, this chapter offers a historical overview of agencification and review of agency action in the EU, rationales behind the creation of agencies' appeal bodies and an attempt of classification of different boards to enhance comprehension and development of a common system of review of agency action. For learning purposes, we look at the system of administrative review in the US. We base our analysis on relevant secondary legislation, such as agencies' founding acts, rules of procedure, case-law in the EU and in the US and relevant academic literature.

Key words: Boards of Appeal, agencies, EU, US, history, independence, rationale for creation

1. Introduction

EU agencies have marked their 45th anniversary in 2020. The EU started agencification in 1975 when the first two agencies were established; today, a network of EU agencies' directors counts 47 directors. Are there 47 EU agencies? The number may vary depending on the definition of an 'EU agency'. Normally, two larger groups of EU agencies are distinguished – decentralised and executive – agencies. The former is an umbrella term for all kinds of agencies, including offices, undertakings, etc., that can be compared with national independent regulatory and supervising-enforcement agencies. These EU agencies receive normally tasks and powers to contribute to rule-making and enforcement processes, if not to ensure these completely for specific parts of policy areas. These decentralise agencies are normally composed of management boards representing different stakeholders (member states, EU institutions, relevant organisations and at times also EEA countries), (executive) directors and other functional units like scientific committees of national experts or advisory stakeholder groups, which correspond to the agency's work. The Boards of Appeal have become one of such units that can be and have been established within EU agencies which have somewhat 'more' powers (decision-making tasks which produce legal effects on third parties). Whereas EU decentralised agencies are established normally by (sectoral) secondary legislation based on such 'open treaty clauses' as Articles 114 and 352 TFEU, and are placed in different member states (hence the label 'decentralised'), executive agencies, i.e., the other type of 'EU agencies', can be created, restructured and abolished by the EU Commission in accordance with Council Regulation (EC) No 58/2003. The latter are more 'assistants' to the Commission and fall outside scope of this study, also as they have no Boards of Appeal.

The empowerment of EU agencies with powers raises inevitably the question of how to control the exercise of such powers, especially given the fact that they are deemed to be better ‘decentralised’, or in other words, independent from the main Executive institution, which is the EU Commission, and from other interests, such as industry they regulate and supervise. The debate in the literature has been quite growing with a number of landmark publications about agencies’ accountability in light of the classic question of ‘independent, hence unaccountable?’¹ and judicial controls.² In light of a growing number of studies on individual types of controls over agency action, the question has arisen to what extent it is clear which type of controls should be there for various agencies’ tasks and outputs and how to ensure a watertight or comprehensive system of controls given the challenges that individual types of controls may face, also due to a multi-jurisdictional set up of the European Union.³ The political salience of an issue seems a relevant factor for the exercise of political accountability and the possibility to bring a claim needs to be there to initiate a check by a judge. And even if launched, each type of control may face other limits, such as the lack of expertise on the side of the controllers – politicians and judges – to be involved in meaningful controls. Moreover, the question of the possibility of meaningful controls is even more challenging in a shared administration of the EU where more tasks and powers have been delegated to organs and bodies with mixed compositions. This prompts the question if the system of shared tasks should be not also including joint controllers, i.e. de facto and de jure possibilities for joint hearings by relevant parliamentarians, perhaps ad hoc or permanent tribunals for transnational cases which involves rules of several jurisdictions, to name but a few. It is exactly within this debate that the rise of and our focus on the Boards of Appeal has been happening in this chapter.

We start with a brief sketch of the agencification phenomenon in the EU, which is the part and parcel of the appearance of the Boards of Appeal (section 2). Then, we give an overview of institutional features and independence feature of the Boards of Appeal (section 3). This is essential for further analysis of the Boards as an existing and potential mechanism of control over the agency action. This section shows great varieties of institutional features which in turn prompt the question of the need to create a coherent system for the creation and operation of the Boards of Appeal to ensure legal certainty and embedment of these organs in the system of controls over agencies. Before addressing the question as to how and what kind of coherent system there can be (section 5), we give a short comparative analysis on the rationales behind having such appeal bodies (section 4). Our analysis has distilled three key reasons for creating such bodies to control for agency action: ensuring the separation of powers ideals, providing an effective remedy and offering substantive expertise to ensure meaningful controls. We provide some insights on these rationales also using examples from the US, the system more advanced in terms of normative debate and organisation of appeal of agency decisions. We then conclude (section 6) putting forward our main argument that the Boards of Appeal offer an important controlling venue addressing (at least potentially) a number of challenges in the system of controls, such as lack of expertise of controllers, effective conflict-resolution procedure and lowering down the workload of the Court of Justice of the European Union. For this mechanism to be legitimate though, an authoritative guidance/regulation explaining the legislator and the

¹ Scholten M, ‘Independent, hence unaccountable? The need for a broader debate on accountability of the executive’ (2011) 4(1) *Review of European Administrative Law*, 5

² See, e.g. a recent PhD dissertation on ensuring effective judicial protection in the case of the Single Supervisory Mechanism (SSM): Laura Wissink (forthcoming)

³ Miroslava Scholten and Alex Brenninkmeijer, ‘Controlling EU agencies. The rule of law in a multi-jurisdictional legal order’, Edward Elgar, 2020.

boards (and the public) what choices can be made and when and why and how review should be conducted is essential to enhance legal certainty and legitimacy.

2. Agencification in the EU

It has been noted that the notion of ‘agencification’ is a rather well-settled and old one among the national regimes in the EU⁴ and certainly across the Atlantic. The US has been often referred to as the motherland of independent agencies (1889 Interstate Commerce Commission), even though the historical search shows that the first ideas may have appeared in Britain.⁵ In the EU, the ‘agency fever’ is a relatively new phenomenon.⁶ The literature divides the evolution of EU agencies in three waves.⁷ In 1975, the first wave saw the establishment of two agencies – the European Centre for the Development of Vocational Training (Cedefop) and the European Foundation for the Improvement of Living and Working Conditions (Eurofund). Then, the 90s were characterised by a true agency fever with the establishment of many further agencies. These years are characterised by a perceptive demand for regulatory activity.⁸ Among the agencies that were established in those years, one finds the Office for the Harmonisation in the Internal Market (OHIM) – now, European Intellectual Property Office (EUIPO) and the Community Plant Variety Office (CPVO). Finally, the last wave took place just after 2002 with the European Aviation Safety Agency (EASA), the European Railway Agency (ERA), the European Chemicals Agency (ECHA), among others. Given the fact that EU agencies’ powers have grown from information-gathering to advisory, rule-making and direct enforcement, one could mark the fourth wave of creation of EU agencies, namely EU enforcement agencies, like the European Markets and Securities Authorities (ESMA). ESMA, among others, can register credit rating agencies and trade repositories, monitor their performance and upon suspicion of violation of relevant laws, can appoint an independent investigating officer, who has investigation powers. Such investigation can lead to imposition of fines.⁹ The agencification phenomenon thus seems only gaining its momentum as EU agencies seem to have been only growing in number and powers they may get. So far only one EU agency has been abolished (European Agency for Reconstruction (2000-2008) with the mission in Kosovo) on the grounds of ‘needs satisfied’.¹⁰

The essence of agencies is that of bodies with detailed institutional objectives that gather expertise and sectoral knowledge.¹¹ Therefore, traditionally, the main rationale behind the establishment of an agency is

⁴ Morten Egeberg and Jarle Trondal, ‘Agencification of the European Union Administration: Connecting the Dots’ (ARENA Centre for European Studies 2016) Working Paper 3/2016 1.

⁵ Miroslava Scholten, *The political accountability of EU and US independent regulatory agencies* (diss. Maastricht University, 2014) 181.

⁶ Morten Egeberg and Jarle Trondal, ‘Agencification of the European Union Administration: Connecting the Dots’ (ARENA Centre for European Studies 2016) Working Paper 3/2016 1.

