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Complementarity, Structure, and Ambivalence

Review Bodies' Role in Protecting Fundamental Rights

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5.1 INTRODUCTION

Thinking about protecting fundamental rights often equals thinking about courts. Courts protect rights and are the most revered accountability forum vis-à-vis public power. This is especially so in the European Union, where fundamental rights norms and their accompanying institutions were first developed by the Court of Justice of the European Union (CJEU) and then expanded with the judicial process as the main avenue to justice in mind. However, in lockstep with the European Union's vast executive expansion since the 1990s, the EU offers much more than courts to protect fundamental rights today. In fact, a rich but underemphasised bouquet of mechanisms unfolds if one takes a closer look. Examples range from the European Ombudsman (the Ombudsman) and various Boards of Appeal (BoAs), to newly established 'Fundamental Rights Officers' (FROs) in the context of migration and asylum. Although all these bodies and mechanisms differ widely in their detail, they share a common mission: enabling – or at least pretending to enable – individuals to protect their fundamental rights. Most of their procedures are individualised and *ex post*. Typically, these bodies aim to remedy, in one form or another, fundamental rights violations attributable to the EU. Yet none of the bodies discussed here is formally a court. For lack of a better term, we may call these mechanisms *Review Bodies beyond Courts* or,

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for short, *Review Bodies*. As an umbrella concept, Review Bodies includes all actors except courts that, upon individual petition, independently review potential fundamental rights violations by EU actors.

This chapter progresses in five steps. First, it contextualises Review Bodies as an entrenched but normatively ambivalent new normal in EU executive governance. Second, the chapter offers short portraits of each of the three types of body presented, namely the European Ombudsman, Boards of Appeal, and the newly established Fundamental Rights Officers. In general, the chapter puts particular emphasis on the FROs as these have not yet been subject to intense academic scrutiny. Third, the chapter offers a taxonomy of the Review Bodies. Structured along three axes, the section illuminates the interests the Review Bodies represent as well as their authority and expertise. Fourth, the chapter offers several possibilities for reform, most crucially that Review Bodies should team up with EU courts to combine their advantages in structure-focused expertise with the authority of the judicial process. Fifth, the chapter concludes by summarising the key takeaways.

5.2 AN AMBIVALENT NEW NORMAL

As already mentioned, thinking about fundamental rights protection and accountability often equals thinking about courts. Court-centred thinking is particularly prominent in EU law, a legal system shaped like few others by a single judicial institution.[1] Consequently, many EU lawyers might consider Review Bodies beyond the CJEU unimportant. Critics might then point either to Review Bodies' normative output, like Ombudsman reports or the FROs' recommendations, which are not legally binding. Others might dismiss Review Bodies as rather technical and specialised, like Boards of Appeal that control EU agencies' licensing of aeroplane parts, chemicals, or pharmaceuticals. Sometimes, one might even rightly say both, as, for example, the European

[1] The origins of said court-centricity might be found in Eric Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution' (1981) 75 American Journal of International Law 1; but see in contrast Joseph H H Weiler, 'The Transformation of Europe' (1991) 100 The Yale Law Journal 2403, 2407. Recently, the seal might have been broken as scholars begin dragging actors beyond courts and judges into the spotlight, see Antoine Vauchez, 'The Force of a Weak Field: Law and Lawyers in the Government of the European Union (For a Renewed Research Agenda)' (2008) 2 International Political Sociology 128; Tommaso Pavone, *The Ghostwriters: Lawyers and the Politics behind the Judicial Construction of Europe* (Cambridge University Press 2022); from an international law perspective, see Fuad Zarbiyev, 'On the Judge Centredness of the International Legal Self' (2021) 32 European Journal of International Law 1139; Joost Pauwelyn and Krzysztof Pelc, 'Who Guards the "Guardians of the System"? The Role of the Secretariat in WTO Dispute Settlement' (2022) 116 American Journal of International Law 534.

Central Bank's Administrative Board of Review or the Frontex Fundamental Rights Officer cannot issue legally binding decisions but deal with highly complex and, sometimes, very fundamental rights–sensitive matters.[2]

In other words, although Review Bodies are sprinkled along the crucial junctures of EU executive power, they have a low public profile. Consequently, Review Bodies' downstream effects on the legitimacy of the Union executive are yet to be fully explored. Nonetheless, for several reasons outlined below, Review Bodies should be understood as the proliferated, important, and ambivalent new normal that they are.

5.2.1 *Complementarity and Structural Focus*

On the one hand, Review Bodies advance access to justice through two distinct features. Review Bodies *complement* but do not replace 'classic' judicial protection. Today, Review Bodies are a widespread albeit imperfect accountability mechanism complementary to actions in front of EU courts.[3] Review Bodies are complementary in the sense that formally they are neither courts nor block the path to judicial review.[4] Nonetheless, the practice of some Review Bodies, namely Boards of Appeal, could be described as adjudication, even though they are not 'courts' in the sense of EU constitutional law.[5] All Review Bodies are designed as 'independent' institutions yet belong, in one way or another, to the typical ecosystem of a contemporary administrative state.[6] Generally

[2] See Section 5.4.2.

[3] The typical judicial remedy against fundamental rights violations by EU actors is the action for annulment based on Article 263 TFEU. Further, individuals may seek damages according to Article 340 TFEU, Consolidated Version of The Treaty on the Functioning of the European Union [2016] OJ C202/47, arts 263 and 340. See further Melanie Fink, 'The Action for Damages as a Fundamental Rights Remedy: Holding Frontex Liable' (2020) 21 German Law Journal 532, 533 et seq.

[4] That aspect is emphasised by the recently reformed Article 58a(3) of the CJEU Statute, which restricted appeals from the General Court to the Court of Justice to cases that 'raise . . . an issue that is significant with respect to the unity, consistency or development of Union law', Consolidated Version of the Treaty on the Functioning of the European Union Protocol (N03) on the Statute of the Court of Justice of the European Union [2016] OJ 202/210, art 58a (3). However, even though this limits review by the European Court of Justice, judicial review by the General Court is still guaranteed.

[5] The term 'adjudicate' is used here as it is understood in the United Kingdom, Canada, or Australia, i.e., referring to appellate review, not like in the United States, where adjudication may also refer to first instance decisions by administrative actors, see further Peter Cane, *Controlling Administrative Power: An Historical Comparison* (Cambridge University Press 2016) 325 et seq.

[6] See, for comparable debates in the United States, Jerry L Mashaw, *Bureaucratic Justice: Managing Social Security Disability Claims* (Yale University Press 1983).

speaking, Review Bodies have less formal authority than courts, meaning most of them cannot 'bindingly decide' or offer immediate 'relief'. This weaker formal authority then impairs Review Bodies' public authority (Boards of Appeal might be an exception here, see below). However, differences from the judicial process also offer advantages. Often, Review Bodies are specialised adjudicators, have, or at least claim to have, additional expertise compared to courts, and may entertain a more lenient standing regime than courts.[7]

Second, Review Bodies focus on *structure* and not (only) on legality.[8] Whereas courts often focus on the legality of specific executive actions in individual cases, Review Bodies have a broader, perhaps at times even better, perspective on the root causes of problematic executive behaviour. Although most Review Bodies respond to individualised complaints, their review often appears more focused on the structural practices, set-ups, and circumstances that lead to fundamental rights violations in the first place. This is important. Serious and repeated fundamental rights violations do not emerge primarily from isolated, unusual incidents. Rather, such offences reflect deeper-rooted problems entrenched in governance architectures, behavioural patterns, and organisational set-ups.[9] Against that backdrop, Review Bodies' focus on structure appears crucially important to improve EU executive governance. EU courts, aching under heavy caseloads, may, sometimes, underestimate how strongly the effective protection of fundamental rights depends on structural factors like organisation, personnel, and funding.

[7] However, the Frontex FRO's complaint mechanism highlights that a lenient standing regime does not necessarily equal broad accessibility. Access is not only a matter of legal standards but, far too often, mainly an issue of practical feasibility. See Section 5.4.2.

[8] The term 'structure' describes recurring and stabilised sets of practices within organisational contexts. These practices can be or touch upon anything from internal norms or formal rules to explicit and public procedures or institutions. For the sociological foundations, see Pierre Bourdieu, *Outline of a Theory of Practice* (Cambridge University Press 1977) 72 et seq; highlighting the difference of *formal* structures to internal practice, see John W Meyer and Brian Rowan, 'Institutionalized Organizations: Formal Structure as Myth and Ceremony' (1977) 83 American Journal of Sociology 340 (in that sense, many of the phenomena described here as 'structural root causes for fundamental rights violations' are 'practice' in the sense of Meyer and Rowan or, to borrow their words, '*informal* structures'); for a focus on 'structure' as root causes of fundamental rights violations, see, e.g., Daniel Halberstam and Sina von der Boegart, 'A Fresh Look at Judicial Remedies in EU Equality Law and Beyond: The Untapped Possibility of Structural Injunctions' [2023] Michigan Law Public Law and Legal Theory Research Paper Series 2–3.

[9] Insightful from a historical and comparative perspective: Lani Guinier, 'From Racial Liberalism to Racial Literacy: Brown v. Board of Education and the Interest-Divergence Dilemma' (2004) 91 Journal of American History 92.

5.2.2 *Functional Differentiation*

On the other hand, Review Bodies reflect the ongoing functional differentiation of EU law.[10] Europe faces inherently globalised and transnational challenges that cannot be effectively met domestically. Markets, digitisation, the climate crisis – the key to, somehow, successfully approaching these issues lies, also, in EU law. Thus, EU law will deal with more and more issues, each more complicated than the next. 'Dealing' with these issues then regularly spawns complex normative material and novel institutions.[11] Between the 1990s and the late 2010s, inspired by New Public Management and alongside the overall ascent of 'governance', these novel institutions were typically 'agencies'.[12] However, agencies still need accountability, especially when vested with the power to make legally binding decisions in highly complex and financially sensitive matters. Thus, to protect (fundamental) rights and control these agencies, Review Bodies beyond courts became, in one form or another, the 'tool of choice for European lawmakers'.[13] As a rule of thumb, Review Bodies emerge wherever the EU exerts administrative power over individuals or legal persons. The more specialised an area, the more likely we will encounter a Review Body.

