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# Quo vadis, Boards of Appeal?

*The Evolution of EU Agencies' Boards of Appeal  
and the Future of the EU System of Judicial Protection*

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# A CALL FOR A NEW APPROACH IN THE STUDY (AND MANAGEMENT) OF EU AGENCIES' BOARDS OF APPEAL

*Verso un nuovo approccio allo studio (e alla gestione) delle commissioni di ricorso delle  
agenzie dell'Unione europea*

*Un appel pour une nouvelle approche dans l'étude (et la gestion) des chambres de  
recours des agences de l'Union européenne*

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## 1. Introduction

Since their establishment more than 30 years ago, EU Agencies' Boards of Appeal have attracted growing attention in legal and, to a lesser extent, political debates.

As happens when new kids come on the block, the Boards of Appeal were first studied individually, in a very sector-based approach<sup>1</sup>, by

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<sup>1</sup> See, *ex multis* and in addition to the Authors mentioned in the footnotes below, E. GASTINEL, *Community Trade Mark and the OHIM Boards of Appeal*, in *European business law review*, 1998, p. 176; D. T. KEELING, *The decisions of the OHIM Boards of Appeal*, in *Revue des Affaires Européennes*, 1998, p. 360; A. VON MÜHLEND AHL, *The Office for Harmonization in the internal market and its boards of appeal: registrability of Community trade marks*, in *Intellectuelle Eigendom & Reclamerecht*, 1999, p. 95; T. MARGELLOS, *La pratique du règlement négocié auprès des Chambres de recours de l'Office de l'Harmonisation dans le Marché Intérieur*, in *Revue des Affaires Européennes*, 2013, p. 299; D. THOMAS, *European Chemical Agency Board of Appeal decisions in Honeywell and Dow Chemicals*, in *Maastricht journal of European and comparative law*, 2013, p. 609; M. CLARICH, *Il riesame amministrativo delle decisioni della BCE*, in *Rivista Italiana di Diritto Pubblico Comunitario*, 2015, p. 1513; M. NAVIN-JONES, *A legal review of EU boards of appeal in particular the European Chemicals Agency Board of Appeal*, in *European Public Law*, 2015, p.

scholars addressing their peculiarities and their powers. Studies have since also covered them as a group, so as to assess their differences and similarities<sup>2</sup> and to identify their nature, also by looking at the experience of their national counterparts<sup>3</sup>. At a managerial level, the sector-based

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143-168; L. BOLZONELLO, *Independent administrative review within the structure of remedies under the treaties : the case of the Board of Appeal of the European Chemicals Agency*, in *European Public Law*, 2016, p. 569-581; C. BRESCIA MORRA, *The Administrative and Judicial Review of Decisions of the ECB in the Supervisory Field*, in *Quaderni di Banca d'Italia*, n. 81, 2016; A. CASSATELLA, *Il ricorso dinanzi all'agenzia europea per la sicurezza aerea*, in *Rivista Italiana di Diritto Pubblico Comunitario*, 2016, p. 1373; N. LA FEMINA, *Rimedi amministrativi e tecniche alternative di risoluzione delle controversie nell'Ufficio dell'Unione europea per la proprietà intellettuale*, in *Rivista Italiana di Diritto Pubblico Comunitario*, 2016, p. 1409; G. LIGUGNANA, *I procedimenti giustiziali nei confronti delle decisioni dell'ECHA*, in *Rivista Italiana di Diritto Pubblico Comunitario*, 2016, p. 1311; A. MAGLIARI, *I rimedi amministrativi nel settore della vigilanza finanziaria europea : modelli a confronto*, in *Rivista Italiana di Diritto Pubblico Comunitario*, 2016, p. 1331; E. MITZMAN, *I rimedi amministrativi nello spazio di libertà, sicurezza e giustizia*, in *Rivista Italiana di Diritto Pubblico Comunitario*, 2016, p. 1689; B. MARCHETTI (ed.), *Administrative Remedies in the European Union. The Emergence of a Quasi-Judicial Administration*, Turin, 2017; Banca d'Italia, *Quaderni di Ricerca Giuridica della Consulenza Legale, Judicial review in the Banking Union and in the EU financial architecture*, n. 84, 2018. M. EKVAD, *The Functioning of the Community Plant Variety Office Board of Appeal*, in C. GEIGER, C. A. NARD, X. SEUBA (eds.), *Intellectual Property and the Judiciary*, Cheltenham, 2018; M. CHAMON, A. VOLPATO, *Sketching out the role and function of the ECHA Board of Appeal: Germany v ECHA and BASF v ECHA*, in *European Law Review*, 2020 p.840.