⁷ *ibid* 4; European Commission, ‘Interinstitutional Agreement on the Operating Framework for the European Regulatory Agencies’ (European Commission 2005) Draft COM(2005)59 final 2; Stefan Griller and Andreas Orator, ‘“Mapping the Jungle”: A Legal Attempt to Classify European Agencies’ (Europainstitut, WU Vienna 2006) CIT1-CT-2004–506392 4.

⁸ Michelle Everson, ‘Agencies: The “Dark Hour” of the Executive?’ in Herwig Hofmann and Alexander Türk (eds), *Legal challenges in EU administrative law: towards an integrated administration* (Edward Elgar Publishing 2009); Merijn Chamon, ‘EU Agencies: Does the Meroni Doctrine Make Sense?’ (2010) 17 *Maastricht Journal of European and Comparative Law* 281.

⁹ Miroslava Scholten and Michiel Luchtman (eds) ‘Law Enforcement by EU Authorities. Political and judicial accountability in shared enforcement’, Edward Elgar, 2017; Marloes van Rijsbergen and Miroslava Scholten, ‘ESMA Inspecting: The Implications for Judicial Control under Shared Enforcement’ (*European Journal of Risk Regulation*, 7 (3), pp. 569-579), 2016.

¹⁰ The Ramboll evaluation, Volume III, p. 48-51.

¹¹ ‘European Governance: A White Paper’ (European Commission 2001) COM(2001) 428 final 24.

rendering the “executive more effective at European level in highly specialized technical areas requiring advanced expertise and continuity, credibility and visibility of public action”.¹² And indeed – the EU agencies tackle issues as diverse as aviation, trade marks and designs, energy, plant variety, chemicals, railway, among many others. This central “ability to draw on highly technical, sectoral know-how”¹³ bears a key cost-saving role as having delegated certain tasks to the agency the EU Commission can focus on its core function, which is policy formation, while the agency is there to implement the policy within a specific technical context.¹⁴ The cost-saving rationale should be understood in a broad sense as valid both for the EU body itself, eg the EU Commission, but also for third parties, users of the agency, eg commercial entities. To this end, certain EU agencies have had to address the coordination and reduction of regulatory and supervisory burdens for market participants in cross-border operations, as long as the competent national authorities retained supervision of a specific sector.¹⁵ Importantly, agencies may also facilitate the centralisation of powers. This is mainly due to the fact that, where the EU competence is a shared one, the recourse to an agency has been particularly relevant and impactful as in this manner the implementation of new policies at a Union level takes place in close cooperation between the EU and the Member States.¹⁶ In this regard, agencies are thought to distance the decision-making process from the political influence.¹⁷

In addition to the strong benefit of technical expertise of the EU agencies, the establishment of a new agency can be linked to specific reasons peculiar to the subject matter at stake. For instance, some policy areas risk suffering from time inconsistencies if entirely left to the traditional mechanisms of democratic representation.¹⁸ This is the case usually in the field of financial markets regulation and surveillance.¹⁹ Yet, the same logic may be extended, with limited adaptations, to other areas where investment is tightly linked to consistent policies. This is the case especially when long-term results depend on complex technologies. Credible policy commitments are also crucial for reasons beyond investor confidence. Safety is a good example where detaching the independent assessment from traditional political representation is advisable. For these reasons, in many respects the agency approach is, and has been for many years, indeed “the way forward”.²⁰ Already in 1997, when just ten agencies were functional in the EU, it has been suggested that

¹² European Commission, ‘The Operating Framework for the European Regulatory Agencies’ (European Commission 2002) COM(2002) 718 final 5.

¹³ ‘European Governance: A White Paper’ (n 10) 24.

¹⁴ European Commission, ‘The Operating Framework for the European Regulatory Agencies’ (n 11) 2.

¹⁵ P Magette, ‘The Politics of Regulation in the European Union’, in D Geradin, R Muñoz, N Petit (eds.), *Regulation Through Agencies in the EU. A New Paradigm of European Governance* (Edward Elgar 2005), 7 ff.

¹⁶ ‘European Agencies – The Way Forward’ (n 1) 5.

¹⁷ Merijn Chamon, *EU Agencies: Legal and Political Limits to the Transformation of the EU Administration* (Oxford University Press 2016) 106.

¹⁸ G Majone, ‘Strategy and Structure: the Political Economy of Agency Independence and Accountability’, in OECD Working Party on Regulatory Management and Reform (ed.), *Designing Independent and Accountable Regulatory Authorities for High Quality Regulation* (OECD 2005), 130 ff., 126; OECD, *Best Practice Principles for Regulatory Policy – The Governance of Regulators* (OECD 2014), 51.

¹⁹ This holds true not only for monetary policy which is conferred on central banks – entities that cannot be easily compared to agencies, although they both share a high level of institutional independence – but also for securities regulators, as time inconsistency affecting law-making and supervision in financial markets can also discourage investments (C Di Noia and M Gargantini, ‘Unleashing the European Securities and Markets Authority: Governance and Accountability After the ECJ Decision on the Short Selling Regulation (Case C-270/12)’ (2014) 15 *European Business Organization Law Review* 1, 6).

²⁰ ‘European Agencies – The Way Forward’ (n 1).

agencies are a central form of governing instrument crucial in the process of administrative integration.²¹ Thus, while agencies provide “functional opportunities for increased European integration”, it is imperative that transparency and accountability remain at the heart of their operation.²²

Currently, there are 34 decentralised agencies, which are characterised as “separate legal entities set up to perform specific tasks under EU law”.²³ This highly populated administrative panorama, may nonetheless give rise to certain accountability issues. The objectives of some agencies are difficult to define, and thus to measure, when compared to those of other independent entities such as central banks.²⁴ A precise delineation of the agency’s goals bears the promise of enhancing accountability.²⁵ Hence, vaguely defined statutory duties (something, that may inevitably flow from the regulatory subject matter in question) could jeopardise legal certainty and cannot adequately guide stakeholders’ interests. Besides, there might be several directly and indirectly interested groups. A measure justified as aimed at protecting one group of interests might not satisfy that of others.²⁶ To this end, administrative discretion is the typical remedy to fill in the gaps in the statutes and balance these multiple interests. Accountability tools operate at different levels ensuring discretion is properly exercised to serve the statutory objectives. Indeed, according to the traditional view, in democratic systems unelected bodies can only be conferred with the power to make discretionary choices to the extent that such bodies are held accountable. A well-designed accountability toolbox therefore complements the independence of the agency by strengthening the control.²⁷

EU administrative law offers a wide array of accountability tools. The literature has labelled this as “controlling agencification”.²⁸ These mechanisms of control can be broadly categorised as vertical or horizontal.²⁹ The former pertain to the reporting obligation between the agency and the EU institutions,

²¹ Alexander Kreher, ‘Agencies in the European Community - a Step towards Administrative Integration in Europe’ (1997) 4 *Journal of European Public Policy* 225, 239.

²² *ibid* 242.

²³ Furthermore, in the EU there are 6 executive agencies; See more at ‘Agencies and Other EU Bodies’ (*European Union*, 5 July 2016) <https://europa.eu/european-union/about-eu/agencies_en> accessed 20 September 2020.

²⁴ Donato Masciandaro, Marc Quintyn and Michael W Taylor, ‘Inside and Outside the Central Bank: Independence and Accountability in Financial Supervision: Trends and Determinants’ (2008) 24 *European Journal of Political Economy* 833, 834.

²⁵ Paul Craig, *EU Administrative Law* (2nd Edition, Oxford University Press 2012) 161, where it has been underlined that ‘the greater the specification of the agency objectives and criteria for attainment, the greater the control exercised over agency choices by the legislature’.

²⁶ Masciandaro, Quintyn and Taylor (n 23) 834.