[10] For a rich description of that process see Curtin, who, under the topos of 'fragmentation' highlights that EU law 'expands and diversifies in terms both of its objects and its techniques'; Deirdre Curtin, 'From a Europe of Bits and Pieces to a Union of Variegated Differentiation' in Paul P Craig and Gráinne De Búrca (eds), *The Evolution of EU Law* (Oxford University Press 2021) 373. For a critique of the concept of 'governance' in its European context, see Christoph Möllers, 'European Governance: Meaning and Value of a Concept' (2006) 43 Common Market Law Review 313.

[11] Typifying that normative material and the emerging institutions often operates on a rather coarse level. Regularly, novel EU norms and institutions reflect what is believed to be effective in a specific substantive area but not what would fit an overarching theoretical canon. In that sense, understanding how those diverse actors are structured and how they exercise power is even more crucial. For an illuminating and comprehensive analysis of the EU's burgeoning executive power, see Deirdre Curtin, *Executive Power of the European Union: Law, Practices, and the Living Constitution* (Oxford University Press 2009).

[12] On the historical context of the Union's 'agencification', see Merijn Chamon, *EU Agencies: Legal and Political Limits to the Transformation of the EU Administration* (Oxford University Press 2016) 45 et seq; Edoardo Chiti, 'The Agencification Process and the Evolution of the EU Administrative System' in Craig and De Búrca (eds), *The Evolution of EU Law* (Oxford University Press 2021) 123 et seq.

[13] Speaking of EU agencies regulating the financial sector: Marco Lamandini and David Ramos Muñoz, 'Law and Practice of Financial Appeal Bodies (ESAs' Board of Appeal, SRB Appeal Panel): A View from the Inside' (2020) 57 Common Market Law Review 119, 120. For a comprehensive overview of the genesis and current state of such Boards of Appeal, see Merijn Chamon, Annalisa Volpato, and Mariolina Eliantonio (eds), *Boards of Appeal of EU Agencies: Towards Judicialization of Administrative Review?* (Oxford University Press 2022).

In principle, that is a very positive development. The very existence of Review Bodies points to a crucial legitimacy asset of the European Union: self-control.[14] Even as the Union's administrative power diversifies and complicates, it does not do so in an 'uncontrolled' manner as some demagogues or critics might argue. In contrast, the Union's executive expansion remains chaperoned by various guardians, some in Luxembourg, others spread all over the continent.

5.2.3 *Tripartite Government*

Further, the functional differentiation of the Union's executive power has a crucial but undertheorised side effect: it challenges a traditional reading of the notion of tripartite government.[15] Most Review Bodies do not 'organically' fit into broad categories like executive or judicial. Expressed in the reverse, Review Bodies' low public profile is partly owing to the fact that they challenge these widespread 'organic' understandings of the separation of powers in

[14] See esp. Peter L Lindseth, *Power and Legitimacy: Reconciling Europe and the Nation-State* (Oxford University Press 2010) 253 et seq; see further recently Matthias Ruffert, *Law of Administrative Organization of the EU: A Comparative Approach* (Edward Elgar 2020). For the concept of 'legitimacy assets', see Ingo Venzke and Joana Mendes, 'The Idea of Relative Authority in European and International Law' (2018) 16 International Journal of Constitutional Law 75; Joana Mendes and Ingo Venzke (eds), *Allocating Authority: Who Should Do What in European and International Law?* (Hart 2018).

[15] In domestic (and international) contexts, some argue that such institutions should be understood as a new 'fourth branch' complementing the legislative, executive, and judicial branch. That fourth branch's distinctive characteristic would be its 'independence' from the political process and pro-active fostering of pre-set goals and values, e.g., protecting electoral fairness, the environment, or preventing maladministration. Although it is evident that many contemporary phenomena do not fit an organ-focused reading of Montesquieu, it seems unclear whether the idea of a 'fourth branch' easily fits the European Union. After all, the Union's level of democratic accountability lags behind that of most democratic states and, crucially, itself follows a somewhat value and goal-oriented trajectory ('an ever-closer Union'). In other words, squeezing the EU into an inherently state-centred model of three branches (and not, say, various balanced functions and institutions) risks overlooking its distinctive genealogy and mode of operation. The original notion can be found in Montesquieu, *The Spirit of the Laws* (1748) XI.6; See further Bruce Ackermann, 'Good-Bye, Montesquieu' in Susan Rose-Ackerman, Blake Emerson, and Peter L Lindseth (eds), *Comparative Administrative Law* (2nd edn, Edward Elgar 2017); Tarunabh Khaitan, 'Guarantor Institutions' (2021) 16 Asian Journal of Comparative Law 1; Mark V Tushnet, *The New Fourth Branch: Institutions for Protecting Constitutional Democracy* (Cambridge University Press 2021); Antoine Vauchez, 'The Genie of Independence and the European Bottle: How Independence Became Europe's Most Contentious Legal and Political Category' (2022) 20 International Journal of Constitutional Law 1; arguing for an updated understanding of the notion of tripartite government, see Christoph Möllers, *The Three Branches: A Comparative Model of Separation of Powers* (Oxford University Press 2013).

the European Union. This aspect is particularly relevant for Boards of Appeal. They adjudicate but are nonetheless not formal courts. Intuitively, many still conceptualise tripartite government, or, in other words, the separation of powers, as a distinct separation of institutions or, to borrow from Koen Lenaerts, 'organs' (i.e., parliament, ministerial bureaucracy, courts).[16] Review Bodies transgress such a model of distinct branches of government. For example, Review Bodies may be not formally judicial but nonetheless adjudicate. Equally, they may be 'organically' executive but (largely) independent of political control. However, as Lenaerts argued, 'an organic understanding of the separation of powers is not practicable in the European Community.... In view of this, the understanding of the separation of powers principle should not in the first place be an organic one, but a functional one'.[17] This is important. Review Bodies offer accountability and, at least in the case of Boards of Appeal, do so in a quintessentially adjudicative fashion. The fact that no BoA is considered a court under Union law seems therefore puzzling. Consequentially, many argue that BoAs would be 'administrative in nature' and are 'not judicial bodies' because, inter alia, many currently do not live up to the standards established by the right to an effective remedy as enshrined in Article 47 Charter of Fundamental Rights of the European Union (CFR).[18] From an institutionalist – or 'organic' to use Koen Lenaert's words – reading of the principle of tripartite government this makes sense.

However, simultaneously, the same string of literature considers BoAs increasingly 'judicialized'.[19] Only a functionalist perspective explains what otherwise appears to be a contradiction. On the one hand, judicial functions may very well be embedded into administrative organisational contexts. From a comparative and historical perspective, this is even the norm rather than the exception. Many legal regimes feature guardian institutions that are not part of the judiciary but nonetheless adjudicate executive power.[20] In turn, judicial

[16] Koen Lenaerts, 'Some Reflections on the Separation of Powers in the European Community' (1991) 28 Common Market Law Review 11, 12–13.

[17] Referring mainly to legislative and executive powers but the argument also works, mutatis mutandis, for the Union's judicial function (esp. regarding Boards of Appeal), see ibid.

[18] Charter of Fundamental Rights of the European Union [2016] OJ C202/389; see, e.g., Merijn Chamon, Annalisa Volpato, and Mariolina Eliantonio, 'Conclusion' in Merijn Chamon, Annalisa Volpato, and Mariolina Eliantonio (eds), *Boards of Appeal of EU Agencies: Towards Judicialization of Administrative Review?* (Oxford University Press 2022) 323–324.

[19] Ibid 323.

[20] Examples abound in many common law jurisdictions, such as so-called legislative courts or Article I tribunals in the United States or administrative tribunals in the United Kingdom or Australia. From the rich literature, see Cane *Controlling Administrative Power* (n 5) 325 et seq; Peter Cane, *Administrative Tribunals and Adjudication* (Hart 2010); Michael Asimov, 'Five Models of Administrative Adjudication' (2015) 63 The American Journal of Comparative Law

review of administrative action historically developed 'organically' (largely) out of the executive branch and not from courts or the judicial branch, the example of France being the most illustrious one.[21] Therefore, conceptualising the overall 'nature' of a phenomenon in stylised categories like 'administrative' or 'judicial' risks obscuring rather than elucidating the phenomenon's actual operation.[22] On the other hand, the argument that a Review Body cannot be 'judicial' because it does not sufficiently comply with (the CJEU's reading of) the criteria of effective remedies in Article 47 CFR can be turned on its head. Maybe BoAs indeed operate in quite a 'judicial' way – hence the inevitable discussions about 'judicialization' – but are imperfect and need reform to comply with their normative goal, that is, providing an effective remedy. Simply put, non-compliance with Article 47 CFR does not render BoAs 'administrative in nature' but imperfect to fulfil their adjudicative function.

5.2.4 *The Peril of Ceremony*

Lastly, Review Bodies are important yet ambivalent in terms of legitimacy as they cloak the Union's burgeoning transnational executive in publicly legitimising notions of accountability and rights protection. Review Bodies reflect increasingly institutionalised narratives of 'accountability', 'transparency', and 'good governance'.[23] Therefore, Review Bodies have diffused as a 'quick fix' to accountability deficits and, by extension, legitimacy deficits in the EU executive.[24]

3; for the US debate, see James E Pfander, 'Article I Tribunals, Article III Courts, and the Judicial Power of the United States' (2004) 118 Harvard Law Review 643; Richard H Fallon, 'Of Legislative Courts, Administrative Agencies, and Article III' (1988) 101 Harvard Law Review 915; William Baude, 'Adjudication Outside Article III' (2020) 133 Harvard Law Review 1511.

