

# **Jogelméleti Szemle 2016/3. szám**

## **TARTALOM**

### **Tanulmányok**

Bató Szilvia: A szándékon túli eredményért való felelősség az 1795. évi és az 1830. évi tervezetekben.....	2
Böcskei Balázs: Késő modernitás és a szorongásmenedzsment .....	19
Chum, Chandarin: Public Administration Reform in Cambodia: PEST Analysis.....	33
Csatlós, Erzsébet: Perspectives of the Cooperation of National Administrative Authorities in the EU.....	45
Deák, Beáta: Right to a fair trial and the protection of it in the Charter of Fundamental Rights of the European Union .....	56
Kevevári István: Mit jelent, hogy a dekonstrukció maga az igazságosság? .....	63
Sághi Tamás András: A germán törzsek vándorlási folyamata a Nyugatrómai Birodalom bukásáig, alkotmányos viszonyaik tükrében .....	73
Tóth-Lakos Fruzsina: A fordított általános forgalmi adó aktuális kérdései.....	87

### **Glossa**

Pokol Béla: Emberi értelem, mesterséges intelligencia - a társadalom értelmi felépítettségének változásai .....	107
---	-----

### **Lectio**

Sulyok, Tamás: Constitutional review on the basis of the new Fundamental Law of Hungary .....	146
---	-----

### **Recenzió**

Sándor István: Cicero: Az állam .....	149
---------------------------------------	-----

### **Szerkesztőség**

*Főszerkesztő: Karácsony András*

*Szerkesztők: Bódi Stefánia, Szabó Béla, Téglási András, Tóth J. Zoltán*

*A 2016/3. szám technikai szerkesztésében közreműködött: Kakuk Gabriella*

*HU ISSN 1588-080X*

## Perspectives of the Cooperation of National Administrative Authorities in the EU

The growing number of European Union (EU) policies that require the elimination of State borders in many aspects of life necessarily increased the emergence of transboundary issues. Due to this, the cooperation of national authorities has become a key issue for the effective execution of EU law. Even so, this legal area was never generally legislated; the Treaties were silent on administrative law issues and different kind of legal and non-legal solutions were made up for different cooperative situations. However, over the recent decades, the right of EU citizens to *good administration* has revaluated and an intense demand has been emerged for a transparent and reliable administration. Therefore, the Lisbon Treaty was a milestone in the history of European integration as it regulated a tiny piece of administrative cooperation for the first time.

Nowadays effective general regulation of administrative procedures based on EU law and beyond national borders is one of the central challenges for is finding solutions for the forms of intense procedural cooperation between national and European administrative actors, so EU administrative procedure law needs to overcome its fragmentation. This was intended by a group of experts when they tried to codify this legal area and published the so called *ReNEUAL Model Rules*. The essay aims to analyse the legal basis for regulating administrative cooperation of authorities, the necessity of such legislation, the result of codification, its deficiencies and the alternatives to achieve the main goal: an effective execution of EU law.

### *I. The essence of European administrative procedure*

The EU's supranational executive capacity (*direct administration*) is relatively small. As the guardian of the Treaties, the European Commission is responsible for the proper execution of EU law, it may establish agencies for specific issues but it does not have deconcentrated bodies deployed in the Member States. Regulatory agencies seated in a Member State are not that kind of organs. These bodies are installed upon Article 352 of the Treaty on the Functioning of the European Union [TFEU] for technical, scientific, or administrative function to help EU institutions in policy formation, law-making and execution. Sometimes they are called decentralized agencies as their seats are in different Member States although they are considered central supranational organs and not local ones placed on the territory of all the Member States.<sup>2</sup>

Execution is, therefore, left to the administrative capacity of Member States' (*indirect administration*).<sup>3</sup> These two levels form the so called *European administrative space*<sup>4</sup>

---

<sup>1</sup> PhD, Assistant Professor, University of Szeged, Faculty of Law and Political Sciences, Department of Administrative Law, [csatlos.e@juris.u-szeged.hu](mailto:csatlos.e@juris.u-szeged.hu)



Az Emberi Erőforrások Minisztériuma Új Nemzeti Kiválóság Programjának támogatásával készült.