²⁷ SCW Eijffinger, MM Hoeberichts and E Schaling, ‘A Theory of Central Bank Accountability’ (Tilburg University, Center for Economic Research 1998) 1998–103 13 <<https://ideas.repec.org/p/tiu/tiucen/5741a56f-3a69-41f4-b9fb-46107db2784f.html>> accessed 20 September 2020; Masciandaro, Quintyn and Taylor (n 23) 834; Giandomenico Majone, ‘Independence Vs. Accountability?: Non-Majoritarian Institutions and Democratic Government in Europe’ [1994] *European University Institute Working Paper No 94/3* 1, 26.

²⁸ Chamon (n 16) 299.; Miroslava Scholten and Alex Brenninkmeijer, ‘Controlling EU Agencies. The Rule of Law in a Multi-jurisdictional Legal Order’, Edward Elgar 2020.

²⁹ Accountability is also reinforced by other procedural tools, eg inquiries by the European Ombudsman (Art. 228 TFEU). While the Ombudsman does not have binding power over the administrative bodies against which a complaint is filed, its influence is increased by the possibility to send reports to the Parliament. Thus, an important link exists between the Ombudsman’s inquiry and vertical accountability tools. On average, the EU agencies tend to comply with the Ombudsman’s proposals (See European Ombudsman, *Putting it Right? - How the EU institutions responded to the Ombudsman in 2013* (2014), § 8).

while the latter may incorporate peer reviews or public consultations meant to involve stakeholders, equals, or “concerns outside of the hierarchal relationship between central government and executive agency”.³⁰

In recent years, another accountability tool has gained momentum, namely the legality review by internal organs. This administrative review function is performed by internal appeal bodies, most often called ‘Board(s) of Appeal’, but also ‘Appeal Panel’,³¹ ‘Administrative Board of Review’³² or ‘Complaint Boards’.³³ Appeal bodies have been set up as an element of the internal governance of an many EU agencies with decision-making powers. They carry out an internal review and ensure that private parties directly affected by an administrative decision of the agency can resort to a preliminary review. The boards of appeal have been characterised as the “most elaborate technique used by the legislator” in the panorama of tools for judicial scrutiny of the agencies acts.³⁴ While the existence of internal appellate bodies does not deprive parties from the possibility of later bringing an action before the General Court (GC) and the Court of Justice of the EU (CJEU), these play a crucial role in the filtering of cases in unfounded appeals.³⁵ Furthermore, provided they benefit from a sound organisational and procedural framework, they provide an effective dispute-resolution mechanism that stands apart from the classical expensive litigation in court.

A central ambition behind the establishment of BoAs is the separation of powers, whereby these appeal bodies provide for “an initial internal control function while remaining independent of decisions”.³⁶ It naturally follows that the wider the decision-making power of the BoA is, the more evidently underlined its independence and accountability mechanisms must be, or like some refer to these, the “counterweight”³⁷ and the “institutional check[s]”.³⁸ The principle of separation of powers also necessitates separation of the BoA from the Commission itself, as the alternative risks giving the Commission excessive influence on the regulatory process. These bodies now take the central stage in the assessment.

3. EU Agencies’ Boards of Appeal: institutional features and independence

a. Definition

Boards of Appeals (BoAs) are independent internal bodies established to conduct review of agency decision-making powers. Currently, 11 out of the 38 EU agencies have established Boards of Appeals. In chronological order, these are the following:

³⁰ Thomas Schillemans, ‘Accountability in the Shadow of Hierarchy: The Horizontal Accountability of Agencies’ (2008) 8 *Public Organization Review* 175, 175–176.

³¹ In the case of the Single Resolution Board.

³² In the case of the Single Supervisory Mechanism.

³³ In the case of the European Schools, which even though not an EU agency, hold an observer seat in the Inter-Agency Appeal Proceedings Network (IAAPN).

³⁴ Chamon (n 16) 338.

³⁵ Damien Geradin, ‘The Development of European Regulatory Agencies: What the EU Should Learn from American Experience’ (2005) 11 *Columbia Journal of European Law* 1, 33.

³⁶ European Commission, ‘The Operating Framework for the European Regulatory Agencies’ (n 11) 12.

³⁷ Edoardo Chiti, ‘An Important Part of the EU’s Institutional Machinery: Features, Problems and Perspectives of European Agencies’ (2009) 14 *Common Market Law Review* 395, 1406.

³⁸ Chirulli and De Lucia (n 3) 834.

1. The European Union Intellectual Property Office (EUIPO);
2. The Community Plant Variety Office (CPVO);
3. The European Aviation Safety Agency (EASA).
4. The European Railway Agency (ERA);
5. The European Chemicals Agency (ECHA);
6. The European Agency for the Cooperation of Energy Regulators (ACER);
7. The three European Supervisory Authorities, i.e.
 - the European Banking Authority (EBA);
 - the European Insurance and Occupational Pensions Authority (EIOPA);
 - and the European Securities and Markets Authority (ESMA);
8. The ECB in the framework of the Single Supervisory Mechanism (SSM);
9. The Single Resolution Board (SRB) in the framework of the Single Resolution Mechanism (SRM);

With the exception of ERA,³⁹ all BoAs have been established in the founding regulations of their respective agencies. The ESAs compose of a joint BoA with one common legal framework, which will be ‘counted’ as one body for the subsequent analysis. The ECB is not a European agency, but an institution following article 13(1) TEU. Nevertheless, in the context of the SSM it exercises supervisory tasks similar to those enjoyed by regulatory agencies, its BoA is included in this analysis.⁴⁰ The ECB and the SRB do not technically compose of ‘Board of Appeals’, but, respectively, an ‘Administrative Board of Review’ and an ‘Appeal Panel’. Particularly the former term suggests a function which differs from that other BoAs.⁴¹ The preceding analysis will investigate this in more detail.

BoAs are established specifically for the review of decision-making powers. No BoAs were established in agencies whose mandate is limited to information-gathering, cooperation-enhancing or service- or advise-providing. Legality review in these agencies is regulated in various ways, with reference to review by the Commission, ‘regular’ CJEU review or without any specific provision.⁴² In turn, there are no agencies with the authority to adopt binding decisions without a BoA. Procedures before all BoAs are limited to decisions of the agencies. EUIPO, ACER and the ESAs explicitly specify that their BoA is established for the decision-making powers or instances of the agency. This relation was confirmed in the recent establishment of the Body of European Regulators for Electronic Communications (BEREC). Although a BoA was initially included in the legislative proposal, it was finally considered unnecessary ‘as BEREC is not empowered to adopt regulatory decisions’.⁴³

³⁹ The ERA was set up in Regulation 881/2004, but its Board of Appeal was only established in the recasting Regulation 2016/796

⁴⁰ To avoid confusion with the abbreviations SRB and SRM, reference will be made to ‘ECB’, which should be understood as ‘the ECB in the capacity of acting within the supervisory powers allocated to it in the framework of the SSM’.

⁴¹ Concetta Brescia Morra, René Smits, and Andrea Magliari, ‘The Administrative Board of Review of the European Central Bank: Experience After 2 Years’ (2017) 18 *European Business Organization Law Review* 3 567, 571

⁴² Paul Craig, *EU Administrative Law* (Oxford University Press 2012), 157-158

⁴³ Proposal for a Regulation of the European Parliament and of the Council establishing the Body of European Regulators for Electronic Communications. - Examination of the Presidency text, Interinstitutional File: 2016/0286 (COD) (Brussels, 2 October 2017)

b. Independence

All BoAs are, organisationally, internal to their establishing agency. This is in line with the Commission's intention that 'The *internal* organisation of the decision-making agencies should include boards of appeal to provide an initial *internal* control function.'⁴⁴ However, in spite of this organisational dependence, BoAs are supposedly established as independent bodies. These capacities are naturally juxtaposed.