[21] See esp. France's strict reading of Montesquieu and the consequential narrow '*fonctions judicaires*', cf. John Bell and François Lichère, *Contemporary French Administrative Law* (Cambridge University Press 2022) 61 et seq.

[22] Further, notions like 'court' or 'judicial' are inherently context-dependent and multifaceted. See esp. Mauro Cappelletti, *The Judicial Process in Comparative Perspective* (Clarendon Press 1989) 217 et seq; see also famously Martin M Shapiro, *Courts, a Comparative and Political Analysis* (University of Chicago Press 1981).

[23] Seminal on the formative power of institutionalised practices and narratives for organisational structures: Meyer and Rowan (n 8). Critical of the narrative of 'governance': Möllers 'European Governance' (n 10).

[24] See the illuminating literature on policy diffusion started by D Eleanor Westney, *Imitation and Innovation The Transfer of Western Organizational Patterns to Meiji Japan* (Harvard University Press 1987); and later picked up by Beth A Simmons, Frank Dobbin, and Geoffrey Garrett (eds), *The Global Diffusion of Markets and Democracy* (Cambridge University Press 2008) (see

However, the extent to which Review Bodies indeed deliver on their promises of expertise, independence, and '(administrative) justice' is not always clear. Review Bodies' faint authority, reliance on non-binding measures, relatively scant funding, and low public profile might impede their ability to effectively identify and weigh into the root causes of recurring offences. Then, Review Bodies would not complement judicial accountability but remain timid bystanders. In such a case, the very existence of a Review Body might even thwart long-term improvement, as an existing but ultimately 'toothless' Review Body might bolster the false impression of accountability. Submitting complaints to a Review Body could then be understood as mere ceremony, without real-world effects.[25] Thereby, Review Bodies might disguise scarcely accountable, rights-endangering governance. For example, the recent trend to establish 'Fundamental Rights Officers' in the area of migration could be criticised as partly ceremonial. For more than a decade now, we have been aware of the 'systemic' problems in some Member States and, arguably, also the Union's own executive structures.[26] Establishing a new but rather weak institution, the FROs, to make serious and systemic fundamental rights abuses more transparent instead of overhauling the structures that lead to these offences, might have been the only politically feasible compromise. However, from a normative perspective, such Realpolitik may end up delivering only a ceremonial mimicry of justice but neither structural improvement nor effective remedy in individual cases.

The risks of that trend are palpable. Setting up new, perhaps merely ceremonial institutions instead of addressing deeper rooted governance problems perpetuates, rather than remedies structural flaws. Eventually, this may trade the public appearance of accountability and rights protection for the erosion of substantive legitimacy, which hinges upon effective – and not merely ceremonial – accountability and rights protection.

esp. the part about emulation at 31–40); Charles R Shipan and Craig Volden, 'The Mechanisms of Policy Diffusion' (2008) 52 American Journal of Political Science 840.

[25] I use the term 'ceremonial' as understood in neo-institutionalist organisation theory, see esp. the influential work by Meyer and Rowan (n 8).

[26] See, for various examples, Case C-4/11 *Bundesrepublik Deutschland v Kaveh Puid (Systemic Deficiencies in Greece)* [2013] ECLI:EU:C:2013:740; Nick Waters, Emmanuel Freudenthal, and Logan Williams, 'Frontex at Fault: European Border Force Complicit in "Illegal" Pushbacks' (*Bellingcat*, 23 October 2020) <www.bellingcat.com/news/2020/10/23/frontex-at-fault-european-border-force-complicit-in-illegal-pushbacks/>; Stefanos Levidis and Others, 'Drift-Backs in the Aegean Sea' (*Forensic Architecture*, 15 July 2022) <https://forensic-architecture.org/investigation/drift-backs-in-the-aegean-sea>; Melanie Fink and Jorrit J Rijpma, 'The Management of the European Union's External Borders' in Evangelina Tsourdi and Philippe De Bruycker (eds), *Research Handbook on EU Migration and Asylum Law* (Edward Elgar 2022).

5.2.5 *Interim Conclusion*

To summarise, Review Bodies exist in almost any administrative context. In court-focused systems like the EU, they reflect functional differentiation, complementing the accountability mechanisms provided by EU courts through offering more specialised, more structure-focused, or more accessible forums to challenge the Union's burgeoning executive power. Yet some Review Bodies may be more of a 'quick fix', responding to current discourses about transparency and accountability instead of establishing stringent protection of fundamental rights. Review Bodies with weak authority in particular risk remaining ceremonial actors advancing the perception but with no actual practice of legitimating accountability and rights protection. Today, Review Bodies are an ambivalent new normal in a Union that increasingly transcends its traditional executive federalism and incrementally morphs into a multifaceted administrative behemoth.

5.3 SHORT PORTRAITS

After that general context, we now briefly portray the three types of Review Bodies presented in this chapter. These bodies are, first, the European Ombudsman; second, specialised Review Bodies attached to agencies, typically called 'Boards of Appeal'; and third, the relatively novel Fundamental Rights Officers that, among other things, enable complaints about potential fundamental rights violations through EU agencies at the Union's borders.

5.3.1 *The European Ombudsman*

The European Ombudsman, established in 1995, follows the most generalist approach of all Review Bodies presented here.[27] According to Article 228(1) Treaty on the Functioning of the European Union (TFEU), the 'European Ombudsman' shall investigate and remedy 'maladministration' by the European Union. Individuals may file complaints with the Ombudsman to investigate specific administrative proceedings. Further, the Ombudsman may conduct investigations of its own, called 'own initiative inquiries' as well as

[27] From the rich literature on the European Ombudsman, see esp. Michał Krajewski, *Relative Authority of Judicial and Extra-Judicial Review: EU Courts, Boards of Appeal, Ombudsman* (Hart 2021) 139 et seq; Anne Peters, 'The European Ombudsman and the European Constitution' (2005) 42 Common Market Law Review 697; Anchrit Wille and Mark Bovens, 'Watching EU Watchdogs Assessing the Accountability Powers of the European Court of Auditors and the European Ombudsman' (2022) 44 Journal of European Integration 183.

'strategic inquiries'.[28] The latter two often focus on suspected structural problems such as Frontex's handling of transparency and accountability.[29] The Ombudsman's key advantage vis-à-vis most other Review Bodies is its welcoming standing regime.[30] While other Review Bodies require *Plaumann*-inspired, neatly individualised standing requirements, the Ombudsman is open to complaints from almost anyone dealing with the EU administration.[31] Further, the Ombudsman's mandate is also general in the temporal dimension. While most individual complaints seek to remedy past maladministration, the Ombudsman, ex officio, may also investigate more political, ongoing matters of general concern.[32]

5.3.2 *Boards of Appeal*

The biggest and most diverse group of Review Bodies beyond courts are Boards of Appeal (for short, as introduced above, 'BoAs').[33] Terminologically, 'Boards of Appeal' is an imperfect umbrella term as most but not all such bodies go by that name.[34] To avoid overly complicating things, we will however stick to the term. In a broad sense, Boards of Appeal are specialised, independent bodies that review agency actions vis-à-vis individual and legal persons.[35] Although

[28] See further Wille and Bovens (n 27) 193–194.

[29] For the former, see European Ombudsman Case OI/1/2021/KR *Revolving Door* (16 May 2022) <https://europa.eu/!c46qcF>; for the latter, see European Ombudsman Case OI/4/2021/MHZ *Frontex* (17 January 2022) <https://europa.eu/!3q7bvM>.

[30] See, in that sense also, Krajewski, *Relative Authority of Judicial and Extra-Judicial Review* (n 27) 145.

[31] See comprehensively ibid 163 et seq.

[32] ibid 142 et seq.

[33] See Chamon, Volpato, and Eliantonio (n 13); Krajewski, *Relative Authority of Judicial and Extra-Judicial Review* (n 27) 103 et seq; Paola Chirulli and Luca De Lucia, *Non-Judicial Remedies and EU Administration: Protection of Rights versus Preservation of Autonomy* (Routledge 2021) 103 et seq.

[34] For example, the Single Resolution Board's board of appeal is called Appeal Panel, cf. Regulation (EU) 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 [2014] OJ L225/1, art 85(1).

[35] The first agency for which a Board of Appeal was created was the EU Intellectual Property Office (EUIPO) in 1994. Interestingly, that first board of appeal followed a private law arbitration model that can be traced back to a 1973 international convention on patents. The second agency to get its own board of appeal was the Community Plant Variety Office (CPVO), which was modelled on the EUIPO. Then, in a classic example of policy diffusion, other decision-making agencies followed suit – even though their practice and organisational set-ups differed fundamentally to the EUIPO and the CPVO. These agencies were the European Aviation Safety Agency (EASA); the European Chemicals Agency (ECHA); the

their precise authority, mandate, and institutional practices differ, all Boards of Appeal offer appellants an independent second look at the facts and law of each case.[36] Typically, BoA decisions are legally binding.[37]

Recent reforms of the statute of the Court of Justice elevated BoAs' institutional status. Since 2019, the Court of Justice does not hear cases reviewed already by the 'independent board(s) of appeal' of four specified agencies and the General Court, unless they touch upon foundational issues. Thereby, four BoAs – namely those attached to the European Union Intellectual Property Office, the Community Plant Variety Office, the European Chemicals Agency, and the European Union Aviation Safety Agency – effectively became first instance adjudicators below the General Court. However, for the time being, the EU has refrained from rebranding these BoAs as specialised courts according to Article 257 TFEU.[38] Much in the same vein, the General Court underscored the adjudicative function of BoAs in 2019, when it applied Article 47 CFR instead of the much lower standards of Article 41 CFR to a BoA for the first time.[39] In the medium term, this might trigger procedural reforms at the BoAs. Whether those will be for the better remains to be seen. Some BoAs follow an inquisitorial model, which is typical (and sensible) for adjudicative review of administrative actors but at odds with the otherwise adversarially structured EU judicial process.[40]

European Agency for the Cooperation of Energy Regulators (ACER); three agencies supervising financial and prudential services, the so-called European Supervisory Authorities (ESAs) with one joint board of appeal; the EU's central banking resolution authority; the Single Resolution Board (SRB), whose board of appeal is called 'Appeals Panel'; and the European Railways Authority (ERA). For the historical context, see Hanf, who rightly highlights that especially the first two boards of appeal were 'legal transplants' with a 'very particular nature' as they dealt with private parties and are thus structurally different to most other adjudicative guardians of public power, cf. Dominik Hanf, 'The Trailblazers: The Boards of Appeal of EUIPO and CPVO' in Merijn Chamon, Annalisa Volpato, and Mariolina Eliantonio (eds), *Boards of Appeal of EU Agencies: Towards Judicialization of Administrative Review?* (Oxford University Press 2022) 60, 78.