<sup>2</sup> A. DAMMANN, *Die Beschwerdekammern der Europäischen Agenturen*, Frankfurt am Main, 2004; E. SCHMIDT-ABMANN, *Rechtsschutz gegen Europäische Agenturen: vor einem neuen Aufbruch?*, in *Privatrecht, Wirtschaftsrecht, Verfassungsrecht: Festschrift für Peter-Christian Müller-Graff zum 70. Geburtstag*, 2015, p. 1322; C. TOVO, *Le agenzie decentralizzate dell'Unione europea*, Naples, 2016; M. CHAMON, *EU Agencies. Legal and Political Limits to the Transformation of EU Administration*, Oxford, 2016; J. ALBERTI, *Le agenzie dell'Unione europea*, Milan, 2018; S. PUGLIESE, *I meccanismi di revisione degli atti delle agenzie come veicoli di partecipazione: verso un'amministrazione europea aperta, efficace e trasparente*, in *Il diritto dell'Unione europea*, 2018, p. 715; G. GRECO, *Le commissioni di ricorso nel sistema di giustizia dell'unione europea*, Milan, 2020.

<sup>3</sup> Particularly interesting in this regard are A. TÜRK, *Oversight of Administrative Rulemaking: Judicial Review*, in *European Law Journal*, 2013, p. 126; L. DE LUCIA, *I ricorsi amministrativi nell'Unione europea dopo il Trattato di Lisbona*, in *Rivista trimestrale di diritto pubblico*, 2013, p. 323; P. CHIRULLI, L. DE LUCIA, *Tutela dei diritti e specializzazione nel diritto amministrativo europeo. Le commissioni di ricorso delle agenzie europee*, in *Rivista Italiana di Diritto Pubblico Comunitario*, 2015, p. 1305; J. DAVID, *Les recours administratifs contre les actes des agences européennes*, in *Revue Trimestrielle de Droit Européen*, 2016, p. 275; L. PARONA, *L'appel nelle agenzie federali statunitensi*, in *Rivista Italiana di Diritto Pubblico Comunitario*, 2016, p. 1719; M. CHAMON, A. VOLPATO, M. ELIANTONIO (eds.), *Boards of Appeal of EU Agencies. Towards Judicialization of Administrative Review?*, Oxford, 2022. With specific regard to the banking and finance Boards of Appeal, see W. BLAIR, *Board of appeal of the European supervisory authorities*, in *European Business Law Review*, 2013, p. 165; M. LAMANDINI, *The Esa's Board of Appeal as a Blueprint for the Quasi-Judicial Review of European Financial Supervision*, in *European Company Law*, 2014, p. 290; M. LAMANDINI, D. RAMOS MUÑOZ, *Law and practice of financial appeal bodies (ESAS's board of appeal, SRB appeal panel): a view from the inside*, in *Common market*

approach is still predominant. Indeed, neither the European Commission, nor the Council, nor the European Parliament have a working unit dedicated to these bodies as a whole – not even within the office or the working group dedicated to the Court of Justice of the European Union – since the monitoring (if any) of these bodies takes place within the offices dealing with the policy field in which the Board concerned operates.

However, after a while, even newcomers become part of the settled institutional landscape and the attention – of both scholars and practitioners as well as, above all, the EU legislator – has to shift from a micro perspective, aimed at discussing what these bodies are, to a macro perspective, which is focused on assessing what they are bringing to the EU judiciary and how the latter is evolving thanks to their presence<sup>4</sup>.

This Volume aims exactly to address these latter issues and proposes a new approach for the study and management of EU Agencies' Boards of Appeal, for three main reasons.

## 2. The age of maturity of EU Agencies' Boards of Appeal

First, the Boards of Appeal have entered their age of maturity, enhancing their status and role in the EU system of judicial protection.

A wind of change started to blow for the Boards of Appeal a few years after the entry into force of the Lisbon Treaty, with the never explained<sup>5</sup>, yet consistently replicated<sup>6</sup>, choice of the EU legislator to

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*law review*, 2020, p. 119; M. LAMANDINI, D. RAMOS MUÑOZ, *Finance, law, and the courts: financial disputes and adjudication*, Oxford, 2023.