A closer look at the law establishing BoAs lays bare that the 11 BoAs vary in their degree of independence. A distinction can be made between the extent to which BoAs are internal in their *form* and *function*. The former refers to the position of the BoA in the governance of the agency, whereas the latter refers to its decisional power.⁴⁵

Internal in form

6 out of 9 BoAs are explicitly established as organs of the agency or as part of its administrative structure.⁴⁶ EUIPO, the ECB and the SRB are the exceptions. Nevertheless, factoring in the appointment procedures of BoA members, the following three categories emerge.

- 2 out of 9 BoAs are strongly internal in form, hence have *weak organisational independence*: the ECB and SRB. Although no official agency bodies, the ECB's Administrative Board is specifically established with the task of '*internal* review' and its members are appointed by the ECB upon an open call without any non-agency interference. The same applies to the Appeal Panel of the SRB. These appointments are subject to the least external, non-agency interference.
- 5 BoAs are moderately internal in form, hence have *moderate organisational independence*: ERA, ECHA, ACER, the ESAs and EASA. These boards are both an official agency organ and appointed by the agency board from a list of qualified persons assembled by the Commission.
- 2 BoAs are weakly internal in form, hence have *strong organisational independence*: EUIPO and CPVO. Both agencies have a two-tier appointment procedure. The president and chairpersons of the EUIPO BoAs are appointed by the Council upon a proposal of the Management Board. In the CPVO, the BoA chairmen are appointed by the Council upon a proposal by the Commission, which is informed by the 'opinion' of the agency's Administrative Council. Subsequently, in both agencies, BoA members are appointed by the chairmen from lists assembled by the agency board. These procedures, particularly that of CPVO, involve a high degree of non-agency interference as compared to the 5 BoAs which are moderately internal in form and leave the BoA chairmen a high degree of influence on the appointment of BoA members. The two-tier appointment procedure thus grants these BoAs a relatively high degree of independence from the agency. However, as EUIPO's Management Board retains far-reaching influence on the appointment of BoA chairmen and

⁴⁴ European Commission, 'The Operating Framework for the European Regulatory Agencies', COM(2002)718 final, 12; page 13 also refers to 'the internal boards of appeal'

⁴⁵ These evaluative axes are inspired by the typology of internal review mechanisms provided by Rossi and Anderson. See Jim Rossi, 'ALJ Final Orders on Appeal: Balancing Independence with Accountability' (1999) *J. Nat'l Ass'n Admin. L. Judges* 19; William R. Anderson, 'Judicial Review of State Administrative Action - Designing the Statutory Framework' (1992) 44 *Admin. L. Rev.* 523, 555

⁴⁶ Most agencies establish the BoA as an organ of the agency; EASA merely provides in a recital that its BoA 'shall be established as part of the administrative structure of the Agency'. This is understood as an unintended deviation from legislative practice.

CPVO's BoA is an official agency organ, EUIPO and CPVO still compose of BoAs internal in form.

ACER's organisational structure has a slight deviation which deserves mention here. Its founding regulation, amended in 2019, prescribes that its BoA should be 'part of ACER, but independent from its administrative and regulatory structure'. This provision is translated into separate budget lines. Other than that, however, the organisational structure of ACER's BoA conforms with that of the other BoAs. Most importantly, it is still an official organ of the agency. It thus seems as if these provisions should be read as strong independence provisions, rather than as the establishment of a BoA external in form.

Internal in function

The following three categories can be distinguished as regards the decisional power, i.e. the organisational function, of BoAs.

- 3 out of 9 BoAs take non-binding decisions, hence have *weak functional independence*: ECB, EASA and ERA. The ECB's BoA creates 'opinions' which are only made known to parties, hence not published, and 'taken into account' by the ECB. EASA 'takes account' of decisions. The ERA's BoA creates 'reasoned findings' after which ERA takes a new decision 'in compliance' with these findings.
- 5 BoAs take binding decisions, hence have *moderate functional independence*: ACER, the three ESAs and SRB, after which they can choose to confirm the agency decision or remit the case to the relevant agency body. Decisions are always public in the case of ACER and the ESAs. This is not the case for the SRB.
- 3 BoAs take binding, substitutive decisions, hence have *strong functional independence*: EUIPO, CPVO and ECHA. These BoAs are entitled to 'exercise any Agency power', which means that they can not only choose to remit the case to the agency, but also modify or substitute agency acts. All decisions taken by these BoAs are public. These BoAs are weakly internal in function.

It follows that EUIPO and CPVO's BoAs are most independent as regards their organisational form; the BoAs of EASA, ERA, ECHA, ACER and the ESAs are moderately independent; and those of SRB and ECB are weakly independent. Moreover, EUIPO, CPVO and ERA's BoAs have strong functional independence; the BoAs of ERA, ACER and the ESAs moderate functional independence; and those of EASA, ECHA and ECB weak functional independence. Particularly EUIPO and CPVO thus stand out for their BoA independence, whereas the ECB has a weakly independent BoA on both accounts.

Internal, but independent?

As all BoAs are internal to the agency for which they are established, attention now turns to the extent to which establishing law provides provisions which enable BoA members to remain independent of the inevitable risk of agency influence on decisions. All BoAs are subject to a range of independence provisions, although several variations can be noted. The stronger the independence provisions provided, the greater the extent to which each respective BoA is enabled to fulfill its establishing aim of the separation of powers. It should be reiterated that the CJEU has stated that provisions on judicial independence should

be ‘such that they cannot give rise to reasonable doubts, in the minds of individuals, as to the imperviousness of the judges concerned to external factors and as to their neutrality with respect to the interests before them’.⁴⁷ Although this judgment was given in the context of article 19 TEU, which regards the national judiciary and does not apply to BoAs, it nevertheless deserves consideration that independence provisions are not only to protect the BoA from agency influence, but also to provide individuals with the reassuring impression that their appeal is considered by an independent body.

All agencies provide declaratory provisions, stating that the BoA or its members ‘shall be independent’. The ESAs, the ECB and SRB add that BoA members ‘act in the public interest’. ERA and ACER include a second mention of independence - in the case of ACER ‘full’ independence - and EUIPO’s RoP add two references to independent decisions and members. It was established that ACER provides the strongest independence provision, stating that the BoA should be ‘part of ACER, but independent from its administrative and regulatory structure’.

BoA members which simultaneously exercise other functions in the agency raise reasonable doubts on the neutrality of the case at hand. 7 out of 9 BoAs provide a prohibition of dual functions. EUIPO is silent on dual functions; ACER, curiously, mandates the recruitment of members from agency staff. It follows that EUIPO and ACER provide no dual functions prohibition and hence weak safeguards on the removal of members.

The protection of BoA members from their arbitrary removal by the agency boards is an important independence safeguard. In the US, internal review officers effectively have life tenure and their removal is subject to a formal hearing before a Federal Board.⁴⁸ These strong safeguards are not mirrored in the EU. However, members of 5 out of 9 BoAs (EUIPO, CPVO, ERA, ECHA, EASA) can only be removed on ‘serious grounds’ and upon the notification of the Commission. Contrarily, members of 2 out of 9 BoAs are vulnerable to being removed by agency bodies without Commission interference (the ESAs, ACER). However, ACER’s removal procedure is subjected to a high threshold: ‘A member of the Board of Appeal shall not be removed during his or her term of office, unless he or she has been found guilty of serious misconduct’. The ECB and the SRB have no procedure for the removal of BoA members. It follows that the ESAs, SRB and ECB provide weak safeguards for the removal of BoA members.