[36] Cf. Merijn Chamon, Annalisa Volpato, and Mariolina Eliantonio, 'Introduction' in Merijn Chamon, Annalisa Volpato, and Mariolina Eliantonio (eds), *Boards of Appeal of EU Agencies* (Oxford University Press 2022) 3–4.

[37] For the one exception, the European Central Bank's Administrative Board of Review, see Section 5.3.2.

[38] See further Jacopo Alberti, 'The Position of Boards of Appeal: Between Functional Continuity and Independence' in Merijn Chamon and Mariolina Eliantonio (eds), *Boards of Appeal of EU Agencies* (Oxford University Press 2022).

[39] See Case T-755/17 *Germany v ECHA* [2019] ECLI:EU:T:2019:647.

[40] See, in that regard, also Krajewski, *Relative Authority of Judicial and Extra-Judicial Review* (n 27) 117 et seq.

5.3.3 *Fundamental Rights Officers*

The newest and perhaps most peculiar type of Review Bodies are Fundamental Rights Officers (for short, as introduced above, 'FROs'). FROs are attached to the two agencies dealing with migration, namely the European Border and Coast Guard Agency, commonly known as Frontex, and the European Union Agency for Asylum (EUAA), which is a vastly expanded version of the European Asylum Support Office.[41] Fundamental Rights Officers emerged as new institutions in the 2010s in response to increasing concerns about the fundamental rights record of the Union's border regime.[42] In the law and 'governance' of asylum in and migration to Europe, traditional 'executive federalism' gave way to ad hoc, make-shift arrangements veiled by diffused responsibilities, informality, and externalisation.[43] One

[41] See Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624 [2019] OJ L295/1 (EBCG Regulation), arts 109 and 111; Regulation (EU) 2021/2303 of the European Parliament and of the Council of 15 December 2021 on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010 [2021] OJ L468/1 (European Asylum Agency Regulation) arts 49 and 51.

[42] In fact, it was the European Ombudsman that recommended the establishment of individual review mechanisms to Frontex as early as 2013 (and again in 2015). However, the agency did not act upon these recommendations. Only the 2019 overhaul of the EBCG Regulation expanded the role of the already existing – but at that point entirely marginalised – FRO and introduced a complaint mechanism. These institutional reforms, albeit imperfect, can be seen as productive interplay of structure-focused review by the Ombudsman and mounting political outrage over apparent fundamental rights abuses. The reformed EBCG Regulation explicitly alludes to the agency's 'extended tasks' that 'should be balanced with strengthened fundamental rights safeguards' (recital 24) and that it was necessary to 'monitor … the respect for fundamental rights in the border management and return activities of the agency' (recital 42), EBCG Regulation, recitals 24 and 42. For further historical context on FROs, see Marco Stefan and Leonhard den Hertog, 'Frontex: Great Powers but No Appeals' in Merijn Chamon, Annalisa Volpato, and Mariolina Eliantonio (eds), *Boards of Appeal of EU Agencies: Towards Judicialization of Administrative Review?* (Oxford University Press 2022) 151, 158–159.

[43] See, e.g., Loïc Azoulai and K M de Vries (eds), *EU Migration Law: Legal Complexities and Political Rationales* (Oxford University Press 2014); Violeta Moreno Lax, *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law* (Oxford University Press 2017); Melanie Fink, *Frontex and Human Rights: Responsibility in 'Multi-Actor Situations' under the ECHR and EU Public Liability Law* (Oxford University Press 2018); Juan Santos Vara and Laura Pascual Matellán, 'The Informalization of EU Return Policy: A Change of Paradigm in Migration Cooperation with Third Countries?' in Eva Kassoti and Narin Idriz (eds), *The Informalisation of the EU's External Action in the Field of Migration and Asylum* (Springer 2022) 37 et seq; Aysel Küçüksu, 'Adjudicating Asylum as a Technical Matter at the Court of Justice of the European Union: Neglecting Human Rights When the CEAS Appears to Be in Jeopardy?' in Eva Kassoti and Narin Idriz (eds), *The Informalisation of the EU's External Action in the Field of Migration and Asylum* (Springer 2022) 169 et seq. From a comparative and normative perspective, see already Thomas Gammeltoft-Hansen and James C Hathaway, 'Non-Refoulement in a World of Cooperative Deterrence' (2015) 53 Columbia Journal of Transnational Law 235.

result of these tendencies is an overall lack of properly working review mechanisms, especially at the EU border itself.[44]

FROs shall be 'independent in the performance of his or her duties' and 'shall be responsible for ensuring the Agency's compliance with fundamental rights in all its activities'.[45] FROs' existence reflects the – tacit – acknowledgement that there is a structural problem with fundamental rights abuses in European migration governance.

Apart from overseeing and advising their respective agencies in fundamental rights matters, FROs are 'responsible for handling' complaints by individuals who are adversely affected by the respective agency.[46] Remarkably, the Frontex FRO is even responsible for helping the agency to 'set up and further develop' its complaint mechanism.[47] That is potentially a significant divergence from common practice in other fields, where one would assume that procedures to protect fundamental rights are thoroughly detailed in law and not incrementally developed in internal rules, guidelines, and practices.

5.4 A TAXONOMY OF REVIEW BODIES' CHARACTERISTICS

As already mentioned, Review Bodies differ significantly in terms of their characteristics. Therefore, a taxonomy of these characteristics clarifies the strengths and weaknesses of each body. Three axes structure the taxonomy. The first axis marks what could be described as a Review Body's *orientation*. Does a Review Body focus on remedying individual grievances, like a court, or more on the public interest, like the European Ombudsman. The second axis is the most complex. It describes the reflexive interplay of a Review Body's legal and political *authority* with the kinds of *measures* it takes. Boards of Appeal, for example, are vested with the authority to bindingly adjudicate, a kind of measure the other Review Bodies lack. In turn, other bodies may operationalise other measures, such as public reports, political pressure, or internal discourse to influence the course of action of EU executive actors. Inevitably, authority beyond formal mechanisms like adjudication builds over

[44] The European Court of Human Rights explicitly held that in Greek 'hot spots' for asylum seekers, Greece and, by implicit extension, the EU do not provide remedies that are 'available in theory and in practice . . . and capable of providing redress', *A.D. v Greece*, App no 55363/19 (ECtHR, 4 April 2023) paras 23–24.

[45] European Asylum Agency Regulation, arts 49(2) and (3); see also, however with less emphasis on the officers' independence EBCG Regulation, art 109(4).

[46] EBCG Regulation, art 111(4); European Asylum Agency Regulation, art 51(4).

[47] EBCG Regulation, art 111(1); See further Sarah Tas, 'Frontex Actions: Out of Control?' 2020 TARN Working Paper 03/2020 11–15.

time and remains contingent on a wide range of contextual factors. Lastly, the third axis looks at the kind of *expertise* Review Bodies provide – here we can distinguish between substantive and organisational expertise – and their *financial resources*.

5.4.1 *Orientation towards Public or Individual Interest*

The first axis distinguishes between Review Bodies oriented mainly towards protecting individual interests and those looking out more for the public interest. Albeit remedying individual interests advances the rule of law and, thereby, also the public interest, distinguishing individual interest–oriented bodies from public interest–oriented bodies offers analytical value. In particular, variations in standing regimes are best understood as tailored towards the needs of reviewing public or individual interests.[48] For example, BoAs review individual agency decisions vis-à-vis individual natural or legal persons. In these procedures, BoAs may nullify the agency decision and, depending on the BoA's authority, even replace it with their own decision. Such a procedure serves, predominantly, individual interests, that is, the exercise of property rights. Because of this individual interest orientation, standing requirements before Boards of Appeal reflect those before formal EU courts.[49] In contrast, European Ombudsman proceedings, even when initiated by individual complaints, generally also look towards improving the administrative procedures that led to individual instances of maladministration in the first place. Since the European Ombudsman cannot nullify or otherwise bindingly interfere with the EU executive but seeks to generally advance good administration, standing requirements to file a complaint to the European Ombudsman are very lenient: any EU citizen or resident may file complaints about any 'instance of maladministration' by the EU.[50]

The Fundamental Rights Officers operate somewhere in between these two positions. On the one hand, FROs' main task is to advise and oversee their respective agency's fundamental rights track record. Their oversight is independent of individual petitions and is more reminiscent of the Fundamental

[48] See in that sense also Krajewski, *Relative Authority of Judicial and Extra-Judicial Review* (n 27) 144 et seq passim.

[49] Cf. ibid 125 et seq.

[50] Regulation (EU, Euratom) 2021/1163 of the European Parliament of 24 June 2021 laying down the regulations and general conditions governing the performance of the Ombudsman's duties (Statute of the European Ombudsman) and repealing Decision 94/262/ECSC, EC, Euratom [2021] OJ L253/1 (Statute of the European Ombudsman), art 2(1).

