

Introduction

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Introduction

Merijn Chamon, Annalisa Volpato, and Mariolina Eliantonio

One of the most significant institutional developments in EU law over the past decades has been the agencification of the EU administration.¹ This phenomenon may be defined as (EU) agencies taking up an increasingly important role in (EU) administration both in a qualitative and a quantitative sense.² The latter is captured most easily: not only is the number of agencies growing, the total number of civil servants working at EU agencies and the total combined budgets of the EU agencies are also continuously increasing.³ Admittedly, the qualitative dimension is more difficult to capture, but that increasingly important powers and tasks are conferred on EU agencies is evident when looking at recent developments in policy fields as diverse as financial regulation, border control, and public health. Indeed, in new institutionalist terms, a logic of appropriateness, rather than a logic of consequences,⁴ has appeared: today the EU legislature does not simply seem to establish and empower EU agencies because they are a *rational* response to policy challenges, but instead because the ‘appropriate’ way to tackle almost any type of policy crisis or priority at EU level seems to be to (further) empower independent bodies.⁵

¹ See generally Wolfgang Weiß, ‘Dezentrale Agenturen in der EU-rechtsetzung’ (2016) 51 *Europarecht* 6, 631–5; Rostane Mehdi, ‘Le pouvoir de décision à l’épreuve de “Agenciarisation” de l’Union—Quelques questions constitutionnelles’ in Fabrice Picod, Brunessen Bertrand, and Sébastien Roland (eds), *L’identité du droit de l’Union européenne: Mélanges en l’honneur du Doyen Cl. Blumann* (Bruylant 2015) 698–713; Herwig Hofmann and Alessandro Morini, ‘Constitutional Aspects of the Pluralisation of the EU Executive through “Agencification”’ (2012) 37 *ELRev* 4, 419–43.

² See Merijn Chamon, *EU Agencies: Legal and Political Limits to the Transformation of the EU Administration* (OUP 2016) 45.

³ See TARN, *Agencification of EU Executive Governance*, TARN Policy Brief 2019/1, p 4.

⁴ See Ole Jacob Sending, ‘Agency, Order and Heteronomy’ (2016) 3 *European Review of International Studies* 3, 66–7. Applied to the EU agencies, see Merijn Chamon, ‘The European Railway Agency under the Fourth Railway Package: A Political and Legal Perspective’ in Cécile Rapoport (ed), *L’espace ferroviaire unique européen: Quelle(s) réalités* (Bruylant 2015) 173.

⁵ For instance, to make the EU more social, then Commission President Juncker in his 2017 State of the Union Speech proposed a ‘European Social Standards Union’ and pushed the establishment of a new agency, the European Labour Authority. See Bart Vanhercke, Sebastiano Sabato, and Dalila Ghailani, ‘Conclusions: The European Pillar of Social Rights as a game changer’ in ETUI Nineteenth Annual Report, *Social policy in the European Union: state of play 2018*, 160. In the wake of the COVID-19 pandemic, the European Commission proposed to beef up the European Centre for Disease Prevention and Control, see European Commission, COM(2020) 726 final. The European Supervisory Authorities in turn were established in the wake of the financial crisis (see also Chapter 1 by Chamon and Fromage in this volume). For earlier examples, see Marc Blanquet and Nathalie de Grove-Valdeyron, ‘Le recours à

Since the mid-1990s academics' and practitioners' interest in the EU agencies has grown and the EU agencies have become a research topic in their own right.⁶ In the meanwhile, different research strands are branching off that of the general research on EU agencies. One of these is the topic of the present volume: the Boards of Appeal, that is internal review bodies of EU agencies. These bodies allow for a further level of administrative protection, preceding the judicial review acts of these agencies' acts that is provided under the EU Treaties.⁷