<sup>2</sup> European Agencies – The Way forward. Brussels, Communication from the Commission to the European Parliament and the Council, 11.3.2008. COM(2008) 135 final p. 4.; Chiti, Edoardo: EU and Global Administrative Organizations. Springer-Verlag Berlin Heidelberg, 2011, p. 21.

<sup>3</sup> Ficzer, Lajos: Európai közigazgatás – nemzeti közigazgatás. In Gerencsér, Balázs – Takács, Péter (eds.) Ratio legis, ratio iuris: ünnepi tanulmányok Tamás András tiszteletére 70. születésnapja alkalmából. Szent István Társulat, Budapest, 2011. pp. 383-84.

together with an intermediate networking structure of administrative authorities erupting between the two. Under the terms and *spill over* effect of the following statement “[i]n carrying out their missions, the institutions, bodies, offices and agencies of the Union shall have the support of an open, efficient and independent European administration”<sup>5</sup> the former concept of executive federalism is overridden towards a unified executive power. *European administration* thus covers the public administration activity of bodies and institutions at supranational and also at Member States’ level which perform administrative functions and competences while *European administrative law* describes all the procedural rules that govern their functioning and cooperation.<sup>6</sup>

In the history of the European integration, the emergence of new policies and the need for abolishing administrative burdens to serve the four freedoms put the question of indirect administration on the agenda.<sup>7</sup> Common administrative values were first defined when the accession of the Central and Eastern European States were prepared. The program called *Support for Improvement in Governance and Management* [SIGMA] is a common program of the European Commission and the OECD established in the beginning of the 1990’s to help and support mainly the ex-communist States in a peaceful democratic transition. Before their accession, they were required to establish a public administration which is capable for the effective execution of the *acquis* which is governed by the principles of reliability, predictability, accountability and transparency, as well as technical and managerial competence, organisational capacity, financial sustainability and citizen participation.<sup>8</sup> Then in 2000, effective public administration was declared to be the key for a competitive and a dynamic knowledge-based economy.<sup>9</sup>

<sup>4</sup> Dezső, Márta – Vincze, Attila: Magyar alkotmányosság az európai integrációban. HvgOrac, Budapest 2012, p. 490.; Heidbreder, Eva G.: Structuring the European Administrative Space: Channels of EU Penetrations and Mechanisms of National Chance. KFG Working Paper Series, No. 5. 2009, p. 5.; Torma, András: Az Európai Közigazgatási Térségről – magyar szemmel. Miskolci Jogi Szemle, 6. évf. spec. ed. 2011, p. 197.; Kárpáti, Orsolya: Az európai közigazgatási tér kialakulása (I. rész), Sectio Juridica et Politica, Miskolc, Tomus XXIX/1. 2011, p. 234.; Koprić, Ivan– Musa, Anamarija – Novak, Goranka Lalić: Good Administration as a Ticket to the European Administrative Space. Zbornik PFZ, Vol. 61. No. 5. 2011, pp. 1545-46.; Curtin, Deirdre – Egeberg, Morten: Towards a New Executive Order In Europe? Routledge, London. 2013, pp. 30-32.

<sup>5</sup> Consolidated version of the Treaty on the Functioning of the European Union. OJ C 326, 26.10.2012 [TFEU] Article 298.

<sup>6</sup> Hofmann, Herwig C. H.: Composite Decision Making Procedures in EU Administrative Law. In Hofmann, Herwig C. H. – Türk, Alexander H. (eds.) Legal Challenges in EU Administrative Law. Towards an Integrated Administration. Edward Elgar, Cheltenham, 2009, p. 136.; Boros, Anita: Az Európai Unió közigazgatási eljárásjoga – európai közigazgatási eljárásjog avagy európaizálódás a közigazgatási eljárásjog területén (is)? Jogtudományi Közlöny, 2013/12. 2013, pp. 611-612.; Hofmann, Herwig C. H. – Rowe, Gerard C. – Türk, Alexander 2011: Administrative Law and Policy of the European Union. Oxford University Press, Oxford, 2011, p. 907.