Impartiality, although also part of the due process rights discussed below, can be understood as a more narrow element of independence. It refers to the impartiality of individual BoA members on the case at hand, rather than to the institutional set-up or the procedure as a whole. The founding regulations of EUIPO and ECHA specifically prescribe the impartiality of BoA procedures. Procedures for the removal of members in the case of partiality conflicts are provided for in the founding regulations of 7 out of 9 BoAs (EUIPO, CPVO, ERA, ECHA, ACER, the ESAs, EASA). Interestingly, SRB’s BoA has in its independently adopted RoP included a strong impartiality safeguard. Members can withdraw from a case upon their own initiative and their impartiality can be challenged by parties: a challenge to remove a member may only be rejected when ‘manifestly inadmissible or manifestly unfounded’. However, as independently adopted RoP have less legal weight than founding regulations, the SRB’s BoA can be said

⁴⁷ Case C-619/18, *Commission v Poland* [2019] ECLI:EU:C:2019:531, para 111

⁴⁸ Section 11 APA; Jeffrey Lubbers, ‘The Federal Administrative Judiciary: Establishing an Appropriate System of Performance Evaluation for ALJ’s’ (1993) *Admin. LJ Am. U.* 7 589

to safeguard a moderate level of impartiality. Impartiality provisions or procedures are lacking for the ECB's BoA, which grants a weak level of impartiality.

All BoAs have, in addition to the procedural provisions in founding legislation, separate Rules of Procedures (RoP). The Commission drafts these RoP in 5 out of 9 BoAs: by means of delegated acts (EUIPO, EASA) implementing acts (CPVO, ERA, ECHA) and a Commission Regulation which predates the distinction between delegated and implementing acts (EASA).⁴⁹ In contrast, 3 out of 9 BoAs (the ESAs, SRB and ACER) adopt their own RoP. ACER adds that 'The Board of Appeal shall notify the Commission of its draft rules of procedure as well as any significant change to those rules. The Commission may provide an opinion on those rules within three months of the date of receipt of the notification.'⁵⁰ Although the power to adopt own RoP in theory grants strong independence, it may be questioned whether this independence materializes in practice, especially in light of the weak independence safeguards of these BoAs on other accounts. By exception, the ECB adopts the main RoP for its BoA. The BoAs of the ECB and EASA can adopt RoP alongside those adopted by the Commission or the ECB. It deserves mention that the Commission recently included extensive due process provisions in EUIPO's RoP and detailed requirements on substantive expertise in the case of EASA. Checks and balances may thus also increase the extent to which BoAs are able to serve their other two aims of establishment. It follows that EUIPO, CPVO, EASA, ERA and ECHA are strongly independent from the agency as regards RoP due to the Commission's delegating or implementing powers; the ESAs, SRB and ACER are moderately independent; and the ECB's BoA, again, is least independent.

Budgetary independence is ensured in the establishing law of 3 out of 9 BoAs (ACER, ECB, SRB), which grants these BoAs strong independence, whereas the remaining BoAs are only weakly independent as regards budget. The relevance of budget lines to the independence of BoAs was explicitly made in the recent Impact Assessment of the reform of the founding regulation of ACER. The two versions of proposed reform both included the transformation of the status quo at the time. Although the BoA was envisaged as an independent body also before the 2019 reform, part of its budget came directly from the ACER budget. According to the Impact Assessment, this situation rendered the independent functioning of the Board 'highly vulnerable'. 'Experience shows that its functioning and financing must be reaffirmed to ensure its full independence and efficiency.'⁵¹ Consequently, ACER's founding legislation makes explicit that the BoA has a separate budget line. This case demonstrates that the Union legislator is very well aware of the importance of budgetary independence. However, besides ACER, only the ECB and the SRB create a level of budgetary independence: the BoA 'shall have sufficient resources'. Although not as strongly as in the case of ACER, this provision at least suggests that the agency should not exercise influence on its BoA through budgetary matters.

The determination of the level of remuneration of BoA members is another variable to their independence. Agencies are subject to the Staff Regulations which apply to all EU institutions. The remuneration of BoA

⁴⁹ The Commission is the main legislative body in the drafting of delegated and implementing acts. See articles 290 and 291 TFEU

⁵⁰ Article 25(3) Regulation (EU) 2019/942

⁵¹ Commission Staff Working Document Impact Assessment, SWD/2016/0410 final - 2016/0379 (COD)

members may thus be regulated by the agency board in the implementing rules of the Staff Regulations.⁵² This ‘standard formula’ does not protect BoA members from agency board influence. 3 out of 9 BoAs are also subject to specific provisions on the remuneration of members. The Commission’s RoP for EUIPO provide that the Management Board, when adopting implementing rules on remuneration, should take BoA independence provisions into account to ensure BoA independence. BoA members of ERA are remunerated per day based on their ‘actual involvement’ in cases. The levels of remuneration are fixed in the RoP. In the CPVO, the level of remuneration is determined by the agency’s Administrative Council based on a proposal by the President of the Office. It follows that the law on the remuneration of BoA members grants EUIPO and ERA strong independence; EASA, ECHA, ACER, the ESAs and ECB moderate independence; and CPVO weak independence.

All BoAs enjoy administrative support. This support takes the form of a separate registry in all agencies except the 3 financial supervision BoAs (the ESAs, SRB and ECB). 3 out of 9 BoAs provide that a registry is appointed by or functions under the authority of the BoA itself (EUIPO, ERA, ECHA). In 2 out of 9 BoAs, registries are appointed or ensured by the agency staff (CPVO, EASA). It is unclear from the currently available legislation how the registry of ACER is to be appointed, but it is provided that the registry shall have a separate budget line, which suggests at least a moderate level of independence. 3 out of 9 BoAs provide that staff which has participated in decisions subject to appeal are excluded from appointment to the registry (CPVO, EASA, ERA). The independence of registries is specifically noted in the case of ECHA and ACER. The 3 BoAs in financial supervision (the ESAs, ECB and SRB) merely prescribe that the agency shall ensure ‘adequate’ or ‘appropriate’ support. However, the SRB’s Appeal Panel prescribes in its independently adopted RoP that the SRB shall ensure ‘appropriate segregation of duties and functional separation from all other activities of the Board [...] The Secretariat shall [...] not take instructions nor orientations from the Board.’ Again, it may be noted that independently adopted RoP have less legal weight than founding regulations. It follows that EUIPO, ERA and ECHA are strongly independent as regards their registry; CPVO, EASA, ACER and SRB have moderate independence; and the ESAs and ECB weak independence.

In conclusion, BoA independence is reflected in the law establishing BoAs, but to varying degrees. The establishing law of the first wave BoAs is strongly independent in form and function. Nevertheless, in terms of independence provisions, the lack of a dual functions prohibition for EUIPO and the determination of the level of remuneration for CPVO makes these BoAs fall behind as regards the second wave BoAs. The second wave BoAs are homogenous as regards their relative organisational independence, although EASA and ECHA have weak functional independence by merit of their weak decisional powers. The second wave BoAs is largely homogenous in their independence provisions, with ECHA and ERA performing strong on independent registries and ERA on remuneration provisions. ACER is exceptionally strong as regards budgetary independence, on which all other BoAs perform weakly or moderately. The recent introduction of this budgetary provision and its express mention in the Impact Assessment might indicate a general move towards budgetary independence. The third wave financial supervision BoAs overall perform weak on independence provisions. Their unique declaratory provisions that members ‘act in the public interest’ and ‘make public declaration of commitments and interests’ do not make up for this weak performance.