Historically, the first EU agencies established with a Board of Appeal were the EU Intellectual Property Office (EUIPO) and the Community Plant Variety Office (CPVO), following the example of the Boards of Appeal in the European Patents Office,⁸ that have been working since the 1970s.⁹ Since then, their ranks were joined by the European Aviation Safety Agency (EASA), the European Chemicals Agency (ECHA), the European Agency for the Cooperation of Energy Regulators (ACER), the three European Supervisory Authorities (ESAs), the Single Resolution Board (SRB), and the European Railway Agency (ERA). The ERA is an interesting case in point. So far it is the only decision-making agency that was not originally established in 2004 with decision-making powers.¹⁰ The other decision-making agencies were established as such *ab initio* but the ERA only received 'decision-making powers' pursuant to the fourth railway package in 2016.¹¹ The revision of its mandate meant that a Board of Appeal was also included in the ERA's organizational set-up.¹² From the EU institutions' practice, one clear rule

des agences de l'Union en réponse aux questions de sécurité' in Joël Molinier (ed), *Les agences de l'Union européenne* (Bruylant 2011) 103.

⁶ The body of literature on EU agencies has become too vast, but *ex multis*, see inter alia Dorothee Fischer-Appelt, *Agenturen der Europäischen Gemeinschaft* (Duncker & Humblot 1999) 609 (hereafter Fischer-Appelt, *Agenturen*); Edoardo Chiti, *Le agenzie europee—Unità e decentramento nelle amministrazioni comunitarie* (Cedam 2002) 514; Giacinto Della Cananea (ed), *European Regulatory Agencies* (Éditions Rive Droite, 2005) 199; Joël Molinier (ed), *Les agences de l'union européenne* (Bruylant 2011) 268; Nicolas Raschauer (ed), *Europäische Agenturen* (Jan Sramek Verlag 2011) 253; Michelle Everson, Cosimo Monda, and Ellen Vos (eds), *European Agencies in between Institutions and Member States* (Kluwer Law International 2014) 312; Merijn Chamon, *EU Agencies: Legal and Political Limits to the Transformation of the EU Administration* (OUP 2016) 432 (hereafter Chamon, *Limits to the Transformation of the EU Administration*); Carlo Tovo, *Le agenzie decentrate dell'Unione europea* (Editoriale Scientifica 2016) 474 (hereafter Tovo, *Le agenzie*); Andreas Orator, *Möglichkeiten und Grenzen der Einrichtung von Unionsagenturen* (Mohr Siebeck 2017) 549; Jacopo Alberti, *Le agenzie dell'Unione europea* (Giuffrè 2018) 490 p.; Natalia Kohtamäki, *Theorising the Legitimacy of EU Regulatory Agencies* (Peter Lang 2019) 429 (hereafter Kohtamäki, *Theorising the Legitimacy*).

⁷ Marta Simoncini, *Administrative Regulation beyond the Non-Delegation Doctrine. A Study on EU Agencies* (Hart Publishing 2018) 158 (hereafter Simoncini, *A Study on EU Agencies*).

⁸ Oliver Streckert, *Verwaltungsinterner Unionsrechtsschutz: Kohärenter Rechtsschutz durch Einführung eines Widerspruchskammermodells für die Europäische Kommission* (Mohr Siebeck 2016) 48.

⁹ The first edition of the EPO's overview of the case law of its Boards of Appeal notes that the very EPO BoA decision was adopted on 1 March 1979, see EPO, *Case Law of the Boards of Appeal of the European Patent Office 1987–1992*, München, EPO, p 12.

¹⁰ See Regulation (EC) 881/2004 establishing a European Railway Agency [2004] OJ L164/1.

¹¹ See Regulation (EU) 2016/796 on the European Union Agency for Railways [2016] OJ L138/1.