<sup>7</sup> Boros, Anita: A közigazgatási jog europánizálódása - különös tekintettel közép-magyarországi régióban megvalósuló közbeszerzési eljárásokra. Pro Publico Bono Online, Támop Speciál, 2011, p. 2.

<sup>8</sup> Preparing Public Administrations for the European Administrative Space. SIGMA Papers, No. 23, OECD Publishing. <http://dx.doi.org/10.1787/5kml6143zd8p-en> (21.06.2016.) p. 1. Madrid European Council 15 and 16 December 1995 presidency conclusions. [http://www.europarl.europa.eu/summits/mad1\\_en.htm#simplif](http://www.europarl.europa.eu/summits/mad1_en.htm#simplif) (21.06.2016.) Part A. III. The program still helps the candidate states to prepare for the accession. Reinforcing Public Administration Reform in the Enlargement Process. Regional Ministerial Conference on the Principles of Public Administration. Brussels, 12 November 2014. <http://www.sigmaweb.org/publications/Principles-Public-Administration-Nov2014.pdf#page=7> (21.06.2016.) p. 6.

<sup>9</sup> The Lisbon Special European Council (March 2000): Towards a Europe of Innovation and Knowledge. Presidency Conclusions Lisbon European Council 23 and 24 March 2000. <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:c10241> (21.06.2016.) point 9. and 17.; Drechsler, Wolfgang: Towards a Neo-Weberian European Union? Lisbon Agenda and Public Administration. Halduskultuur, Vol. 10. 2009, p. 10.

Along this process the rights of the EU citizens revalued the principle of *good administration* first in judicial case law,<sup>10</sup> then as a fundamental right by Charter of Fundamental Rights of the European Union (EU Charter) in 2001, and then it got primarily legal source status by the Lisbon Treaty ten years later.<sup>11</sup> Article 41 of the EU Charter encompasses the basic procedural rights the right to fair procedure, the right to get the reasons for decisions, the right to defence, the right to effective legal remedy and the right to use native language in administrative procedures along with the right to compensation if maladministration causes damage.<sup>12</sup> Additionally, Article 8 and 42 declare the right to access to documents and in this context, the protection of personal data for a better evaluation and enforcement of the formerly mentioned rights.<sup>13</sup>

Article 41 of EU Charter brought nothing new for a democratic State but for the development of regulating administrative law, the articulation of procedural rights of the citizens in a primarily source was a milestone in the history of the integration.<sup>14</sup> Being a unifying force, it urges Member States to approximate and simplify administrative burdens to serve better EU citizens while the EU have legislative competence only to support, coordinate or supplement the actions of the Member States to improve their administrative capacity for better implementation of EU law without any harmonisation of the national laws.<sup>15</sup>

European administration, even after the Lisbon Treaty, is purely regulated in the Treaties, but the number and legal value of different kind of secondary sources is numerous in many fields of common policies as they were elaborated on an *ad hoc* basis when a policy needed common executive rules to be effectively applied. Rules governing administrative issues are therefore fragmented as they do not share common normative background. Concrete executive instructions to help uniformity at Member State level often appear in non-legislative acts of the Commission. They take the form of delegated acts<sup>16</sup>, implementing acts<sup>17</sup> and sometimes in different kinds of soft law documents of agencies<sup>18</sup> and other bodies,

<sup>10</sup> Chronowski, Nóra: Mikor megfelelő az ügyintézés? Unió és magyar alapjogvédelmi megfontolások. Magyar Jog, 2014/3. 2014, pp. 138-139.

<sup>11</sup> Charter of Fundamental Rights of the European Union. OJ C 326. 26.10.2012. Article 41 (1). Consolidated version of the Treaty on European Union. OJ C 326. 10.2012. [TEU], Article 6 (1).

<sup>12</sup> Schiffner, Imola: A gondos ügyintézés elvének érvényesülése az Európai Unió gyakorlatában. In Papp Tekla (ed.) A jó állam aspektusai, perspektívái: Az önkormányzatok változó gazdasági, jogi környezete. Pólay Elemér Alapítvány, Szeged, 2013, p. 47.