<sup>4</sup> For some preliminary examples of this new wave of studies on Boards of Appeal, in addition to some publications already mentioned at footnote 2, see J. ALBERTI, *Verso un sistema giurisdizionale a 'specializzazione decentrata'? Brevi note sulle forme di specializzazione del sapere giudiziario dell'Unione all'indomani della riforma del Tribunale*, in *Il diritto dell'Unione europea*, 2018, p. 23; L. DE LUCIA, *The shifting state of rights protection vis-à-vis EU agencies: a look at article 58a of the Statute of the Court of Justice of the European Union*, in *European Law Review*, 2019, p. 809; J. ALBERTI, *The draft amendments to CJEU's Statute and the future challenges of administrative adjudication in the EU*, in *Federalismi.it*, 2019, p. 2; J. ALBERTI, *A new era for EU Agencies' Boards of Appeal? A Preliminary Assessment of the Recent Reform of CJEU's Statute and its Implication on EU Administrative Adjudication*, in M. CONTICELLI, M. DE BELLIS, G. DELLA CANANEA (eds), *EU Executive Governance: Agencies and Procedures*, Turin, 2019, p. 204.

<sup>5</sup> See on this point L. DE LUCIA, *L'evoluzione della tutela dei diritti nei confronti delle agenzie europee*, in *Rivista Italiana di Diritto Pubblico Comunitario*, 2019, p. 352.

<sup>6</sup> The choice of depriving the Boards of Appeal of this power of substitution has been applied since 2010 both when new Boards of Appeal have been established (see what will be hereinafter called 'SRB Regulation', namely Regulation (EU) n. 806/2014 of the European Parliament and of the Council of 15 July 2014, in *OJ L225*, 30.7.2014, p. 11, at Article 85(8) and 'ERA Regulation', namely Regulation (EU) n. 2016/796 of the

progressively deprive the Boards of Appeal of their power of substitution, as well as with the increasing decline of the principle of functional continuity<sup>7</sup> between the latter and their Agencies. The two recent reforms<sup>8</sup> of the Statute of the Court of Justice (hereinafter, the ‘CJEU Statute’) have since confirmed an evolutionary trend. Indeed, in 2019 and 2024 the role and the responsibilities of these bodies were further enhanced, by strengthening (unfortunately, only on paper)<sup>9</sup> their independence and by stating that, under specific circumstances, the decisions originally taken by the Boards of Appeal can be exempt from the scrutiny of the Court of Justice. Lastly, with the recent *BASF* and, above all, *Aquind* judgments<sup>10</sup>, there have been further signals of the dawn of a new era for EU Agencies’ Boards of Appeal. Indeed, in those judgments the Court of Justice explicitly imposed on the Boards of Appeal a duty to perform an in-depth review of the acts undertaken by EU agencies so as to supplement the limited scrutiny carried out by EU Courts as regards complex technical and economic assessments. Those who may deem these judgments as trifles of a purely technical nature would prove them wrong. Indeed, in these decisions the Court of Justice further stated (admitted?) that if Boards of Appeal were not to perform such deep scrutiny, the EU

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European Parliament and of the Council of 11 May 2016, in *OJ* L138, 26.05.2016, p. 1, at Article 62(3)), as well as when the regulations establishing the existing Boards have been substantially revised after that date (see, in particular what will be hereinafter called ‘EASA Regulation’, namely Regulation (EU) n. 2018/1139 of the European Parliament and of the Council of 4 July 2018, in *OJ* L 212, 22.08.2018, p. 1, at Article 113 and ‘ACER Regulation’, namely Regulation (EU) n. 2019/942 of the European Parliament and of the Council of 5 June 2019, in *OJ* L 158, 14.06.2019, p. 22, at Article 28(5)). Therefore, at present, only the Boards of Appeal of EUIPO, CPVO and ECHA retain this power of substitution, whereas all the others do not. The former is the only exception to the rule, probably because of the specificities of the trademark sector and its litigation. As for the latter two, it must be noted that their respective founding regulations, adopted well before 2010, have not been subject to any substantial revision since then.

<sup>7</sup> See on this point J. ALBERTI, *The Position of Boards of Appeal: Between Functional Continuity and Independence*, in M. CHAMON, A. VOLPATO, M. ELIANTONIO (eds.), *Boards of Appeal of EU Agencies. Towards Judicialization of Administrative Review?*, *cit.*, p. 247-248.