¹² See also Chapter 2 by Tovo in this volume.

thus emerges: decision-making agencies always have Boards of Appeal, regardless of how many decisions these agencies adopt per year. Indeed, while for one of the first two decision-making agencies (the EUIPO) the sheer number of decisions requires a filter, consisting of the review exercised by the Board of Appeal, in order to ensure that the General Court is not swamped with cases,¹³ the same does not apply to the other agencies.¹⁴

Instead, part of the *raison d'être* of the Boards of Appeal, together with the speedy and procedurally light weight review (see below), in these other agencies is to allow a review of technically or factually complex cases by panels with expertise in the field concerned. The review offered by those Boards of Appeal is then to be contrasted with the review exercised by the EU judge. The latter will in any event have full jurisdiction in the sense of Article 6 of the European Convention on Human Rights (ECHR),¹⁵ but given that it lacks specific scientific or technical expertise it will typically only exercise a light touch review.¹⁶ In contrast, the Boards of Appeal may provide a more thorough review and provide greater legal protection beyond that which is required under Article 6 ECHR (when combined with the review exercised by the Courts).¹⁷

The additional added value of this internal review (compared to the 'external' review offered by the EU Courts) should be that, given their mixed composition (of lawyers and experts), they can perform a more thorough review of technical or scientifically complex decisions than ordinary judges. In addition, proceedings

¹³ See Chapter 3 by Hanf in this volume.

¹⁴ The exception here is the ECHA BoA for which the Commission had anticipated a significant workload (of 549 cases in 2010) when the REACH Regulation was proposed but ultimately the BoA's workload remained very modest overall. See Chamon, *Limits to the Transformation of the EU Administration* (n 6) 343 at footnote 246.

¹⁵ While the requirement of full jurisdiction has not fully crystallized yet, the EU Courts arguably comply with the requirement that they must be able to review all relevant questions of fact and law, see *Terra Woningen v the Netherlands* App no 20641/92 (ECtHR, 17 December 1996), para 52. On the (sometimes erratic) jurisprudence of the ECtHR, see Miriam Allena and Francesco Goisis, 'Full Jurisdiction' under Article 6 ECHR: Hans Kelsen v. the Principle of Separation of Powers' (2020) 26 *EPL* 2, 287–306.

¹⁶ Under the European Court of Human Rights' (ECtHR) jurisprudence, this is indeed acceptable and compatible with the idea of full jurisdiction. This is because the latter does not impose a single uniform standard but only that 'sufficient review' is exercised whereby what is sufficient may vary depending on several factors, such as when the dispute concerns 'a specialised issue requiring professional knowledge or experience and whether it involved the exercise of administrative discretion and if so, to what extent'. See *Fazia Ali v the United Kingdom* App no 40378/10 (ECtHR, 20 October 2015), para 78.

¹⁷ This is because under the ECtHR's jurisprudence, even when a body like a Board of Appeal might not meet the requirements under Article 6 ECHR this can be remedied if that body's proceedings are subject to a subsequent appeal before a judicial body that does have full jurisdiction. See *Bryan v the United Kingdom* App no 19178/91 (ECtHR, 22 November 1995), para 40. In contrast, Coutroun suggests that both before the Boards of Appeal and the EU Courts, Article 6 ECHR is respected. See Laurent Coutroun, 'L'infiltration des garanties du procès équitable dans les procédures non juridictionnelles' in Caroline Picheral (ed), *Le droit à un procès équitable au sens du droit de l'Union européenne* (Anthemis 2012) 186 (hereafter Coutroun, 'L'infiltration'). Whether that is the case for the Boards of Appeal depends, inter alia on whether they can be qualified as independent tribunals which does not seem to be the case for most Boards of Appeal as transpires from the case studies in the first part of this volume.

before Boards of Appeal are also much more speedy than proceedings before the Courts¹⁸ and they are subject to much less cumbersome or strict procedural requirements, as they for instance do not require parties to be represented by qualified lawyers and lodging an appeal may often be done simply by email. In addition to these features that are especially interesting for litigants, one ‘systemic’ added value is that the Boards of Appeal may fulfil a filtering function, sieving cases before they are lodged before the EU Courts. The Boards of Appeal have become a characteristic feature of the agencification phenomenon and while the process of EU agencification itself is characterized by *ad hocery*,¹⁹ the EU legislature has been remarkably consistent in ‘equipping’ all agencies that have been granted decision-making powers²⁰ with a Board of Appeal.