⁵² Article 110(b) Regulation No 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community

4. Boards of Appeal in the EU and US: rationales behind creation

a. Separation of powers

The separation of powers is the first and primary aim of establishing BoAs in EU agencies.⁵³ As noted, BoAs are exclusively established to review the decision-making powers of agencies. This follows the rationale that the more intrusive the agency power is, the more relevant it becomes to counterbalance it.⁵⁴ Such counterbalance is, as noted, particularly relevant in light of the lacking political accountability of agencies. In the EU, BoAs have similarly been identified as accountability mechanisms,⁵⁵ specifically as legal accountability mechanisms on the power of EU agencies.⁵⁶ Chiti and Chirulli identify BoAs more generally as a ‘counterweight’ against agency power,⁵⁷ whereas Curtin refers to BoAs as an ‘institutional check’.⁵⁸ Geradin and Petit, even before the establishment of the majority of BoAs, preferred review by independent BoAs to administrative review before the Commission, which would give the Commission ‘undue influence on the regulatory processes’.⁵⁹ Anyways, BoA independence is the core criterion to their capacity as institutional check.⁶⁰ The Commission has specified long before the establishment of most BoAs that they are an ‘initial internal control function while remaining independent of decisions,’⁶¹ for which ‘the basic requirement is that they can make an independent judgement.’⁶² Having the executive assess executive discretionary power can indeed hardly be considered satisfactory from a tripartite power balance perspective.

⁵³ European Commission, ‘The Operating Framework for the European Regulatory Agencies’, COM(2002)718 final; Gerard Rowe, ‘Administrative supervision of administrative action on the European Union’ in: Herwig Hofmann and Alexander Türk (eds), *Legal challenges in EU administrative law: towards an integrated administration* (Edward Elgar Publishing 2009)

⁵⁴ Madalina Busuioc, *The accountability of European agencies: legal provisions and ongoing practices* (diss. Utrecht University 2010), 167

⁵⁵ Iris H-Y Chiu, ‘Power and accountability in the EU financial regulatory architecture: examining inter-agency relations, agency independence and accountability’ (2016) 8 *European Journal of Legal Studies* 1, 67-101, 82; Concetta Brescia Morra, René Smits, and Andrea Magliari, ‘The Administrative Board of Review of the European Central Bank: Experience After 2 Years’ (2017) 18 *European Business Organization Law Review* 3 567, 570

⁵⁶ Paul Craig, *EU Administrative Law* (Oxford University Press 2012), 157; Madalina Busuioc, *The accountability of European agencies: legal provisions and ongoing practices* (diss. Utrecht University 2010), 167-172; Jens-Peter Schneider, ‘A Common Framework for Decentralized EU Agencies and the Meroni Doctrine’ (2009) 61 *Admin. L. R.* 29, 40-43; Damien Geradin and Nicolas Petit, ‘The Development of Agencies at EU and National Levels: Conceptual Analysis and Proposal for Reform’ (2004) 1 *Jean Monnet Working Paper* 4, 52-54

⁵⁷ Edoardo Chiti, ‘An Important Part of the EU’s Institutional Machinery: Features, Problems and Perspectives of European Agencies’ (2009) 46 *Common Market Law Review* 5, 1395–1442, 1406; Paola Chirulli, ‘The Boards of Appeal of European agencies: an overview’ (2015) *Amicus Curiae* 103, 2

⁵⁸ Deirdre Curtin, ‘Delegation to EU non-majoritarian agencies and emerging practices of public accountability’, in: Damien Geradin, Rodolphe Munoz and Nicolas Petit (eds.), *Regulation Through Agencies In The EU, A New Paradigm Of European Governance* (Edgar Elgar Publishing 2005) 88-119

⁵⁹ Damien Geradin and Nicolas Petit, ‘The Development of Agencies at EU and National Levels: Conceptual Analysis and Proposal for Reform’ (2004) 1 *Jean Monnet Working Paper* 4, 54

⁶⁰ Marcus Navin-Jones, ‘A Legal Review of EU Boards of Appeal in Particular the European Chemicals Agency Board of Appeal’ (2015) *European Public Law* 21 1 143; William Blair, ‘Board of Appeal of the European Supervisory Authorities’ (2013) 24 *European Business Law Review* 2 165

⁶¹ European Commission, ‘The Operating Framework for the European Regulatory Agencies’, COM(2002)718 final, 10 and 12

⁶² European Commission, ‘The Operating Framework for the European Regulatory Agencies’, COM(2002)718 final, 12

This mirrors the establishment of internal review mechanisms in the US, where agencies have been characterized as the fourth, ‘headless’ branch of government.⁶³ The Supreme Court has stated internal review should function ‘as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices.’⁶⁴ Decisions should be taken isolated from political influence which might be exerted by the agency.⁶⁵ The importance of independence, again, mirrors the institutional discourse on internal review in agencies in the US.⁶⁶ The Supreme Court specifies that the task to provide independent judgment lies ‘at the heart of administrative adjudication.’⁶⁷

b. Effective remedy

The second aim of establishing BoAs is ensuring the right to an effective remedy.⁶⁸ This mirrors the establishment of BoAs in the US.⁶⁹ This aim is informed by two concerns: efficiency and individual rights protection. With respect to efficiency, the establishment of BoAs is taken to provide an alternative venue for judicial review. This is closely correlated to the ever-increasing workload of national and European courts.⁷⁰ Where parties can no longer find recourse with regular courts, or such recourse is very lengthy or costly, BoAs provide a ‘judicial safety net’.⁷¹ By extension, the exhaustion of remedies before all BoAs is a precondition for access to the European Court of Justice (CJEU). Even more, the ECJ recently altered its institutional rules by providing that appeals on agency decisions which have already been reviewed ‘twice’ - by the internal BoA and the General Court- will only be considered in exceptional cases.⁷² This limitation applies to EUIPO, CPVO, ECHA and EASA. The BoAs of these agencies are now effectively the first instance judicial review of agency decisions. It is remarkable in this respect that EASA and ECHA issue non-binding decisions of which one might wonder to what extent they provide an effective remedy. The above raises the question whether internal review by BoAs can indeed be considered equivalent to judicial

⁶³ Peter L. Strauss, ‘*The place of agencies in Government: separation of powers and the fourth branch*’ (1984) 84 *CLR* 3 573

⁶⁴ United States Supreme Court, *United States v. Morton Salt Co.*, 338 U.S. 632, 644 (1950)

⁶⁵ Jeffrey Lubbers, ‘The Federal Administrative Judiciary: Establishing an Appropriate System of Performance Evaluation for ALJ’s’ (1993) *Admin. LJ Am. U.* 7 589

⁶⁶ Aditya Bamzai, ‘The Origins of Judicial Deference to Executive Interpretation’ (2017) 126 *Yale LJ* 908

⁶⁷ *Butz v. Economou*, 438 U.S. 478 (1978).

⁶⁸ Case T-755/17 *Germany v ECHA* [2019] ECLI:EU:T:2019:647, para 56

⁶⁹ See, amongst others, *Marshall v. Jerrico*, 446 U.S. 238 (1980); James G Gilbert and Robert S Cohen, ‘Administrative Adjudication in the United States’ (2017) 37 *J Nat’l Ass’n Admin L Judiciary* 222; Michael Asimow (ed), *A Guide to Federal Agency Adjudication* (American Bar Association 2002); Jeffrey Lubbers, ‘The Federal Administrative Judiciary: Establishing an Appropriate System of Performance Evaluation for ALJ’s’ (1993) *Admin. LJ Am. U.* 7 589; Dan Tarlock, ‘Administrative Law: Procedural Due Process and Other Issues’ (1980) 56 *Chi-Kent L Rev* 13

⁷⁰ Barbara Marchetti, ‘Administrative Justice Beyond the Courts: Internal Reviews in EU Administration’ in Barbara Marchetti (ed), *Administrative Remedies in the European Union: The Emergence of a Quasi-Judicial Administration* (Giappichelli 2017); Paul Craig, *UK, EU and Global Administrative Law. Foundations and Challenges* (Cambridge University Press 2015); Merijn Chamon, ‘EU Risk Regulators and EU Procedural Law’ (2014) 3 *EJRR* 324

⁷¹ Gerardin and Petit prefer judicial review by BoAs to the CJEU for this reason. Damien Gerardin and Nicolas Petit, ‘The Development of Agencies at EU and National Levels: Conceptual Analysis and Proposal for Reform’ (2004) 1 *Jean Monnet Working Paper* 4, 52