Rights Agency's mandate.[51] On the other hand, Fundamental Rights Officers are also 'responsible for handling complaints' vis-à-vis the agencies.[52] Against Frontex, such complaints may be filed by 'anyone who is directly affected' by the 'actions or failure to act on the part of staff involved in [e.g.] a joint operation'.[53] Many such operations aim to remove or exclude individuals from EU territory. Although this might not formally exclude those individuals from EU jurisdiction, physical absence from EU territory complicates or practically prevents the exercise of EU fundamental rights.[54] Hence, the complaint mechanisms' practical feasibility remains questionable. In 2021, only twenty-seven complaints were filed, only six of which were deemed admissible.[55]

5.4.2 *Authority and Measures*

Perhaps the most decisive characteristic of each Review Body is its authority. Authority is important to effectively remedy fundamental rights violations and is closely related to the type of measures a Review Body takes. The introduction anticipated that, typically, we consider courts to be *the* guardians of fundamental rights. Consequently, the typical measure to remedy fundamental rights violations would be a judgment, that is, a legally binding normative act issued by a judicial institution to decide an individual case. However, courts already operate with various other normative tools, such as settlements or more structure-oriented forms of judicial control.[56] Since most Review Bodies cannot adjudicate, BoAs being again the exception, the European Ombudsman or Fundamental Rights Officers use various tools to exert oversight and (attempt to) remedy fundamental rights violations. Since the Review Bodies presented here complement the Union's judicial process, their measures are often distinctly different to those obtainable in court. Nevertheless, we

[51] In fact, there are even personal continuities from the Fundamental Rights Agency to Frontex's Fundamental Rights Officer, who formerly worked for the Fundamental Rights Agency.

[52] EBCG Regulation, art 111(4); European Asylum Agency Regulation, art 51(4).

[53] EBCG Regulation, art 111(2); mutatis mutandis, European Asylum Agency Regulation, art 51 (2) mirrors the EBCG Regulation's language.

[54] Territory and space are not the only denominators used to subtly govern migration flows. Another element is time. See Floris de Witte, 'Here Be Dragons: Legal Geography and EU Law' (2022) 1 European Law Open 113; Martijn Stronks, *Grasping Legal Time: Temporality and European Migration Law* (Cambridge University Press 2022).

[55] Frontex Fundamental Rights Officer, Annual Report 2021 (Frontex FRO 2021), 26.

[56] See foundationally Abram Chayes, 'The Role of the Judge in Public Law Litigation' (1976) 89 Harvard Law Review 1281; Judith Resnik, 'Managerial Judges' (1982) 96 Harvard Law Review 374; for EU law, see recently the proposal by Halberstam and von der Boegart (n 8).

shall use a court judgment as a reference point to illustrate the kinds of measures Review Bodies might take.

We begin with those bodies that appear like the EU courts' extended family: Boards of Appeal. BoAs share many characteristics with 'classic' (whatever that means) judicial institutions. Often conceptualised as 'quasi-judicial', many Boards of Appeal are vested with the authority to issue legally binding decisions.[57] Depending on the respective BoA's procedural framework, its decisions may nullify or entirely replace agency decisions. However, in practice, BoAs' authority varies greatly.[58] Although various specialised Review Bodies have emerged in EU governance, only some have generated meaningful amounts of case law over the years, while others show only a very marginal, perhaps even declining influx of cases.

One particularly peculiar member of that extended family is the 'Administrative Board of Review' that oversees the European Central Bank's supervisory function. Just like BoAs, the Administrative Board of Review offers independent, specialised review.[59] However, unlike 'classic' Boards of Appeal, the Administrative Board of Review only 'express[es] an opinion' that is not legally binding.[60] Nonetheless, one could argue that Administrative Board of Review decisions have normative influence as, on the one hand, the CJEU

[57] What exactly 'quasi-judicial' means often remains unclear. Ultimately, the prefix 'quasi' only negatively distinguishes from a stylised image of courts and the judicial process but fails to positively establish the phenomenon's characteristics. For a, in my eyes convincing, function-oriented perspective that qualifies Boards of Appeal as functional adjudicators/courts, see Hannes Krämer, *Rechtsschutz im EG-Eigenverwaltungsrecht zwischen Einheitlichkeit und sektorieller Ausdifferenzierung: eine Untersuchung unter besonderer Berücksichtigung des Gemeinschaftsmarkenrechts* (Duncker & Humblot 2007) 90–93.

[58] For an overview of the various boards of appeal, see Chamon, Volpato, and Eliantonio (n 13); Chirulli and De Lucia (n 33).

[59] Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions [2013] OJ L287/63 (SSM Regulation) art 24 paras 1, 2, 4 and 7.

[60] SSM Regulation, art 24 para 7. This provokes the question whether one should refer to the Administrative Board of Review as a Board of Appeal. In a broader sense, that may be answered in the affirmative since also those specialised adjudicators that issue legally binding decisions are not uniformly labelled Board of Appeal (e.g., the Single Resolution Board's Appeal Panel). The fact that the Administrative Board of Review replaces agency decisions, does not publish its decisions, and deliberates confidentially also does not automatically render it 'administrative'. The first is something commonly done, in one way or the other, by administrative courts in some jurisdictions, the latter two are common phenomena in judicial proceedings concerning sensitive information. In other words, Board of Appeal can be understood as an umbrella term for the sum of those bodies, with inevitable deviations in some of its parts. Regarding the Administrative Board of Review, see Lamandini and Muñoz (n 13) 126–127; Matteo Arrigioni, 'The Administrative Board of Review of the European Central Bank: A Critical Analysis' [2020] Rivista Orizzonti del Diritto Commerciale 519.

relies on them in its decisions and, on the other hand, the expertise and independence of Administrative Board of Review members lends a certain authority even to non-binding 'opinions'.[61] Further, neither the Administrative Board of Review's deliberations nor its decisions are public.[62] These procedural and institutional arrangements again highlight the overall thrust towards functional differentiation – perhaps even fragmentation – in EU administrative law.[63] While confidentiality and non-bindingness appear questionable from an overarching rule of law perspective, they might be justified for practical necessity and the specific organisational requirements for effective financial oversight.[64]

Now we leave the extended family of courts. Except for BoAs, the Review Bodies presented here issue normative material that is formally non-binding. Hence, we leave the realm of adjudication behind us and leap towards the complex – some might say weaker – authority of recommendations, guidelines, reports, and the like. The other Review Bodies studied here, the Ombudsman and Fundamental Rights Officers, are more on this 'weaker' side of the axis. However, given their expertise, non-binding normative material may still have some degree of authority. That authority is best understood as 'relative' to the legitimacy assets (e.g., legal bindingness, expertise, publicity, etc.) each body mobilises.[65]

We start with Fundamental Rights Officers. FROs are relatively novel institutions, attached to the reformed and expanded Frontex as well as the EU Agency for Asylum.[66] FROs protect fundamental rights in the migration context. However, arguably inspired by the European Ombudsman and, perhaps, the Fundamental Rights Agency, FROs focus more on documenting structural governance problems than reviewing or remedying individual grievances. One key element of the Frontex FRO's practice is situational embeddedness. The FRO, represented by observing and advising staffers, the so-called Fundamental Rights Monitors, follows EU agencies and Member States to the

[61] In that sense also Arrigioni (n 60) 529 et seq.

[62] The Administrative Board of Review's confidentiality regime may be reasonably justified with the specifics of prudential supervision, see 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 567, 580.

[63] See above at n 10.

[64] See further Konrad Vossen, *Rechtsschutz in Der Europäischen Bankenaufsicht* (Mohr Siebeck 2020) 233–245.

[65] See Joana Mendes and Ingo Venzke (eds), *Allocating Authority: Who Should Do What in European and International Law?* (Hart 2018) 77–78; for Review Bodies: Krajewski, *Relative Authority of Judicial and Extra-Judicial Review* (n 27) 1–2, 9–10.

[66] For historical context see above at n 42.

field.[67] Fundamental Rights Monitors could be described as the eyes and ears of the FRO and 'shall constantly assess the fundamental rights compliance of operational activities, provide advice and assistance in that regard and contribute to the promotion of fundamental rights' at the European borders.[68]

Although FROs form part of the agency's 'complaint handling mechanisms', they only review the 'admissibility' and not the merits of complaints against agency behaviour.[69] Admissible complaints are only 'forward[ed]' to the agency.[70] Instead of remedying complaints, FROs only 'register and ensure follow-up by the Agency'.[71] In essence, FROs' authority to 'handl[e]' individual complaints means to distribute but not to remedy complaints.[72] Further, the Frontex FRO at least faces continuing challenges in the field. For example, in one instance, Member State authorities simply deleted potentially incriminating camera recordings that the FRO had requested as evidence.[73] Thus, the FRO's slim operational authority might endanger the Frontex FRO, and their team's ability to fulfil their mandate, which is to 'be responsible for handling complaints … in accordance with the right to good administration'.[74]

Further, apart from complaints filed by affected individuals, the Frontex FRO also handles an internal complaint mechanism, called 'serious incident reporting'.[75] In simple terms, the serious incident reporting scheme enables people working for the participating actors – especially FRO staffers that observe agency and Member State action in the field, so-called fundamental rights monitors – to report fundamental rights violations committed by Frontex or co-operating state actors.[76] So far, roughly one serious incident per week is reported (sixty-two in 2021, a stark increase from only ten in 2020).[77] However, the serious incident reporting scheme's start has been bumpy. Several actors, especially Member States, flat-out rejected the