So far, so good. But this specific characteristic feature of EU agencification raises a host of questions from both a theoretic and practical perspective which are only now starting to be systematically analysed.²¹ Are the Boards of Appeal judicial bodies or are they an integral part of the agency in which they were established and thus administrative in nature? Or are they to be considered an additional layer of the judicial system? The distinction is not trivial since the standards, in terms of organization and functioning, which they will have to comply with will be different depending on which ‘branch of government’ they form part of. At least originally, some regarded the Boards of Appeal as exercising a judicial function,²² but the more recent Boards of Appeal function differently from the original Boards of Appeal of the EUIPO and CPVO,²³ suggesting that they are administrative bodies. This has led commentators to qualify them as ‘quasi-judicial bodies,’²⁴ ‘not courts ... but not merely administrative bodies either.’²⁵ It is precisely this ‘quasi,’ which denotes a hybridity, that raises the question on the nature of the Boards of Appeal. From this fundamental question follows a plethora of more practical questions: if Boards of Appeal are equipped with technical expertise, do they also rely on that expertise and offer applicants greater legal protection? Which type of parties have recourse to the Boards of Appeal? What is the scope of review exercised by

¹⁸ Between 2015 and 2019, the average length of proceedings (resulting in both orders and judgments) before the General Court was 18.5 months (own calculations based on Cour de Justice de l’Union européenne, *Rapport annuel 2019*, Luxembourg, 2020, p 297).

¹⁹ Michelle Everson, Cosimo Monda, and Ellen Vos, ‘European Agencies in between Institutions and Member States’ in Michelle Everson, Cosimo Monda, and Ellen Vos (eds), *European Agencies in between Institutions and Member States* (Kluwer Law International 2014) 4.

²⁰ Kohtamäki, *Theorising the Legitimacy* (n 6) 108.

²¹ For earlier research on the Boards of Appeal, see n 26–28.

²² Marcus Navin-Jones, ‘A Legal Review of EU Boards of Appeal in Particular the European Chemicals Agency Board of Appeal’ (2015) 21 *European Public Law* 1, 158 (hereafter Navin-Jones, ‘A Legal Review’).

²³ For the first dedicated work on the Boards of Appeal, which, however, only related to the EUIPO and CPVO, see Amina Dammann, *Die Beschwerdekammern der Europäischen Agenturen* (Peter Lang 2003) (hereafter Dammann, *Die Beschwerdekammern*)

²⁴ Fischer-Appelt, *Agenturen* (n 6) 314.

²⁵ Navin-Jones, ‘A Legal Review’ (n 22) 144–5.

the Boards of Appeal? What procedure applies before them? And, from an analytical perspective and squaring the circle, what do the answers to the latter questions tell us in turn about the nature of the Boards of Appeal?

So far, the topic of the Boards of Appeal has not yet been explored and researched in depth. There are some case studies dedicated to specific Boards of Appeal;²⁶ while in some general studies on EU agencification²⁷ or on legal protection vis-à-vis agencies,²⁸ some attention is being devoted to the mechanism of the Board of Appeal. Very few specific studies on the Boards of Appeal have been conducted.²⁹ Yet, no study has examined in an overarching and coherent manner how the Board of Appeal as a mechanism should be conceptualized and how it should be assessed in light of its rationale. This is a clear gap in current research and literature which this volume aims to fill.

Some of the abovementioned questions are addressed in the first part of this volume which brings together case studies of the Boards of Appeal. As editors we made the conscious decision to include these case studies, since even if all Boards of Appeal share some communalities, the above noted *ad hocery* in agencification has also meant significant differences in the area of legal protection as there are no two Boards of Appeal that function in the same way. In every case study the above-noted questions are then tackled both in deductive and inductive fashion.