<sup>8</sup> See Regulation (EU, Euratom) 2019/629 of the European Parliament and of the Council of 17 April 2019, in *OJ* L 111, 25.04.2019, p. 1 and Regulation (EU, Euratom) 2024/2019 of the European Parliament and of the Council of 11 April 2024, in *OJ* L, 12.08.2024.

<sup>9</sup> For a deeper discussion on this point, see J. ALBERTI, *The draft amendments to CJEU’s Statute and the future challenges of administrative adjudication in the EU*, *cit.*, p. 4-11 and 26-27 as well as the article by C. ZADRA in this *Volume*, p. 293.

<sup>10</sup> General Court, September 20<sup>th</sup> 2019, case T-125/17, *BASF Grenzsch v ECHA*, ECLI:EU:T:2019:638 (not appealed before the European Court of Justice) and General Court, November 18<sup>th</sup> 2020, case T-735/18, *Aquind v ACER*, ECLI:EU:T:2020:542 (subsequently confirmed by the European Court of Justice with the judgment of March 9<sup>th</sup> 2023, C-46/21 P, *ACER v Aquind*, ECLI:EU:C:2023:182).

judiciary as a whole “would fail to offer the guarantees of effective judicial protection to undertakings”<sup>11</sup>.

Therefore, the Boards of Appeal are no longer internal bodies tasked with reviewing some decisions of certain EU agencies and, *in casu*, replacing them with new ones that could subsequently be challenged before a perhaps-to-be-established specialised tribunal<sup>12</sup> or directly before the EU Courts. They have *de facto* replaced – in functional and not institutional terms, of course – the specialised tribunal provided for under Article 257 TFEU and they have become fully part – at least in functional terms – of the EU judicial machinery, since a failure in their scrutiny over the acts of EU agencies can prevent EU Courts from respecting the principle of effective judicial protection.

### **3. The lack of a political vision as to the future of EU Agencies’ Boards of Appeal**

Two consequences follow from the new role assigned to the Boards of Appeal in the last few years.

Firstly (and pragmatically), the model of EU Agencies’ Boards of Appeal, which was conceived and replicated (albeit with relevant differences) in the ‘age of youth’ of these bodies, needs to be reconsidered and reevaluated in light of the different role and responsibilities now given to them.

Despite being labelled as ‘independent’ under the aforementioned reforms of CJEU Statute, the Boards of Appeal still retain features that, as has already been debated extensively in the legal literature, fit poorly with that principle<sup>13</sup>. The examples of the heterogenous levels of independence are, unfortunately, manifold; they have already been discussed by legal scholars and they will be referred to here only to the extent strictly necessary<sup>14</sup>. First of all, only the Boards of Appeal of EUIPO and CPVO

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<sup>11</sup> Court of Justice, March 9<sup>th</sup> 2023, C-46/21 P, *ACER v Aquind*, *cit.*, para 67.

<sup>12</sup> It is worth highlighting that, on the margins of the signing of the Treaty of Nice, the Government of Luxembourg declared that it would not claim the seat of the Boards of Appeal of the Office for Trade Marks and Designs (namely, those now called as EUIPO Boards of Appeal) if they were to become specialised courts attached to the General Court (see Declaration n. 1 annexed to the Treaty of Nice, in *OJ C 80*, 10.03.2001, p. 1). This suggests that, at least in its original intentions, there was a path of evolution of the Boards of Appeal from an internal dimension within the agency to another well rooted within the Court of Justice of the European Union.

<sup>13</sup> See J. ALBERTI, *The Position of Boards of Appeal: Between Functional Continuity and Independence*, in M. CHAMON, A. VOLPATO, M. ELIANTONIO (eds.), *Boards of Appeal of EU Agencies. Towards Judicialization of Administrative Review?*, *cit.*, pp. 252-264.