<sup>13</sup> EU Charter, Article 52 (6), 51 (1); Mendes, Joana: Good Administration in EU Law and the European Code of Good Administrative Behaviour. EUI Law; 9. [http://cadmus.eui.eu/bitstream/handle/1814/12101/LAW\\_2009\\_09.pdf?sequence=3&isAllowed=y](http://cadmus.eui.eu/bitstream/handle/1814/12101/LAW_2009_09.pdf?sequence=3&isAllowed=y) (21.06.2016.) 2009, pp. 2-3.

<sup>14</sup> Szegedi, László: Az Európa Tanács jó közigazgatásról szóló ajánlásának magyar szövegéhez. Pro Publico Bono, 1. 2011, p. 108.

<sup>15</sup> TEU, Article 5.; TFEU, Article 2 (5), 6 (g).

<sup>16</sup> Article 290 of the TFEU allows the EU legislator to delegate to the Commission the power to adopt non-legislative acts of general application that supplement or amend certain non-essential elements of a legislative act. Delegated acts may add new but non-essential rules or involve a subsequent amendment to certain, often highly technical, aspects of a legislative act. The delegation of power to adopt delegated acts is nevertheless subject to strict limits; the objectives, content, scope and duration of the delegation of power must be defined in the legislative acts. The power can be withdrawn anytime. See, Hardacre, Alan – Kaeding, Michael: Delegated & Implementing Acts. The New Comitology. EIPA Essential Guide 4th edition, 2011. pp. 12-14.; Türk, Alexander H.: Lawmaking after Lisbon. In Biondi, Andrea– Eeckhout, Piet – Ripley, Stefanie (eds.) EU Law after Lisbon. OUP, Oxford, 2012, pp. 74-77.

<sup>17</sup> It is primarily the duty of Member States to implement legally binding EU acts unless such acts require uniform conditions for the implementation. In these cases, based on the authorization of Article 291 of the TFEU, the Commission or, in duly justified specific cases and in cases provided in the Articles 24 and 26 of the TEU, the Council is empowered to adopt implementing acts. Hardacre – Kaeding: supra pp. 16-19.; Türk: supra pp. 77-78. See p. ex. RAPEX Guidelines Directive. Commission Decision of 16 December 2009 laying down guidelines for the management of the Community Rapid Information System 'RAPEX' established under Article

and it can also happen that the empowering legal act remains quiet on the legal nature of such kind of provisions.<sup>19</sup> However, these documents are significant sources of administrative rules to achieve the proper execution of EU norms with helping authorities to do so; they are important fillers of legal gaps although they can never substitute formal legislation and legal acts. If a procedure between different Member State authorities that share information including personal data is based on such rules, the practice is definitely against the principle of reliable and transparent administration. It also reveals the question of *direct effect* in the point of view of EU citizens and their legal protection as their procedural rights and their practice becomes also an open question when it is based on.

For instance, a decision of a national consumer protection authority is shared in the RAPEX system so all the authorities acting in the same competence can withdraw from the market all the goods that not in conformity with EU requirements. The decision definitely contains personal data and anyway has a nature that reveals procedural rights of the client, individual or legal person. How and where can it can practice these rights and get legal remedy if it is necessary if the procedure of data sharing is not in the competence of the national authority anymore and national law is quiet on those aspects? The answer for these questions should be laid down in the basic act governing cooperative mechanisms of the national administrative authorities taking part in the data sharing mechanism. This basic act is mostly deficient and has no general normative background to turn for filling legal gaps.

A basic procedural rule or procedural code could create a system in the chaos and that is what codification aimed: to establish a bridge over legal burdens which are due the different administrative structures in of Member States and to make a general legislative basis for the existing and future procedure governing the cooperation of authorities.<sup>20</sup> The necessity to settle administrative procedure law is supported by being defined as a fundamental right of EU citizens and the requirement of a transparent open and reliable administration is also echoed by the Treaties.<sup>21</sup> Between 2009 and 2015 the codification was completed by the *Research Network on EU Administrative Law* (ReNEUAL). ReNEUAL is a network of scientists and experts since 2009. Together with the European Law Institute decided in 2012 to cooperate on the development of the *Model Rules* on EU procedure. The *Model Rules* were published on 1 September 2014.<sup>22</sup>

---

12 and of the notification procedure established under Article 11 of Directive 2001/95/EC (the General Product Safety Directive). OJ 26.1.2010. L22/1.