²⁶ Navin-Jones, 'A Legal Review' (n 22) 143–68; Régis Vabres, 'La commission de recours des autorités européennes de surveillance' (2012) *Bulletin Joly Bourse* 1, 4–5; William Blair, 'Board of Appeal of the European Supervisory Authorities' (2013) 24 *European Banking Law Review* 2, 65–171; Théophile Margellos, 'La pratique du règlement négocié auprès des Chambres de recours de l'Office de l'Harmonisation dans le Marché Intérieur' (2013) *RAE* 2, 299–308; David Thomas, 'European Chemical Agency Board of Appeal Decisions in Honeywell and Dow Chemicals' (2013) 20 *MJ* 4, 609–22; Marco Lamandini, 'The ESAs' Board of Appeal as a Blueprint for the Quasi-Judicial Review of European Financial Supervision' (2014) 4 *European Company Law* 6, 284–90; Eléonore Mullier and Ruxandra Cana, 'The ECHA Board of Appeal and the Court of Justice: Comparing and Contrasting Chemicals Litigation' (2018) 1 *International Chemical Regulatory and Law Review* 3, 105–13; Marco Lamandini and David Ramos Munoz, 'Law and Practice of Financial Appeal Bodies (ESAs' Board of Appeal, SRB Appeal Panel): A View from the Inside' (2020) 57 *CMLRev* 1, 119–60; 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 *EPL* 3, 569–81; Manuel Cienfuegos Mateo, 'El control de las agencias del Sistema Europeo de Supervisión Financiera por la Sala de Recurso y el Tribunal de Justicia de la Unión Europea' (2018) 110 *Revista Vasca de Administración Pública*, 215–65.

²⁷ See inter alia Fischer-Appelt, *Agenturen* (n 6) 313–16; Chamon, *Limits to the Transformation of the EU Administration* (n 6) 338–46; Tovo, *Le agenzie* (n 6) 334–42; Simoncini, *A Study on EU Agencies* (n 7) 157–62.

²⁸ Loïc Gard, 'Le Contrôle des Actes des Agences de Régulation: Analyse Comparée' in Fabienne Peraldi Leneuf and Jacques Normand (eds), *La légistique dans le système de l'Union européenne: quelle nouvelle approche* (Bruylant 2012) 150–53; Merijn Chamon, 'Les agences décentralisées et le droit procédural de l'UE' (2016) 52 *Cahiers de droit européen* 2, 555–61; Katharina Pabel, 'Europäische Agenturen: Rechtsschutz' in Nicolas Raschauer (ed), *Europäische Agenturen* (Jan Sramek Verlag 2011) 76–81; Jules David, 'Les recours administratifs contre les actes des agences européennes' (2016) *Revue trimestrielle de droit européen* 2, 275–92; Barbara Marchetti (ed), *Administrative Remedies in the European Union* (Giappichelli Editore 2017) 320.

²⁹ Dammann, *Die Beschwerdekammern* (n 23) 230; Paolo Chirulli and Luca De Lucia, 'Specialised Adjudication in EU Administrative Law: The Boards of Appeal of EU Agencies' (2015) 40 *European Law Review* 6, 832–57; Estanislao Arana Garcia, 'Los recursos administrativos en la Unión Europea: Hacia un modelo común de justicia administrativa, (2015) Working Papers IDEIR 27.