<sup>14</sup> *Ibidem*.

have a mechanism for removing members that involves the Court of Justice as a guarantee<sup>15</sup>. The members of the other Boards can be removed either by the European Commission (after hearing an opinion from the Agency)<sup>16</sup>, or even directly by the agency itself (i.e. by the supervised entity!)<sup>17</sup>. Moreover, from a financial point of view, all the Boards of Appeal are dependent on their Agency's budget: thus, their financial resources are decided by the entity they are called upon to control. Furthermore, all the Boards of Appeal except those of the EUIPO and ECHA are, as will be extensively discussed elsewhere<sup>18</sup>, *de facto* non-permanent bodies. This has relevant implications for the status of their members (who are not always officials of the agency or of the EU and thus do not enjoy the privileges and immunities set forth by Protocol 7 annexed to the Treaties), the remuneration of their members (often set case by case and just for a specific number of hours, defined *ex ante*, allocated to the case concerned) and the internal structure of the Board itself (with a Registry that is sometimes entrusted to a person who is not dedicated to the Board on a full-time basis, but still partly answers to the agency that the Board is expected to control).

In order to tackle these issues it is crucial, as a second and more theoretical step, to stop treating the Boards of Appeal (only) as monads, or as a group of monads, and to shift the legal and political debates from the sector-based approach mentioned above into a new dimension.

In particular, the Boards of Appeal now clearly deserve to be studied also as an institutional model and their analysis should be combined with

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<sup>15</sup> See what will be hereinafter called 'EUIPO Regulation', namely Regulation (EU) n. 2017/1001 of the European Parliament and of the Council of 14 June 2017, in *OJ L* 154, 16.06.2017, p. 1, at Article 166(1) and 'CPVO Regulation', namely Council Regulation (EC) n. 2100/94 of 27 July 1994, in *OJ L* 227, 1.09.1994, p. 1, subsequently amended, at Article 47(5).

<sup>16</sup> See Article 106(5) of EASA Regulation and what will be hereinafter called 'ECHA Regulation', namely Regulation (EC) n. 1907/2006 of the European Parliament and of the Council of 18 December 2006, in *OJ L* 396, 30.12.2006, p. 1, as subsequently amended, at Article 90(4).

<sup>17</sup> See Article 26(2) of ACER Regulation; Article 56(2) of SRB Regulation; Article 58(5) of what will be hereinafter called 'ESAs Regulation', namely the three Regulations (whose Articles have almost the same numbers) establishing the three authorities operating in the field of micro-prudential supervision (i.e. the European Banking Authority, the European Insurance and Occupational Pensions Authority and the European Securities and Markets Authority, known all together as the European Supervisory Authorities, ESAs, which have a Joint Board of Appeal regulated in Regulations (EU) n. 1093,1094,1095/2010 of the European Parliament and of the Council of 24 November 2010, as subsequently amended, in *OJ L* 331, 15.12.2010, p. 12, 48, 84).

<sup>18</sup> M. NAVIN-JONES, in this *Volume*, p. 197.

that of the EU judiciary as a whole. In other words, the debates on the Boards of Appeal should now also focus on how they could (or should) develop to better fit into the general system of judicial protection and how the EU judiciary itself is evolving (or should further evolve) to better interact with those bodies.

The wiser observers of the EU system of judicial protection will immediately argue that such an aim is at least hindered by the lack of any official project for the future of the EU judiciary. Consequently, proposals for the evolution of one part (the Boards of Appeal) may well be made on the basis of certain legal or political biases regarding how the whole (the EU system of judicial protection) should evolve.

Such an argument certainly has some merits. However, this Volume argues that the current reforms have already gone too far and with too little discussion, meaning that debates on the matter cannot be further postponed. The recent reforms of the CJEU Statute were not adopted on the basis of thorough discussion<sup>19</sup> or with a clear vision as to how the EU judiciary should evolve and in what direction<sup>20</sup>. And there have been even fewer debates with regard to the position of EU Agencies' Boards of Appeal: just by way of example, the recent extension of the filter mechanism to all the Boards of Appeal as provided for by Article 58a of the CJEU Statute did not receive a single proposal for amendment throughout its negotiation and the provision was adopted exactly as proposed by the Court of Justice.

Also in light of this lack of political vision and public debate, academics and practitioners are called upon to fill those gaps and bring the discussion on EU Agencies' Boards of Appeal a step forward by highlighting not only what these bodies are, but also what they are (silently) becoming and how they should further evolve to better perform the functions that they have recently been tasked with.

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<sup>19</sup> It is worth highlighting that during the hearing organised on March 9<sup>th</sup>, 2024 by the JURI committee of the European Parliament, the President of the Court of Justice has called on the EU legislator to adopt the reform of the CJEU Statute “in the weeks to come, not in the two years to come” (recording available at [multimedia.europarl.europa.eu/en/webstreaming/committee-on-legal-affairs\\_20230509-1500-COMMITTEE-JURI](https://multimedia.europarl.europa.eu/en/webstreaming/committee-on-legal-affairs_20230509-1500-COMMITTEE-JURI); see, in particular, at 11:48:00). For a further debate on the negotiations of CJEU Statute, see T. LUKÀCSI, in this *Volume*, p. 283.