<sup>18</sup> Agencies have regulative power but only in a few cases and not in a general manner (*Meroni doctrine*) Meroni case. C-9/56, Meroni v. Haute autorité [1958] ECR 133. p. 152.; Chiti, Edoardo: In the Aftermath of the Crisis – The EU Administrative System Between Impediments and Momentum. Cambridge Yearbook of European Legal Studies, Vol. 17. No. 1. 2015. pp. 315-316. In case of cross-border healthcare guidance can be adopted for the effective implementation of the directive but it does not give further details on its possible legal force. Cross-Border Healthcare Directive. Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare. OJ 4.4.2011. L 88. 45. Article 11. 2. b).

<sup>19</sup> See p. ex. Directive 2010/63/EU of the European Parliament and of the Council of 22 September 2010 on the protection of animals used for scientific purposes. OJ 20.10.2010. L 276/3., Article 23 (4) or Directive 2010/40/EU of the European Parliament and of the Council of 7 July 2010 on the framework for the deployment of Intelligent Transport Systems in the field of road transport and for interfaces with other modes of transport. OJ 6.8.2010. Article 9.

<sup>20</sup> Report of the ReNEUAL Conference. Towards an EU Administrative Procedure Law? Brussels March 15th & 16th – (draft)  
[http://www.reneual.eu/events/ED\\_conference/ReNEUAL\\_conference\\_March\\_2012/Conference%20Report%20Brussels%20March%2015Th%20%2016Th.pdf](http://www.reneual.eu/events/ED_conference/ReNEUAL_conference_March_2012/Conference%20Report%20Brussels%20March%2015Th%20%2016Th.pdf) (21.06.2016.)

<sup>21</sup> Article 1 and 9 and 10 (3) of TEU and Article 15 of TFEU.

<sup>22</sup> ReNEUAL Homepage. Welcome to ReNEUAL – the Research Network on EU Administrative Law. *Model Rules* <http://www.reneual.eu/> (21.06.2016.)



## II. The result of codification and its effect on national administration

Codification primarily aimed to summarise and synthesize the existing procedural rules and their judicial practice for EU institutions; bodies and agencies direct administration under the meaning of Article 298 of TFEU. Three books, not counting the general part, of six refers to the sphere of direct administration: administrative rule-making (Book II), single case decision-making (Book III) and contracts (Book IV) of EU institutions, bodies and agencies in conformity with Article 258 of TFEU. These areas have deep roots and antecedents in the history of integration. So, the challenging part of codification is when the level of direct and indirect administration is linked. The operative procedural cooperation between Member States authorities has fundamental basis only since the Lisbon Treaty and its case-law is also relatively small and as mentioned above, this legal area is mainly governed by different kind of legal or non-legal sources.

The last two chapters of *Model Rules* overlap the margins of the cooperation related to indirect administration area. The EU has the weakest legislative power on administrative cooperation of Member State authorities not including harmonisation effort to Member State's administrative structures. However, Article 298 of TFEU presupposes a sort of common rules for cooperation justified by the flexibility clause (352 of TFEU) as administrative structure is a key element for the effective application and execution of EU law.

Basically, the forms of cooperation of authorities are either (a) *classical legal assistances* or (b) *operational cooperation* forms that do not fall within the scope of the previous one. Mutual legal assistance has the purpose of gathering and exchanging information, and requesting and providing assistance in obtaining evidence located in one Member State's authority to assist in proceedings in another. This legal area is codified by Book V of *Model Rules*.<sup>23</sup> Operational cooperation is, in contrast, a data-sharing mechanism based on EU law which presupposes or assesses direct and continuous cooperation of authorities of the same competence both at EU and national level by forming a network with the Commission or its bodies at the centre. Under such circumstances private data protection along with the transparent and reliable functioning of administration, clarity, availability and predictability together with legal remedy questions are crucial and these expectations and requirements are definitely not served by the present status of their legal environment. For this reason, Book VI of *Model Rules* is dedicated to summarise the existing norms to fill the basic legal gaps in the area of cooperating mechanisms of public authorities.