[67] EBCG Regulation, art 110 but also arts 44(3)(b), 51(2), 60(3)(f).
[68] For the quotes see ibid art 110(1).
[69] European Asylum Agency Regulation, art 51(2); EBCG Regulation, art 111(2).
[70] European Asylum Agency Regulation, art 51(4)(c); EBCG Regulation, art 111(4).
[71] European Asylum Agency Regulation, art 51(4)(f); EBCG Regulation, art 111(4).
[72] See also Stefan and Hertog (n 42) 163–165.
[73] Frontex FRO2021 (n 55) 27 (see under the heading 'complaint No. 2020-00018'). At the time of writing in June 2023, the Frontex FRO had not yet published the annual reports for 2022 and 2023.
[74] European Asylum Agency Regulation, art 51(4); EBCG Regulation, art 111(4).
[75] For an overview, see Frontex FRO 2021 (n 55) 22–25. See further the Decision of the Executive Director, No R-ED-2021-51, Standard Operating Procedure (SOP) – Serious Incident Reporting of 19 April 2021, 3 et seq
[76] See in detail Frontex FRO 2021 (n 55) 22 et seq.
[77] Ibid 22.

accuracy of reported fundamental rights violations with the argument that said violations would be 'incompatible with applicable procedures governing their operational activities'.[78] Further, the FRO highlighted that Frontex's operational staff (border guards etc.) had an 'inhibition threshold' to report fundamental rights violations.[79]

Crucially, in the migration context, informalisation, tacit ignorance of fundamental rights abuses, and diffused responsibilities of Member States, EU actors, and, as the Frontex FRO ominously calls it, other 'assets', pose a challenge to fundamental rights of their own.[80] Any kind of review only works if practice – like a push-back – links to responsibility.[81] That link is not a legalist formality. As Melanie Fink showed in painstaking detail, EU agencies and Member States have 'far-reaching possibilities to influence the course of action' at the European borders.[82] Similar things could be said about the EUAA and its 'assistance' in status determination. Inevitably, this influence entails legal responsibility. Obscuring attribution and severing legal and political links between legitimised actors and, perhaps, illegitimate actions would be a dangerous experiment.

Fundamental Rights Officers are hardly the silver bullet against structural flaws nestled within the EU's migration regime. Quite the contrary, installing predominantly transparency-oriented bodies that lack the authority to grant relief only highlights that structural problems exist – not that a solution has been found. Therefore, that the EU decided to invest considerable funds (two million Euro in 2021) and personnel (between sixty and a hundred people) in the task of making Frontex more fundamental rights–sensitive invites simultaneously criticism and praise. It could be criticised as a mere ceremonial fig leaf, signalling that the problem is taken care of. While the actors who should take care of the problem, the FRO and its monitors, lack meaningful authority to remedy complaints or weigh into abusive practices.[83]

[78] Ibid 23.

[79] Ibid.

[80] See Melanie Fink and Narin Idriz, 'Effective Judicial Protection in the External Dimension of the EU's Migration and Asylum Policies?' in Eva Kassoti and Narin Idriz (eds), *The Informalisation of the EU's External Action in the Field of Migration and Asylum* (Edward Elgar 2022) 124 et seq; Gaia Lisi and Mariolina Eliantonio, 'The Gaps in Judicial Accountability of EASO in the Processing of Asylum Requests in Hotspots' (2019) 4 European Papers 589, 590. For the other 'asset' quote, which apparently refers to personnel that are working for Frontex but are not 'Frontex staff', see Frontex FRO 2021 (n 55) 14.1.

[81] See in that sense also the detailed analysis by Fink and Idriz (n 80) 124 et seq (esp. 141–142).

[82] Cf. Fink *Frontex and Human Rights* (n 43) 332.

[83] On the phenomenon of 'de-coupling', see Meyer and Rowan (n 8) 356 et seq (note that Meyer and Rowan refer to *formal* structures, which are something different from the 'structures' discussed here, see further n 8).

However, perhaps, a fault confessed is half redressed. FROs' potential lies in identifying structural problems that lead to repeated fundamental rights violations and recommending possible solutions. For example, in its 2021 annual report, the Frontex FRO assessed 'serious fundamental rights concerns' in six EU Member States and one co-operating state (Albania).[84] Further, the Frontex FRO identifies – in broad language, but nonetheless – structural practices that lead to repeated fundamental rights violations by the agency itself and Member States. Such structural practices range from 'a lack of female officers deployed in almost all areas', to a lack of translators, or 'limited visibility … of the Complaints Mechanism'.[85] Further, the Frontex FRO explicitly criticises the 'risk' that 'Frontex staff and assets' are involved in 'illegal individual or collective expulsions of migrants', especially at the Greek and Bulgarian border.[86] Further, the FRO directly criticises 'collective expulsions of migrants and the violation of the non-refoulement principle by Lithuanian border guards'.[87] In that context, the body also laments that Frontex 'risk(s)' being complicit through a 'failure to act'.[88] None of this is news. Yet, as a much-needed, more fundamental rights–oriented overhaul of the EU asylum complex appears politically impossible, the FROs might offer bits and pieces of transparency and incentives for incremental reforms from within. Crucially – but from a transparency perspective perhaps problematically – the FRO's influence comes not via grand reports or naming and shaming. Instead, as the Frontex FRO put it in a conversation with the author, they seek to advance a fundamental rights–oriented 'trajectory of cultural changes' within Frontex.[89]

That being said, the European Agency for Asylum got its very own FRO as part of a major institutional reform in 2022. Once fully operational, the EUAA will be by far the largest EU agency in terms of workforce and, arguably, fundamental rights exposure. However, its FRO lacks many of the Frontex FRO's institutional abilities. The EUAA regulation does not explicitly provide for a serious incident reporting scheme, nor does it offer Fundamental Rights Monitors, i.e. 'eyes and ears' of the FRO on the ground. Presumably, the EUAA will not engage in physical border protection like Frontex. The EUAA focuses more on the bureaucratic side of handling asylum requests.[90]

[84] Frontex FRO 2021 (n55) 7 and 11–17.
[85] Ibid 17.7.
[86] Ibid 14.
[87] Ibid 12 (see at concern 12.1).
[88] Ibid.
[89] Background talk with Jonas Grimheden, Frontex Fundamental Rights Officer, 2 May 2023.
[90] See esp. European Asylum Agency Regulation, art 16.

Therefore, the risk for fundamental rights violations like physical push-backs or collective expulsions may be smaller for the EUAA compared to Frontex. However, the EUAA's powers are only vaguely delineated. The agency shall provide 'operational and technical assistance' to the Member States to handle requests for 'international protection'.[91] How exactly the EUAA's 'operational and technical assistance' or 'facilitation' will manifest remains unclear.[92] Given the thrust towards informalisation and lack of transparency, such forms of administrative 'assistance' and 'facilitation' might risk eroding fundamental rights guarantees.[93] For example, we learned from Mariana Gkliati's empirical work that the Appeal Committees, which dealt with appeals by individuals stranded on Greek islands in 2016 and 2017, often transferred their reasoning 'word-by-word from one decision to [an]other, even when the committees are composed of different members'.[94] Such habits and shortcuts may be inevitable in large administrative and judicial operations (highlighting, again, how similar judicial and administrative practices often are).[95] However, review degenerating to mere rubber-stamping would violate the individual's fundamental rights to an *individual* status determination envisaged by Article 18 CFR and the 1951 Geneva convention and its 1967 protocol.[96] Such rubber-stamping practices would epitomise the kind of structural and organisational problems that Review Bodies can identify and, through expertise and advice, perhaps help remedying. That the EUAA FRO apparently lacks 'eyes and ears' might substantially undermine its capacity to do so.

[91] For the assistance provided by the EUAA see European Asylum Agency Regulation, art 16(2)(c).

[92] See European Asylum Agency Regulation, art 16(2).

[93] Cf. the comparable situation of 'team members' in the case of Frontex described by Fink, *Frontex and Human Rights* (n 43) 326 et seq; see in general Eva Kassoti and Narin Idriz (eds), *The Informalisation of the EU's External Action in the Field of Migration and Asylum* (Springer 2022).

[94] Mariana Gkliati, 'The Application of the EU-Turkey Agreement: A Critical Analysis of the Decisions of the Greek Appeals Committees' (2017) 10 European Journal of Legal Studies 81, 94.

[95] See, in that regard, also Resnik (n 56); Owen M Fiss, 'The Bureaucratization of the Judiciary' (1983) 92 The Yale Law Journal 1442.

[96] Even if one accepts current procedural backlog as an argument to introduce more group-oriented status determination procedures, such group-oriented determination procedures would require absolute transparency and effective accountability mechanisms. For a brief overview, see Bruce Burson, 'Refugee Status Determination' in Cathryn Costello, Michelle Foster, and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (Oxford University Press 2021) 585 etc. For the Geneva Convention, see Convention Relating to the Status of Refugees, United Nations, Treaty Series, vol. 189, p. 137, signed 28 July 1951 (*1951 Geneva Convention*); and Protocol Relating to the Status of Refugees, United Nations, Treaty Series, vol. 606, p. 267, done at New York, on 31 January 1967 (*1967 Protocol to the Geneva Convention*).

Lastly, we turn to the authority of the Ombudsman. The Ombudsman's general mandate to 'uncover maladministration' comes with the authority to issue only non-binding decisions. In turn, the Ombudsman's decade-long presence, political gravitas, and discursive ability incrementally vested it with what could be described as *political* authority. In contrast to legal authority, which their recommendations lack, the Ombudsman builds largely on public pressure and strategically piggybacks political discourses. 'Own initiative inquiries' and 'special reports' in particular seldom occur in a political and discursive vacuum but reflect, lend weight to, and substantiate pre-existing concerns. Assessing the Ombudsman's authority, therefore, should not be reduced to that of its specific recommendations but also its ability to weigh into political debates and make informed calls for change.