<sup>20</sup> Conversely, the Court of Justice had rejected multiple times and in the very recent past that the transfer of preliminary rulings was an appropriate measure to be taken: see, on this point, the careful analysis by C. AMALFITANO, *Il futuro del rinvio pregiudiziale nell'architettura giurisdizionale dell'Unione europea*, in J. ALBERTI, G. DE CRISTOFARO (eds.), *Il rinvio pregiudiziale come strumento di sviluppo degli ordinamenti*, Pisa, 2023, in particular at pp. 27-40.



#### 4. Taking the ‘quasi-judicial’ dimension seriously

Finally, this Volume calls for a reconsideration of the ‘quasi’ stigma that for a long time has hindered studies on EU Agencies’ Boards of Appeal.

Indeed, according respectively to the settled and to the most recent case-law of the Court of Justice, Boards of Appeal are “quasi-judicial” bodies<sup>21</sup> or “administrative revision bodies [...] performing a quasi-judicial function”.<sup>22</sup> Thus, outside the realm of specialised studies, the Boards of Appeal have always been considered as bodies performing tasks that are certainly important within their specific policy field, yet not really relevant for those interested in the broader picture. The general feeling, at both the academic and institutional levels, is that the real game of protecting individual’ rights is played elsewhere in the EU legal order. The ‘quasi’ nature of these bodies has often resulted in an equally halved attention to their activity.

It goes without saying that the centrality and the overwhelming importance of the Court of Justice and, to a lesser extent, of the General Court in ensuring the protection of fundamental rights and the evolution of EU integration cannot be questioned. This is a pivotal element that has characterized the EU legal order since its creation and will certainly (and hopefully) keep marking it in the future.

However, the judicial system emerging from the recent reforms calls for a new approach towards EU Agencies’ Boards of Appeal and highlights the importance of bringing their case-law into the analyses of the settled principles of EU litigation.

Classic studies on EU judicial protection, such as those on private parties’ legal standing, interim protection, third-party participation in proceedings, the principle of effective judicial protection and the intensity of scrutiny over complex technical and economic assessments can no longer be fully and properly addressed without also considering the activity of EU Agencies’ Boards of Appeal.

Even though the Court of Justice will clearly continue to have the last word on the implementation of these principles (and the main influence

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<sup>21</sup> General Court, September 18<sup>th</sup> 2012, joined cases T-133/08, T-134/08, T-177/08 and T-242/09, *Ralf Schröder v CPVO*, ECLI:EU:T:2012:430, paras 137 and 190. See also AG Bot Opinion of November 28<sup>th</sup> 2013, case C-530/12 P, *OHIM v National Lottery Commission*, ECLI:EU:C:2013:782, para 93.

<sup>22</sup> Court of Justice, March 9<sup>th</sup> 2023, case C-46/21 P, *ACER v Aquind, cit.*, para 59. See, on the distinction between ‘quasi-judicial bodies’ and ‘administrative revision bodies performing a quasi-judicial function’ also M. PREK, in this *Volume*, p. 239.

over their evolution), those who are interested in understanding their day-to-day application as well as foreseeing how they could (or should) evolve now also have to consider the activity of the Boards of Appeal. Regardless of the judicial or administrative nature of these bodies, they now explicitly support the EU judiciary in ensuring respect for Article 47 of the Charter of Fundamental Rights and take decisions that in 99% of cases are reviewed only by the General Court, thus escaping the oversight of the Court of Justice<sup>23</sup>. Thence, they now fully contribute to shaping the fundamental principles of EU litigation and affect how the General Court and, subsequently, the Court of Justice will deal with them.

Furthermore, including the case-law of these bodies in the study of the classic topics of EU litigation is relevant also for the purpose of monitoring the Boards' activity and assessing whether and to what extent an internal coherence is maintained in respect of these principles despite the various policy fields in which (and the various entities by which) they are applied. Indeed, national experiences with administrative adjudication show that mechanisms of review like those provided for the Boards of Appeal may lead to a certain degree of sectoral isolation and fragmentation in the system of rights' protection. Given their technical function and their institutional position, these bodies might potentially develop a sectoral case-law, characterized by a technical jargon different from the judicial language used by EU Courts and/or other Boards of Appeal, hypothetically undermining the overall coherence of the EU legal order<sup>24</sup>.