## III. Model Rules for administrative cooperation mechanism

Book VI refers to (a) those structured mechanisms of cooperation between authorities which cannot be considered legal assistance; (b) data-sharing mechanisms based on EU norms and not on previous request by another authority and supported by an IT system; and (c) establishment and functioning of databases which gives direct access to authorities of different Member States. *Model Rules* only refer to legal relationships with transboundary element, so when only one Member State's authorities are concerned, domestic law has primacy.<sup>24</sup>

*Model Rules* declare that data management shall be based on legally binding sources to make the procedure predictable and transparent with clearly defined tasks and competences,

---

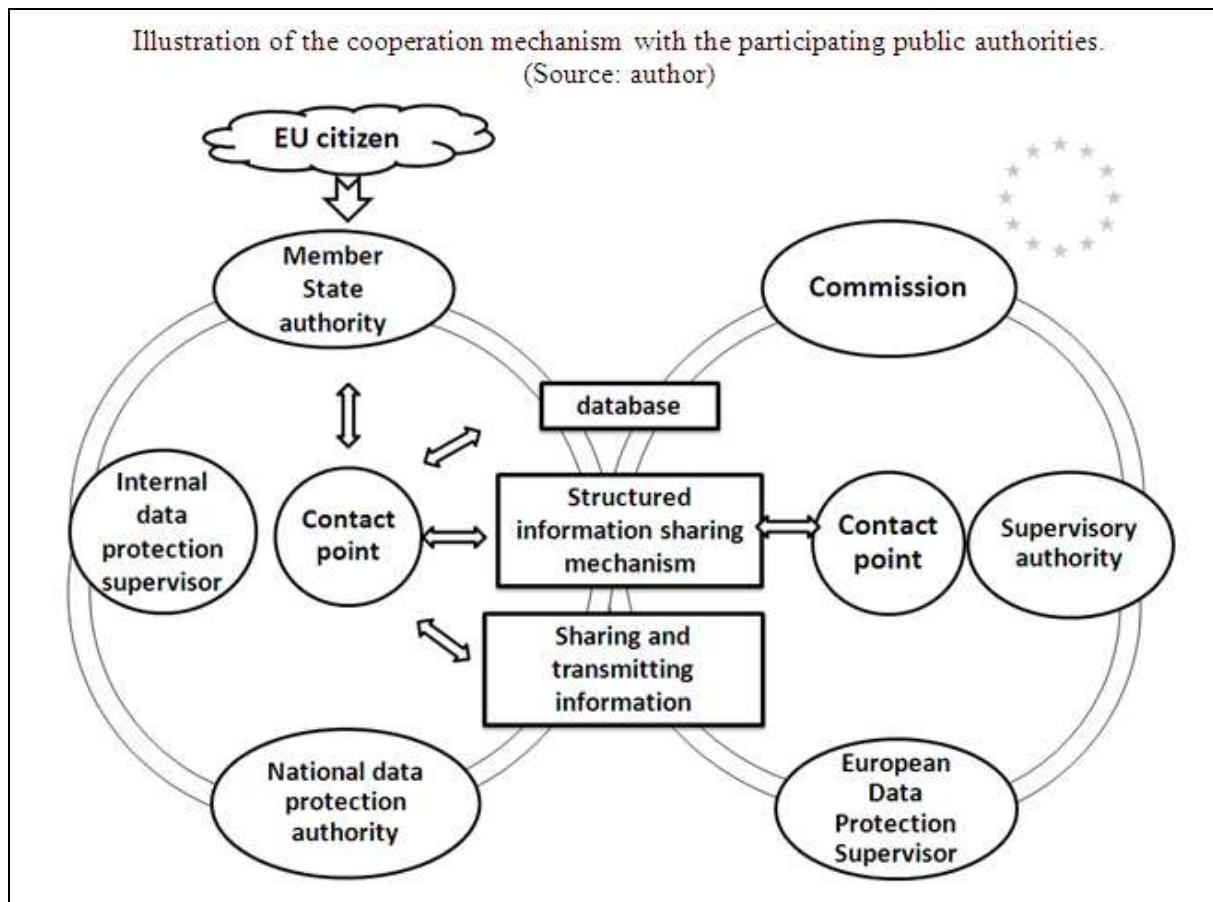
<sup>23</sup> See, Model Rules, Book V – Mutual assistance. [http://www.reneual.eu/publications/ReNEUAL%20Model%20Rules%202014/Book%20V%20-%20mutual%20assistance\\_online%20publication\\_individualized\\_final\\_2014-09-03.pdf](http://www.reneual.eu/publications/ReNEUAL%20Model%20Rules%202014/Book%20V%20-%20mutual%20assistance_online%20publication_individualized_final_2014-09-03.pdf) (21.06.2016.)