⁷² The Court of Justice of the European Union, ‘The Court of Justice adopts new rules on whether or not to allow appeals to proceed in cases which have already been considered twice’ (2019) Press Release No 53/19, Luxembourg, available at: <<https://curia.europa.eu/jcms/upload/docs/application/pdf/2019-04/cp190053en.pdf>>.

review. This question is especially relevant in light of the CJEU's appreciation of judicial review as a core legitimizing condition for the delegation of decision-making powers to agencies. The answer to this question lies in the intensity of review by BoAs and extent to which fair trial rights are observed. As regards the scope of review, a broad-brush analysis of procedures before BoAs raises several obstacles to considering BoAs as providing 'full' judicial review.⁷³

Fair trial rights are inherent to the second concern: that of individual rights protection. Brescia Morra cites protection of natural persons as such as an aim of establishing BoAs.⁷⁴ The observation of fair trial rights is also suggested by Marchetti, which argues that the fact that BoAs delay access to the CJEU is only justified when they produce 'convincing decisions'.⁷⁵ It must moreover be reiterated that Article 47 of the Charter phrases the observation of fair trial rights (a fair and public hearing within a reasonable time, an independent and impartial tribunal previously established by law, the right to defense and legal aid shall be made available to those who lack sufficient resources) as a precondition for an effective remedy.⁷⁶ In the US, the extent to which fair trial rights are observed in internal agency proceedings co-determine the degree of judicial deference towards agency decisions.⁷⁷

The CJEU has not yet specified whether BoA proceedings must or do comply with the right to a fair trial.⁷⁸ In 2002, the Court ruled that article 6 ECHR does not apply to procedures before EUIPO.⁷⁹ In 2019, it did assess procedures before ECHA by article 47 of the Charter, although its assessment was limited to the right to an effective remedy and did not refer to the right to a fair trial.⁸⁰ Procedures before BoAs are expected to abide by the principle of sound administration prescribed in article 41 of the Charter.⁸¹ In response to a challenge based on article 41, the CJEU has made explicit that 'EASA's decisional processes are specifically designed in order to respect [*the right to be heard before any individual measure which would affect him or her adversely is taken*]' by merit of its appellate procedure before the BoA.⁸² Article 41 offers less protection than, but nevertheless overlaps on various points with article 47 of the Charter. Prechal notes that 'in certain circumstances the guarantees listed in Article 41 may come within the scope of Article 47'.⁸³ The extent to which procedures before BoAs should and do comply with fair trial rights will, in all likelihood, remain subject to debate for several years to come.

⁷³ Oosterhuis (forthcoming)

⁷⁴ Concetta Brescia Morra, René Smits, and Andrea Magliari, 'The Administrative Board of Review of the European Central Bank: Experience After 2 Years' (2017) 18 *European Business Organization Law Review* 3 567, 570

⁷⁵ Barbara Marchetti, 'Administrative Justice Beyond the Courts: Internal Reviews in EU Administration' in Barbara Marchetti (ed), *Administrative Remedies in the European Union: The Emergence of a Quasi-Judicial Administration* (Giappichelli 2017), 11

⁷⁶ The Charter of Fundamental Rights of the European Union (the Charter)

⁷⁷ Maciej Bernatt, 'Transatlantic Perspective on Judicial Deference in Administrative Law' (2016) 22 *Colum. J. Eur. L.* 275

⁷⁸ Piscitelli (forthcoming)

⁷⁹ Case T-63/01, *Procter & Gamble v OHIM* [2002] ECR II-5255

⁸⁰ Case T-755/17 *Federal Republic of Germany v European Chemicals Agency (ECHA)* [2019] ECLI:EU:T:2019:647

⁸¹ 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' (2016) 22 *European Public Law* 3 569, 571

⁸² Case T-102/13, *Heli-Flight GmbH & Co. KG v EASA* [2014] ECLI:EU:T:2014:1064, para 46

⁸³ Sacha Prechal, 'The Court of Justice and Effective Judicial Protection: What Has the Charter Changed?' in Christophe Paulussen et al. (eds), *Fundamental Rights in International and European Law* (TMC Asser Press 2016), 143-157

c. Substantive expertise

The third aim of BoAs is the ability to assess substantively complex cases. This mirrors the ‘substantive task’ attributed to internal review bodies in the US.⁸⁴ Substantive expertise distinguishes BoAs from general courts.⁸⁵ As noted, the CJEU adopts judicial discretion as regards ‘highly complex scientific and technical facts’.⁸⁶ Regular courts are often simply unequipped to assess the substance of agency decisions. Bolzonello notes that ‘it can be a humbling experience for a lawyer to attend a hearing in a substance evaluation case’.⁸⁷ The substantive expertise of BoA members arguably legitimizes the provision of legal accountability by non-courts. This rationale is also articulated by the CJEU when stating that ‘as a result of the competences of the members of the Board of Appeal, the intensity of the review conducted by that board is greater than that of a review carried out by the EU Courts’.⁸⁸ As substantive expertise allows BoAs to contribute to the ‘coherence of the regulatory field’ as a whole, it is also of a general sectoral interest.⁸⁹ From the US context, it may be derived that substantive expertise is a double-edged sword: whilst relieving courts from trying to comprehend complicated technical matters, internal review bodies relieve the agency of the time-intensive task of appellate review.⁹⁰ A precondition for this double function is, however, that BoAs have not only technical, but also legal expertise.

The law establishing BoAs reflects the necessity of substantive expertise to a relatively strong degree. 2 out of 9 BoAs were established by specific reference to the ‘special character’ of law in their respective policy fields (EUIPO and EASA). EUIPO, ECHA, EASA and ERA also prescribe the task of maintaining the ‘*quality and consistency*’ of decisions. Although in a somewhat different formulation, ACER prescribes the task of ‘*safeguarding the validity of the Agency's decisions*’. These provisions can be said to formulate a particular substantive mandate, and indirectly refer to the sectoral interest of the BoA’s substantive expertise.

The aim of establishing BoAs with substantive expertise can only be materialized by means of concrete requirements. 7 out of 9 BoAs prescribe requirements on the qualifications and expertise of members. EUIPO and ACER are exceptions, although EUIPO does provide that BoA members should be required to ensure the quality and efficiency of decisions, can be interpreted as indirectly referring to the qualifications of the BoA. 4 out of 9 BoAs provide that both technical and legal expertise is required; ERA adds ‘procedural’ expertise (CPVO, EASA, ERA, ECHA). CPVO, EASA and ECHA also specify the criteria

⁸⁴ Louis L. Jaffe, *Judicial Control of Administrative Action* (Little Brown Book 1965)

⁸⁵ William Blair, ‘Board of Appeal of the European Supervisory Authorities’ (2013) 24 *European Business Law Review* 2 165

⁸⁶ Case T-755/17 *Federal Republic of Germany v European Chemicals Agency (ECHA)* [2019] ECLI:EU:T:2019:647, para 192

⁸⁷ 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’ (2016) 22 *European Public Law* 3 569

⁸⁸ Case T-755/17 *Federal Republic of Germany v European Chemicals Agency (ECHA)* [2019] ECLI:EU:T:2019:647, para 55

⁸⁹ 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’ (2016) 22 *European Public Law* 3 569

⁹⁰ Russell L Weaver, ‘Appellate Review in Executive Departments and Agencies’ (1996) 48 *Admin L Rev* 251

which are considered to compose legal or technical expertise. EASA and ECHA are most detailed and add that the chairman of the BoA should be legally qualified. Finally, the 3 financial supervision BoAs (the ESAs, SRB and ECB) all ask for individuals of ‘high repute’ with ‘proven record of relevant knowledge and professional experience’, upon which the ESAs and SRB add sufficient legal expertise and SRB adds ‘including resolution experience, to a sufficiently high level in the fields of banking or other financial services’.