Deductively, because every Board of Appeal's functioning and organization is defined first in the establishing regulation of its agency. From those secondary law provisions, preliminary answers on our overarching questions may be deduced. However, to present a full and veracious picture of a Board of Appeal, account must also be taken of its corpus of decisions to complement the aforementioned preliminary answers. Inductively, further (refined) insights may then be identified from the institutional practice of the Boards of Appeal. The first part of the volume brings together chapters by Chamon and Fromage on the Boards of Appeal of the European Supervisory Authorities (ESAs) and Systemic Risk Board (SRB) (1); by Tovo who analyses the Boards of Appeal of the Agency for the Cooperation of Energy Regulators (ACER) and EU Agency for Railways (ERA) (2); by Hanf who looks into the two original Boards of Appeal of the EUIPO and CPVO (3); by Volpato and Mullier who investigate the Board of Appeal of the European Chemicals Agency (ECHA) (4); and by Simoncini and Verissimo who study the Board of Appeal of European Union Aviation Safety Agency (EASA) (5). In addition, two further studies were included in the volume's first part although they are not dedicated to typical Boards of Appeal. While they have not been established as decision-making agencies, the agencies in the Common Foreign and Security Policy (CFSP) and the Area of Freedom, Security and Justice (AFSJ) have also (recently) been endowed with specialized review mechanisms. These are assessed by Butler (6) and Stefan and Den Hertog (7) respectively and were included in our project to capture and identify possible broader trends in specialized review in the EU's administration.

These chapters of the first part lay the groundwork for the 'horizontal' second part of the volume. As noted above, the specificities of each Board of Appeal do not preclude that a similar, if not identical, function can be identified across the different Boards of Appeal. Since the entry into force of the Lisbon Treaty, this is also reflected in primary law. While the Treaty is pretty much silent on EU agencies,³⁰ a notable exception are the provisions on judicial protection. Article 263(5) TFEU, in particular, provides that '[a]cts setting up bodies, offices and agencies of the Union may lay down specific conditions and arrangements concerning actions brought by natural or legal persons against acts of these bodies, offices or agencies intended to produce legal effects in relation to them.' This provision has been interpreted as allowing for more favourable standing requirements for non-privileged applicants,³¹ as well as requiring the latter to exhaust the remedies before the Boards of Appeal of EU agencies before seizing the EU Courts.³²

However, the relative uniformity which this provision introduced in primary law was subsequently broken when the Statute of the Court of Justice was amended

³⁰ Chamon, *Limits to the Transformation of the EU Administration* (n 6) 290.

³¹ Coutron, 'Infiltration' (n 17) 182.

³² Kohtamäki, *Theorising the Legitimacy* (n 6) 160 at footnote 242.

in 2019. Through Regulation 2019/629,³³ an Article 58a was added to the Statute which makes the possibility of introducing an appeal against a judgment of the General Court, where the latter ruled on a decision of an ‘independent Board of Appeal’ of the EUIPO, CPVO, ECHA, EASA or any decision-making agency established in the future, subject to the approval by the Court of Justice. The many questions which this amendment raised are analysed in the chapter by De Lucia (8). To better understand the potential and possible future evolution of the EU Boards of Appeal, Oosterhuis and Widdershoven explore the counterparts of the EU BoAs in a selection of national legal orders (9). Muzi in her chapter addresses the question what kind of parties make use of the review procedures offered by the Boards of Appeal (10). Subsequently, Alberti, starting from the theoretic and practical consequences of the elusive notion of ‘functional continuity’, looks at how the recent reform of the Statute of the Court of Justice has impacted the Boards’ independence (and how, arguably, that independence should be further enhanced) (11). Next, Krajewski scrutinizes the promise of the main added value which Boards of Appeal may theoretically offer: the more in-depth scrutiny of technically complex decisions compared to the scrutiny offered by EU Courts (12). Finally, Ritleng investigates how the Boards of Appeal should be assessed from the perspective of Article 47 of the Charter of Fundamental Rights (CFR) (13). In a final Chapter we present a conclusion and identify a future research agenda based on the chapters of Parts I and II.

³³ Regulation (EU, Euratom) 2019/629 amending Protocol No 3 on the Statute of the Court of Justice of the European Union [2019] OJ L111/1.