<sup>24</sup> Model Rules, VI-1. –VI. 2.

aspects of responsibility, applicable law and last but not least: supervision and legal remedy.<sup>25</sup> Each Member State is responsible to establish or designate a competent authority as contact point to collaborate with other Member State contact points and communicate to the Commission or, if established, to the *Management Authority* which is a supranational body to be the central organ for the mechanism.<sup>26</sup>

The data management rules are mainly based on the *Data Protection Directive*<sup>27</sup> but *Model Rules* provisions are also extended on legal persons;<sup>28</sup> their applicability in certain cases is reduced.<sup>29</sup> However, *Model Rules* discusses difference between structured information mechanisms based on a network of authorities with or without a database; they remain quiet on some significant aspects of administrative procedure.

See the structure of the mechanism and its participating authorities on the following chart with the explanation below in the sub-chapters.



### III.1. Structured Information Mechanisms without Database

<sup>25</sup> Ibid, VI-3., Varga, Zs. András: Gyorsértékelés az európai közigazgatási eljárási modell-szabályokról, Magyar Jog, 2014/10, 2014, p. 547.

<sup>26</sup> Ibid, VI-6.

<sup>27</sup> European Parliament and Council Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data. OJ L 281, 23.11.1995, p. 31–50.

<sup>28</sup> Ibid, VI-15 (57).

<sup>29</sup> Ibid, VI-15 (58).

A basic act with binding effect in the form of regulation, directive, and decision shall be adopted before an information management activity is performed.<sup>30</sup> If an information management activity is supported by an information system, the relevant basic act shall also establish or designate a *Supervisory Authority*<sup>31</sup> and regulate its organisational structure to serve as mediator between disputes of participating authorities.<sup>32</sup> It reviews the legality of information management activities against the standards laid down in the basic act and other rules and principles arising from EU law. It may adopt *binding inter-administrative decisions* to order participating authorities to comply with the relevant provisions and on request of the competent authority it may delete or alter inaccurate or unlawful data in the system.<sup>33</sup> Contrarily, when it deals with complaints of individuals with respect to information management activities, its competences does not go beyond investigation;<sup>34</sup> although, the commentaries attached to *Model Rules* consider Supervisory Authority a legal remedy forum. It has the right to access data, to delete and modify them and also can act as a legal forum on the basis of specific legislation<sup>35</sup> but given the fact that *Model Rules* refers only to investigation and remains silent on the possible binding nature of the decision, the Supervisory Authority can serve only as a mediator in case of problems between individuals and authorities.<sup>36</sup> If the individual complaint can be traced back to dispute between administrative authorities the problem may be solved by a binding inter-administrative decision. Otherwise, only the national legal forum is available only against the national authority if it was the one who caused the breach of law as neither the European Data Protection Officer is not a legal remedy forum nor the Supervisory Authority can adopt binding decisions in such cases.<sup>37</sup> Though the Charter of Fundamental Rights only refers to court procedure in connection with effective legal remedy and fair procedure, it needs to be mentioned that the European Ombudsman declared the importance of internal complaint mechanism for fundamental rights protection, a legal supervision by a superior authority. *Model Rules* remain silent on such legal remedy solutions, so in 28 different Member States the issue can be regulated in 28 different ways; therefore the commentaries interpretation would better serve the procedural rights of the citizens and the reliability and clarity of the mechanism.<sup>38</sup> The European Ombudsman put an emphasis on this requirement in connection with *Frontex*<sup>39</sup> procedure when argued that the officer in charge of executing *Frontex* orders act on behalf of an EU authority and not as an officer of a Member State authority. Therefore,

---

<sup>30</sup> Ibid, VI-3 (1)-(2).