Even though there is no signal so far that any such events have occurred over recent years, the growing relevance of these bodies clearly implies a need for greater attention to their activity.

## 5. An overview of the Volume

In order to develop the innovative approach mentioned above, this Volume has been divided into three parts, supported by a concluding chapter.

The first part is made up of a set of different horizontal studies which revisit classic issues of EU litigation law in light of the activity of EU agencies' Boards of Appeal. In particular, Camilla Burelli discusses the locus standi of so-called non-privileged applicants before the Boards of Appeal, focusing in particular on the lack of reviewability of regulatory acts. Ilaria Anrò deals with the intervention of third parties in litigation

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<sup>23</sup> See the articles by R. TORRESAN and P. SILVESTRI in this *Volume*, p. 129 and 161.

<sup>24</sup> P. CHIRULLI, L. DE LUCIA, *Tutela dei diritti e specializzazione nel diritto amministrativo europeo. Le commissioni di ricorso delle agenzie europee*, cit., in particular p. 1343-1344 and R. E. LEVY, R. L. GLICKSMANN, *Agency Specific Precedents*, in *Texas Law Review*, 2011, p. 500.

before the Boards of Appeal, highlighting differences and similarities among them and, above all, the EU Courts, questioning the consequences of those discrepancies. Giulia Agrati starts off by examining the settled principle according to which Boards of Appeal fall within the scope of application of Article 41 of the EU Charter of Fundamental Rights and then goes on to discuss whether this approach still makes sense and to assess whether and to what extent these bodies already respect the classic procedural guarantees set forth in Article 47 thereof. Massimo Orzan evaluates the power of (certain) Boards of Appeal to adopt interim measures, assesses their case-law, comparing it with that of EU Courts, and discusses whether and how those powers could be improved and/or better harmonised with those of the EU Courts. Sofie Oosterhuis looks at the standard of review used by Boards of Appeal when reviewing technical acts, evaluating the impact of the most recent case-law of the Court of Justice and, in particular, the *Aquind* case. She assesses differences and similarities among the various Boards of Appeal and compares their case-law with that of the EU Courts. Riccardo Torresan discusses the most recent reforms of the CJEU Statute, assessing in particular how the new filter on the appeals over decisions originally taken by Boards of Appeal has been applied so far by the Court of Justice and examining its implications. Finally, Paolo Silvestri enriches the debates on EU Agencies' Boards of Appeal with something that, paradoxically enough, is never put at the core of the discussion: namely, data on their activity from 2018 to 2023, considering in particular the sheer number of decisions taken, appeals before the EU Courts, the number of appeals upheld and dismissed, the length of the proceedings and their impact on the ones before the EU Courts.

The second part of this Volume is dedicated to the most relevant challenge that Boards of Appeal have been recently asked to address, namely that of enhancing their scrutiny over complex technical and economic assessments so as to perform a full review that supports the limited one offered by EU Courts. This issue, tackled in the chapter by Sofie Oosterhuis in theoretical terms, is discussed here in pragmatic and institutional terms, with contributions from Gordon Humphreys, Marcus Navin-Jones, Michael Sanchez Rydelski, Antoine Buchet, Miro Prek, Michele Siri, Marco Lamandini, David Ramos Muñoz and Marcel Verslype (Presidents, Vice-Presidents or distinguished members of all the Boards of Appeal established so far)<sup>25</sup>, who participated in a roundtable organised to discuss the impact of *Aquind* on the Boards' activity and its sustainability

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<sup>25</sup> For a discussion of the bodies included in the present study as well as of the reasons why some have been excluded, see below, § 6.

in the long run. Each author discusses this issue from the specific perspective of the Board of Appeal to which he belongs, presenting not only the most recent practice in this regard, but also the institutional and practical consequences of the new challenges posed by this judgment. The texts are as similar as possible to the original speeches, with only minor editorial changes and footnotes, in order to convey to readers the spirit of the roundtable and its capability to combine intensity and ease in the debates.