Further, as Krajewski noted, the Ombudsman's non-binding and structure-focused approach constitutes perhaps the institution's 'greatest strength' as it reflexively allows for broad accessibility.[97] The Ombudsman seeks to remedy not only individual grievances but also to pierce the veil and help overcome the structural preconditions that lead to maladministration and, potentially, fundamental rights violations. To do so, the Ombudsman combines thorough legal analysis – like that exercised by EU courts – with predominantly process- and institution-focused advice.[98] For separation of powers reasons, many courts may be reluctant to spell out specific institutional or procedural measures that would improve administrative dealings. In contrast, the Ombudsman, which is not a judicial institution, brings the necessary expertise and authority to aid administrators in effectively operationalising legal requirements.

For example, circling back to the asylum complex, the Ombudsman's strategic inquiry into Frontex advised how Frontex should revise aspects of its organisational set-up.[99] Much in the same vein, that the 2019 overhaul of Frontex's founding regulation included a – however imperfect – complaint mechanism can be traced back to two strategic inquiries by the Ombudsman. Those inquiries investigate Frontex's lack of individualised accountability mechanisms in 2012 and 2014.[100] This struggle highlights both the potentials and the pitfalls of the Ombudsman's authority. Ultimately, it was the European legislator – especially the European Parliament – and not Frontex itself that

[97] Krajewski, *Relative Authority of Judicial and Extra-Judicial Review* (n 27) 139.
[98] Ibid.
[99] See European Ombudsman *Frontex* (n 30) para 15 et seq; see also the four suggestions at 5–6, and Annex II.
[100] European Ombudsman Case OI/5/2012/BEH-MHZ *Frontex* (12 November 2013) <https://europa.eu/!JknBXb>; European Ombudsman Case OI/9/2014/MHZ *Joint Return Operations* (4 May 2015) <https://europa.eu/!JknBXb>.

established the complaint mechanism. On its own, the Ombudsman could not 'implement' their recommendations. Yet, leveraging its political authority, the Ombudsman managed to infuse their ideas into the political process. Therefore, on the one hand, after several years and via the detour of the legislative overhaul, the Ombudsman's recommendation led to structural reform. On the other hand, the now implemented complaint mechanism is far from perfect and its use negligible. Further, that Frontex (and some Member States) would ignore the two Ombudsman recommendations and then, later, as described above, only grudgingly accommodate the Ombudsman's recommendations shows that structural change only through Review Bodies might often be an illusion. Review Bodies may be supporting actors in a broader play of accountability forums, as also including courts, parliaments, the press, and public discourse. However, as it will be argued in more detail below, Review Bodies are most efficient when teaming up with other accountability forums and contributing their specific substantive and organisational knowledge of structural governance problems.

In conclusion, we see that the legal authority of Review Bodies, except Boards of Appeal, is different – one could say weaker – than that of courts. All bodies analysed here, in one form or the other, respond to individual petitions. Yet neither the Ombudsman nor Fundamental Rights Officers can bindingly stop fundamental rights violations. However, if we take a more nuanced look, Review Bodies incrementally construe their very own authority relative to their organisational setting, public perception, and legal mandate. The measures Review Bodies use to operationalise their authority range from adjudication (BoAs) to non-binding normative material (FROs, Ombudsman), internal advice (FROs, presumably also the Ombudsman), and public pressure campaigns and political mingling (Ombudsman).

5.4.3 *Expertise and Funding*

The substantive and organisational knowledge of Review Bodies brings us to the last axis of this taxonomy. One of Review Bodies' key characteristics and – if used strategically – main advantages is their expertise. Unlike EU courts, which have general jurisdiction, Review Bodies often exercise specialised jurisdiction and, therefore, employ more specialised experts than EU courts. This has two downstream effects. On the one hand, many Review Bodies have, especially when compared to courts, extra knowledge in the substantive fields they oversee.[101] For example, BoAs are typically staffed with people who

[101] However, practically and financially enabling expertise is not always easy. See especially Krajewski, *Relative Authority of Judicial and Extra-Judicial Review* (n 27) 111.

have special knowledge of the specific regulatory field covered by their respective agency. Similarly, FROs are, at least partly, staffed with people who have a background in fundamental rights and asylum law. We may call this *substantive* expertise. On the other hand, Review Bodies accumulate expert knowledge about EU executive structures themselves. In other words, Review Bodies are also experts in the institutionalised practices and (in)formal habits entrenched into EU executive power. We may call this *organisational* expertise.

Although all Review Bodies entertain these two expertise dimensions, we may again distinguish among the actors presented here. BoAs are predominantly on the substantive expertise side of the spectrum. Even though their review also ventures into the organisational and structural aspects of their respective agencies, BoAs are designed as substantive experts in the regulatory area of their agencies.[102] Most founding regulations for agencies that feature a BoA state that board members and the, usually few, members of staff shall have the 'necessary expertise' to review the agency acts.[103] A paradigmatic example is the Joint Board of Appeal of the European Supervisory Authorities. It reviews agency action regulating financial services. According to Article 58 (2) of the three respective regulations, members of the Board of Appeal 'shall be individuals of high repute with a proven record of relevant knowledge of Union law and of having international professional experience, to a sufficiently high level in the fields of banking, insurance, occupational pensions, securities markets or other financial services'.[104] However, since many BoAs are rather small institutions with few (if any) full-time employees, safeguarding

[102] For a detailed analysis of the ECHA BoA's review, see Michał Krajewski, 'Judicial and Extra-Judicial Review: The Quest for Epistemic Certainty' in Merijn Chamon, Mariolina Eliantonio, and Annalisa Volpato (eds), *Boards of Appeal of EU Agencies* (Oxford University Press 2022) 289.

[103] For example, for the Joint Board of Appeal of the European Supervisory Authorities, the relevant clause reads '[t]he Board of Appeal shall have sufficient legal expertise to provide expert legal advice on the legality of the Authority's exercise of its powers', see Article 58(2) respectively in Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC [2010] *OJ L331/84*; Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC[2010] *OJ L331/12*; Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC [2010] *OJ L331/48*.

[104] Ibid.

that expertise might not always be easy. As Krajewski noted for at least one BoA, 'the Commission and co-legislators wrongly assumed that just *one* technically qualified member is capable of guaranteeing the necessary level of expertise'.[105] EU agencies deal with immensely complex regulatory matters. Therefore, offering high-quality review of these matters is complex in and of itself.[106] However, low funding and a small workforce might impair some BoAs' ability to offer comprehensive expertise-based review.

Picking up the thread of funding as a necessary prerequisite for expertise, the Frontex Fundamental Rights Officer and the European Ombudsman seem to have more robust funding than at least some BoAs. For example, Frontex allocated two million Euros to 'fundamental rights activities' in its 2022 budget.[107] According to Jonas Grimheden, then Frontex FRO, all or most of this money went to the FRO, which had a staff of roughly sixty-five people in spring 2023 but aimed at expanding to more than a hundred.[108] Remarkably, in 2020, Frontex allocated no funds to 'fundamental rights activities' and roughly 780,000 Euros in 2021.[109] That sharp increase in personnel and funding indicates at least some financial underpinning and, by extension, the workforce required to develop the Frontex FRO into a serious player for incremental improvements of European asylum governance.

Circling back to the two poles of substantive and organisational expertise, FROs are squarely in the centre. FROs intrinsically combine substantive and organisational expertise. FROs' substantive expertise is to understand the organisational practices (and problems) at Frontex and the new Asylum Agency.[110] On the one hand, FROs focus on how the respective agencies conduct their operations, which gives them a thorough understanding of the agencies' organisational practices. On the other hand, the Frontex FRO's 'monitors' in particular look at this practice from a substantive fundamental rights perspective. In general, however, FROs mainly seek to make Frontex actions more transparent and, by extension, more accountable.

[105] Krajewski, *Relative Authority of Judicial and Extra-Judicial Review* (n 27) 111.

[106] The various BoAs fare very differently in that regard. See, e.g., Carlo Tovo, 'The Boards of Appeal of Networked Services Agencies: Specialized Arbitrators of Transnational Regulatory Conflicts?' in Merijn Chamon, Annalisa Volpato, and Mariolina Eliantonio (eds), *Boards of Appeal of EU Agencies: Towards Judicialization of Administrative Review?* (Oxford University Press 2022) 50 et seq.

[107] Frontex Budget 2022, VOBU Ref FDS/FIN/NAAL/2022 <https://frontex.europa.eu/assets/Key_Documents/Budget/Frontex_VOBU_2022.pdf> 3.

[108] Background talk, Frontex FRO Grimheden (n 89).

[109] Frontex Budget 2022 (n 107) 3.

[110] See Section 5.3.2.

Lastly, the European Ombudsman leans strongly towards the organisational expertise pole. The Ombudsman's expertise focuses exclusively on organisational expertise as its mandate is to remedy maladministration.[111] The Ombudsman does not review the substantive accuracy of agency decisions but analyses the procedures through which decisions are made and, if needs be, whether a procedure might have endangered fundamental rights. With a budget of just over twelve million Euros and a staff of between seventy-three (permanent) and a little under a hundred (including trainees), the Ombudsman's budget is larger than that of the FRO and most to all BoAs.[112] However, mirroring the challenges of other Review Bodies, the Ombudsman's expertise, workforce, and funding must be seen in perspective. As mentioned above, the Ombudsman has a general mandate, spanning potential maladministration by any EU actor. That is a multitudinous and chaotic universe of actors with tens of thousands of employees. From that perspective, the Ombudsman's budget might be large relative to more specialised BoAs but still small relative to its humongous task.

Further, if the Frontex FRO expands as projected, the size of its workforce might eclipse that of the Ombudsman. This, again, provokes queries. If the workforce of the Frontex FRO and the Ombudsman are roughly the same (both between 50 and 100), and both review EU executive actors for maladministration or even fundamental rights violations, why is the Ombudsman's budget six times that of the Frontex FRO (more than twelve million Euros compared with two million Euros)? Vice versa, what does it tell us about the state of fundamental rights at one single agency if the office overseeing said agency's fundamental rights record employs as many people as the body overseeing the whole European Union for any kind of maladministration?