5. Board of Appeals: towards a coherent system

The growth of the Boards of Appeal indicates the necessity of this organs, also arguably as controlling mechanism to enhance the legitimacy of decision-making agencies, especially given the obscure contours of the ‘non-delegation’ doctrine in the Meroni+ jurisprudence.⁹¹ (The non-delegation doctrine requires establishing of a system of controls over the delegated powers). However, it is arguably unsatisfactory for a proper functioning of the system of controls to allow for unclarities about this mechanism and what it represents exactly. Is it administrative or judicial review? What is a set of due process safeguards that need to be ensured? What power should the Board of Appeals have, especially given the Statute of the Court of Justice of the European Union which seems to treat them as a first step in ensuring effective judicial protection? The existing palette of differences should be avoided to streamline relevant processes to enhance clarity, legal certainty and legitimacy. Creating coherence concerning the creation and operation of the Boards of Appeal seems essential.

First, coherence must be thought on the issue of what type of control they (should) represent. For this discussion, it is important to sketch arguably two possible extreme options (based on the analysis above) as how we may picture the role of the Boards:

1. internal check of the agency’s (draft) decision by issuing a publicly unpublished opinion by the Board to the relevant organ of the agency to take the final issue reviewable by the General Court and further (think of similar situation when a national Council of State may deliver an advice on a legislative draft by the parliament). Here, the Board of Appeal’s role is part of the decision-making process;
2. independent check of the final decision by the agency on the set factors (see discussions in the upcoming chapters on the possibilities in terms of the scope and intensity of review), which is publicly published and is a necessary step in the line of effective judicial protection, i.e., appealing before the General Court and only exceptionally further.

The recent developments in law and practice, including the modified Statute of the CJEU, and proliferation of the Boards and their case-law suggests the preference for the second ‘extreme option’ just outlined above. Determining what the Boards of Appeal *should* do and how they *should* fit within the system of operation and controls of EU agencies is crucial in ensuring coherence on the issues of the Boards’ (1) independence, (2) composition and (3) terms of functioning. It is exactly the absence of this normative clarity about the role of the Boards that seems to have led to highlighted variations in their establishing and operation and blurring of this mechanism contours, which blurs the legitimacy of the system in turn.

- (1) The independence of the Boards of Appeal is crucial to ensure it providing an impartial advice or decision and thus is free to go about discretion given to it. To ensure this, institutional, personnel’s and financial elements of independence should be ensured.⁹²

⁹¹ Cite cases Meroni, Romano, ENISA, ESMA-shortselling

⁹² Miroslava Scholten, Independence and Accountability, proving the negative correlation, MJ, 2014

- a. The highest degree of institutional independence is having relevant legislative clauses, such as declaration in law ‘shall be institutionally independent’, ‘shall act in public interest’ and prohibition of double functionality, i.e., a clear legislative mandate, and making it a separate functional unit, if not putting in a separate building, in practice.
 - b. The appointment and removal clauses ensure the degree of personnel’s independence. The highest degree of independence here is a complex procedure involving different stakeholder institutions in steps of a. proposing a candidate or making the short list of candidates, b. hearing and selecting, and c. possible approving. In light of the substantive expertise rationale behind their check, relevant requirements for the personnel appointed need to be prescribed by law and assessed during the procedure. The removal or re-appointment clauses should also be subject to requirements of ‘removal for serious cause’, restrictions for further appointment in the regulated industry and involving several stakeholder institutions in reappointment. The financial remuneration of the heads and the staff shall not be regulated by the agency or other stakeholder alone (e.g. Commission or industry’s fees).
 - c. The financial independence is further important to allow the Board to get necessary support in preparing its assessment and decisions. The highest degree of financial independence from the agency is having the ability to get a lump sum budget line to be able to decide on the allocation of budget for the various tasks of the registry.
- (2) The composition of the Boards is another issue which is tightly connected to the issue of if the Board is an independent advisor or a first step in a judicial review procedure. The composition for the former setting (advisor) may include imposing requirements to have relevant technical experts, lawyers and other experts depending on the nature of the advice to be given. The composition for the latter setting (appeal board) should be based on requirements to have relevant professional, i.e., specialised judges and lawyers in relevant substantive fields and procedural laws, in addition to perhaps other relevant experts, to ensure the ability to issue ‘technically sound’ decision.
- (3) Last but not least, the role of the Board is important to determine to decide further on the issues of its functioning, most importantly the Rules of Procedure, due process requirements necessary and scope and intensity of review. Clearly, a Board of Appeal being part of the agency’s decision-making process would require following other standards and procedures (more connected to the rule-making), than a BoA as part of the judicial protection. The following chapters will zoom into various options possible to discuss how the scope of and intensity of review could be streamlined to ensure coherence of the Boards functioning as appeal bodies.

All in all, the Boards of Appeal can ensure an effective check upon a decision of an agency; they can ensure the necessary separation of power within the agency and in relation to other institutions of the EU, they could be a good advisor or a remedy of first instance, which is effective and expert-based. This is thanks to BoAs’ independent status within the agency, yet proximity in terms of ‘location’ (attachment to the agency), time of review and substantive expertise, and accessibility (largely decisions issued by the Agency which can be reviewed ‘immediately’). It is however crucial to bring coherence into the existing diversity which cannot be simply explained by functional necessities and differences among agencies to have such considerable differences surrounding independence, composition and operation of the BoAs. It seems necessary for the legitimacy of the EU system and EU agencies as such if the BoAs role is clarified in law normatively and relevant differences streamlined along, for instance, two organs: ‘advising expert forum’

as part of an agency decision-making and a true 'Board of Appeal' as part of (upcoming) judicial check of the agency action. Clearly, the latter organ (a true BoA) could be designed to have a few types concerning what they should review and how and what form their decision should take (confirmation/request to reconsider by the agency/new decision). Yet, even then, a clear design of these few 'functional' types supported by good reasons for having those differences is the way forward if the EU seeks enhancing legitimacy of its actions. The question is then also to what extent other elements, which ensure independence and composition, should vary or could also be streamlined along the lines of those 'functionally distinguished' models.

6. Concluding

The need to control EU agencies and hence enhance legitimacy of public decision-making yet by independent bodies explains the rationale behind the creation of various checks over agency action, including that of administrative review. The system of controls over EU agencies, similarly to that of the US in fact, seems to have started to develop sporadically. Yet, with a significant proliferation of agencies with strong powers, the development does inevitably lead to the stage of creating some centralisation and harmonisation around institutional and organisational questions surrounding agencies creation and operation. This study shows that this stage has approached the development of agencification in the EU, including the operation of the Boards of Appeal which have become a constituent part (rather than an exception) of EU agencies' work and the system of controls. The Boards of Appeal can be seen as an important check thanks to independent expertise and effectiveness of the system of control that they can play a role in ensuring judicial control, which could prevent or resolve a dispute with arguably less time, financial and human costs. However, for this instrument to be able to take truly part within the system of control and ensure legitimacy, its contours need to be finetuned normatively, i.e., by an authoritative guidance/regulation explaining what choices can be made by the Boards and when and why and how they can be created and make reviews. This is because in a democratic system as the EU is, these choices and explanations should be done intelligibly by the elected representatives and/or the main executive and not for them or in a disperse manner of different secondary acts passed with different precision and procedures. The latter seems to have been the legislator's approach so far but this does not have to (and arguably should not) continue this way as we have a solid ground of materials, experience and functional necessity for such a clarifying action from the EU main institutions. The following chapters will give more comparative findings concerning individual aspects of the standards of review, scope, etc. which will give even more specifics and stress the necessity for a streamlining action that we think is essential to enhance the legitimacy of this important controlling mechanism over EU agencies action and EU agencies as such.