The same applies for the third part, in which Tamas Lukàcsi, Carlo Zadra, Paolo Stancanelli and Alejandro Menéndez Fernández discuss – from the perspectives of the Legal Services of the European Parliament, of the Council and of the European Commission – the future of EU Agencies’ Boards of Appeal and of the EU system of judicial protection as a whole. Needless to say, the opinions expressed in the latter two parts do not represent the official position of, nor are in any way binding for, the agencies or the institutions to which the authors belong.

Finally, a concluding chapter by the Volume’s editor summarizes the main findings of the research, sketches out an agenda for further studies in the field and enumerates the most urgent interventions that the EU legislator should consider to make Boards of Appeal more efficient, untap their potential and adapt these bodies to the current judicial landscape.

## **6. Caveats and methodology**

Before entering into the reading of this Volume, a few caveats and some methodological clarifications are warranted.

This publication is the final product of the Jean Monnet Module on EU Specialised Judicial Protection, a three-and-a-half year (2020-2024) research project financed by the European Commission under the Erasmus+ Programme of the European Union (621097-EPP-1-2020-1-IT-EPPJMO-MODULE) and coordinated by this Volume’s Editor. One of its aims was to connect different professional communities and to enrich academic research with the perspectives of those who, on a day-by-day basis, work and steer the activities of the bodies which are the main focus of the study. Therefore, the Editor is extremely grateful to everyone from academia, EU Agencies’ Boards of Appeal, EU Institutions and the national administrations that has participated in the conferences, roundtable, seminars, and workshops organised throughout the whole project.

A special thanks obviously goes to the European Education and Culture Executive Agency (EACEA) established by the European Commission for believing in and financing this project and to those who

have constantly supported the scientific coordinator in its implementation, namely Cristiana Fioravanti, Samuele Barbieri, Marcella Cometti, Riccardo Torresan, Tolindo Fina and Paolo Silvestri.

From a methodological perspective, the research covers the Boards of Appeal established until now within agencies of the European Union (i.e., in order of creation, those of EUIPO, CPVO, EASA, ECHA, ACER, the ESAs, SRB and ERA). The Administrative Review Board established within the ECB under the Single Supervisory Mechanism<sup>26</sup> as well as the Administrative Board of Review within the brand new (and not yet operative) Authority for Anti-Money Laundering and Countering the Financing of Terrorism<sup>27</sup> fall outside the scope of this study since they do not have binding powers, but only the possibility of suggesting to the authorities to which they belong that they should adopt a different decision, advice which the latter may, however, disregard.

The horizontal studies discussed in the first part of this Volume have been made possible thanks also to the creation of the Common Database of EU Agencies' Boards of Appeal, namely a brand-new search engine, created within the framework of the same research project that generated this Volume, and which brings together all the documents (namely decisions, corrigendum, orders, judgments, opinions) stemming from the Boards of Appeal as well as from the General Court and the Court of Justice (when they have intervened by way of appeal in cases originally decided by a Board of Appeal) from January 1<sup>st</sup> 2018 to the present. Indeed, before the creation of this database, the possibility of searching among the decisions of all the Boards of Appeal and, therefore, of conducting horizontal studies, was largely hindered by the lack of a one-stop search engine, as well as by the fact that only a few Boards of Appeal have a database for their decisions (namely, EUIPO, CPVO and ECHA), whilst the other Boards simply upload their decisions to their agency's website as a list of PDFs.

With the aim of fostering horizontal studies and helping academics, practitioners and EU institutions to monitor EU Agencies' Boards of Appeal, this database has now been made available to the general public at <https://boa.europeanlitigation.eu/> and it is regularly updated.

Being based on the Common Database, the horizontal studies in Part I cover the same time frame as the former. Unless otherwise specified by

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<sup>26</sup> See Council Regulation (EU) n. 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, in *OJ L* 287, 29.10.2013, p. 63, Article 24(7).

<sup>27</sup> See Article 74(3) of Regulation (EU) 2024/1620 of the European Parliament and of the Council of 31 May 2024, in *OJ L*, 19.6.2024.

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each author, their analysis covers decisions taken from January 1<sup>st</sup> 2018 to April 1<sup>st</sup> 2024.

It bears noting that this study aims in no way to support a one-size-fits-all approach to the study and the evolution of EU Agencies' Boards of Appeal. These bodies have been successful over the years precisely because they have left the EU Legislator the option of adapting the model of these Boards to the technical and political peculiarities of each sector. Therefore, the peculiarity of each Board should be preserved and respected; their evolution should take place progressively through ad-hoc amendments, duly tailored to the needs of each sector.