5.4.4 *Interim Conclusion*

The outlined taxonomy offers several key takeaways. On the one hand, Review Bodies' authority emerges only incrementally. While courts' authority rests on their legal power as well as their position at the cusp of our socio-cultural imaginary (remember Dworkin's Herculean judge?), Review Bodies must build their authority from scratch. Consequentially, they also use a broader panoply of measures to oversee and control executive behaviour. Many of these measures are indirect and certainly not 'binding' in a legalist sense of the

[111] Ibid.
[112] European Ombudsman, Annual Report 2022, 36 at 7.1 and 7.2.

word. However, indirect, non-binding measures may point to the structural root causes of fundamental rights violations. That would be a crucial factor in eventually fixing those structural errors.

On the other hand, none of the Review Bodies covered here is fully convincing from an access to justice perspective. The Ombudsman does important work but some of their recommendations are ignored or watered down in the political process. Fundamental Rights Officers highlight rather than solve the grave fundamental rights problems at the Union's governing of asylum and migration. That is not to say that FROs can do no good. Yet one cannot help but characterise FROs at least in part as ceremonial legitimation of otherwise structurally flawed practices at the Union's borders. BoAs offer a well-established and much needed extra layer of adjudication. Nonetheless, BoAs would require and, I would argue, deserve a more prominent place in discussions about the Union's administrative justice architecture. Lastly, all bodies appear to offer considerable expertise in their respective fields. Yet, to further advance that expertise, all bodies would arguably need more funding.

5.5 POSSIBILITIES FOR REFORM

We conclude with several possibilities for reform. This chapter presented three Review Bodies – the European Ombudsman, Boards of Appeal, and Fundamental Rights Officers – as complementary paths to justice in the EU. None of these Review Bodies can replace the judicial process, which arguably remains the most authoritative avenue to attain individual justice for fundamental rights violations. Yet, Review Bodies are here to stay. It is likely they will diffuse further, perhaps even beyond the classic realm of public executive power into the intricate spheres of public-private administrative–like governance mechanisms.[113] The governance of data and the digital economy especially have spawned a rich but ambivalent cluster of bodies that shall protect individual rights like the freedom of speech or privacy but lack meaningful enforcement capacities.[114]

5.5.1 *Teaming Up*

This chapter premised that recurring fundamental rights violations reflect structural problems nestled within organisational practice. Remedying

[113] Moritz Schramm, 'Administrification of Platform Governance: A New Role for the European Ombudsman in the DSA Framework?' in Deirdre Curtin (ed), *The Evolving Role of the European Ombudsman* (Hart, forthcoming 2024).

[114] See further Moritz Schramm, *The Emulation of Courts in the Digital World: Platforms, the Oversight Board, and the Digital Services Act* (Cambridge University Press, forthcoming 2025).

structural problems requires more than occasional judicial review. Courts focus mainly on reviewing the legality of individual acts and seldom focus on the structural forces that might drag organisations towards violating fundamental rights. Here, Review Bodies – despite their many shortcomings – have a crucial advantage. Because they are not bound by the judicial process' narrow focus on individual legality, Review Bodies may develop a more thorough understanding of the structural issues in each governance context. In other words, Review Bodies might help individual petitioners only mediately, for example, through recommendations, investigations, and public statements (BoAs are an exception here). However, Review Bodies may be crucial in identifying and eventually reforming the structural root causes that lead to fundamental rights violations. They can do so precisely *because* their normative output is, usually, non-binding.

Nonetheless, effectively implementing Review Bodies' often consultative and non-binding output hinges strongly on the goodwill of the EU institutions. Although internal communication, public recommendations, or naming and shaming may work to a degree, executive actors retain the last word over any bit of structural reform short of legislative overhaul. Yet structure-focused but non-binding review that merely seeks to 'gently civilise' recalcitrant offenders is not enough if those offenders – for whatever reason – simply do not wish to change.

This highlights a mismatch in the Union's access to justice architecture. On the one hand, Review Bodies might thoroughly understand what might go wrong in the Union's executive. Yet Review Bodies lack the authority to weigh in. On the other hand, those institutions that could weigh in, courts, mostly focus on vindicating individual grievances through individualised measures (reinstatement, financial compensation, etc.) instead of helping executive actors to remedy structural flaws that might lead to repeated fundamental rights violations. But how to reconcile these two strings of justice?

Therefore, the main take away from this chapter is that Review Bodies and other accountability forums should team up. Together, courts and Review Bodies would combine judicial authority with Review Bodies' structural and substantive expertise. Combining these two elements would advance justice in a more comprehensive way than either of those two mechanisms could on its own. Currently, complementarity too often translates to isolated attempts to remedy fundamental rights violations by courts and Review Bodies. Thus, a pragmatic path forward would be to combine the analytical and recommendatory capabilities of Review Bodies with binding, authoritative judicial review. On their own, neither judicial review nor structural but non-binding review can do away with the root causes nestled into problematic governance

structures, internal cultures, and organisational habitus. However, if courts and other Review Bodies team up, both actors' capabilities increase significantly. Recently, Daniel Halberstam and Sina von der Boegart called on EU courts to begin issuing 'structural injunctions'.[115] Review Bodies could contribute crucial substantive and organisational expertise for these injunctions.

Teaming up could take various forms. For example, Review Bodies could be heard as experts (Article 25 CJEU Statute) or file third-party interventions (Article 42 CJEU Statute) in annulment proceedings. If the Court of Justice espouses the Review Bodies' recommendations, the Court could include them, in one way or the other, in its judgment.

Further, Review Bodies should also actively engage with political actors and leverage their expertise to push for structural improvements. A case in point is the Ombudsman's 'special report' to the European Parliament from 2013, after Frontex 'rejected' a recommendation by the Ombudsman. Crucially, the Ombudsman criticised the fact that the agency 'had no mechanism in place by which it could deal with individual incidents of breaches of fundamental rights alleged to have occurred in the course of its work. The Ombudsman saw the lack of an internal complaint mechanism as a significant gap in Frontex's arrangements'.[116] A decade later, an overhaul of the Frontex regulation introduced such a complaint mechanism – even though in a largely impractical form. This tells us two things. On the one hand, remedying structural flaws requires various fundamental rights-oriented players – courts, Review Bodies, parliamentarians, the Fundamental Rights Agency, NGOs, the press – to team up. On the other hand, at least in the asylum complex, access to justice hinges upon political will and not on idealised legal guarantees.

5.5.2 *More Money, More Wit*

One common thread running through this chapter is that Review Bodies need more funding and more publicity. Arguably, the latter depends on the former. If Review Bodies are better funded, they could invest further in their expertise, which would be a legitimacy asset and, if operationalised well, might make them more publicly known. Except for BoAs, the Review Bodies studied here will continue to have little or no authority to issue legally binding decisions. Apart from jumping, in one way or the other, onto the court's bandwagon, Review Bodies should leverage their role as guardians more confidently and,

[115] Halberstam and von der Boegart (n 8) 9–16.
[116] European Ombudsman, *Special Report of the European Ombudsman in own-initiative inquiry OI/5/2012/BEH-MHZ concerning Frontex* (7 December 2013) 1–2.

crucially, more publicly. Accountability and oversight are not only questions of formal mandates and dry reports but can be effectively orchestrated through public messaging.[117] Also courts construe(d) their authority through performative iterations of power. As a consequence, the public incrementally acquiesced to courts' pre-eminent role in guarding fundamental rights.[118] Mutatis mutandis, Review Bodies should learn from that example. Therefore, Review Bodies should engage more directly in the public discourse to ramp up public and political pressure wherever reasons for fundamental rights abuses occur. That is particularly important in front of the backdrop of the EU's still fragmented public sphere and independent executive actors' lack of electoral accountability.

5.6 CONCLUSION

This chapter presented Review Bodies as complementary avenues to justice vis-à-vis the EU's expanding executive power. Review Bodies are complementary in the sense that they add to but do not replace judicial review. Among their key characteristics is that Review Bodies (potentially) focus on structural root causes of fundamental rights violations instead of individualised questions of legality. Yet their authority is often faint and the measures at their disposal remain indirect and non-binding. Although such measures may be even more appropriate to tackle organisational and entrenched issues, success is not guaranteed. On the one hand, Review Bodies performatively play with notions of review and access to justice, although their practical ability to deliver such justice often remains underdeveloped. This may evoke falsely legitimising impressions of accountability, which would then stabilise normatively questionable executive regimes. Above, it is argued that Review Bodies are, in principle, a positive development as they emphasise the Union's ability to

[117] See, in that regard, also Deirdre Curtin and Linda Senden, 'Public Accountability of Transnational Private Regulation: Chimera or Reality?' (2011) 38 Journal of Law and Society 163.

[118] Examples abound, from *Marbury v Madison* to *van Gend & Loos* or the Bundesverfassungsgericht's famous *Statusschrift*. For illuminating analyses of these phenomena in an international and European context, see Ingo Venzke, *How Interpretation Makes International Law* (Oxford University Press 2012) 16 et seq, 135 et seq; Antonin Cohen and Antoine Vauchez, 'The Social Construction of Law: The European Court of Justice and Its Legal Revolution Revisited' (2011) 7 Annual Review of Law and Social Science 417; Martti Koskenniemi, 'Performing Legal Expertise: Reflections on the Construction of Transnational Authority' in Emilia Korkea-aho and Päivi Leino-Sandberg (eds), *Law, Legal Expertise and EU Policy-Making* (Cambridge University Press 2022) 19 et seq; Pavone (n 1).

self-control.[119] However, presently, some Review Bodies cannot deliver effective guardianship. On the other hand, Review Bodies indeed offer more than many commentators, practitioners, and individuals might expect. Therefore, to advance access to justice in the Union's executive dealings, Review Bodies should team up with other accountability forums like parliaments and, crucially, courts. This might reflexively elevate their authority and pave the way to further institutional reform.

[119] See Section 5.3.2.