<sup>31</sup> Cf. EU Charter, Article 8 (3).

<sup>32</sup> Ibid, VI-30 (1).

<sup>33</sup> Ibid, VI-33.

<sup>34</sup> Ibid, VI-31-32.

<sup>35</sup> Ibid, VI-32(2), (3); chapter 4 (89), (93).

<sup>36</sup> Ibid, VI-30. (2).

<sup>37</sup> Ibid, VI. 4. 1. (94).

<sup>38</sup> Special Report of the European Ombudsman in own-initiative inquiry OI/5/2012/BEH-MHZ concerning Frontex. Strasbourg on 12 November 2013. 39. <http://www.ombudsman.europa.eu/en/cases/specialreport.faces/en/52465/html.bookmark;jsessionid=AA9282D228713007DC45878725D6D998> [European Ombudsman Opinion], point 23.

<sup>39</sup> The *European Agency for the Management of Operational Cooperation at the External Borders* is established with a view to improving the integrated management of the external borders (land and sea borders, airports and seaports) of the Member States of the European Union. The responsibility for the control and surveillance of external borders lies with the Member States thus *Frontex* shall facilitate and render more effective the application of existing and future Community measures relating to the management of external borders. It shall do so by ensuring the coordination of Member States' actions in the implementation of those measures, thereby contributing to an efficient, high and uniform level of control on persons and surveillance of the external borders of the Member States. The agency was set up in 2004, it seats in Warsaw. Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union. OJ L 349 25.11.2004. Article 1.



the alleged administrative infringements of fundamental rights also need appropriate and correspondent treatment inside the administrative structure.<sup>40</sup>

### III.2. Database

If a data-sharing mechanism is supported by a database, all public authorities participating in the mechanism shall appoint a *data protection officer* otherwise data protection supervision is also organized in a cooperative structure.<sup>41</sup> Both domestic and EU level of administration shall ensure the coordinated supervision of the database.<sup>42</sup>

The *European Data Protection Supervisor* (EDPS)<sup>43</sup> independently monitors the lawfulness of the processing of personal data by EU authorities, especially the data's transmission to and from the database. If a management authority is set up, the EDPS shall particularly monitor the exchange and further processing of supplementary information or actions undertaken by the management authority.<sup>44</sup> Independent national supervisory authorities<sup>45</sup> in each Member State has the same task with regard to national authorities' data protection activities to ensure that their activity is carried out in accordance with the required standards.<sup>46</sup>

However, data protection is put under the scope of numerous authorities; there are no model provisions for the proper delimitation of their competences and their responsibility for their data management activities. Only the term '*each act within their competences*' is referred to, but on details, *Model Rules* remain silent. Without strict rules, the legal remedy issues are also open questions. However, there is a short provision declaring the right to compensation if the processing operation breaches the provisions of the basic act and cause damage. The claimant can turn to either the participating authority responsible for the damage suffered or the authority of the jurisdiction in which the claimant is resident or in the case of a legal person, has its registered offices. But without proper responsibility limits how to find the competent forum to get that compensation? As *Model Rules* refrain from giving any minimum rule for responsibility and competence delimitation, the basic act establishing the mechanism

---

<sup>40</sup> Ibid, point 51.

<sup>41</sup> Ibid, VI-34-35.

<sup>42</sup> Ibid, VI-38.

<sup>43</sup> *European Data Protection Supervisor* ensures that EU institutions and bodies respect people's right to privacy when processing their personal data insofar as such processing is carried out in the exercise of activities all or part of which fall within the scope of EU law. EDPS acts in complete independence in the performance of his or her duties. The European Parliament and the Council shall appoint by common accord the *European Data Protection Supervisor* for a term of five years, on the basis of a list drawn up by the Commission following a public call for candidates. An Assistant Supervisor shall be appointed in accordance with the same procedure and for the same term, who shall assist the Supervisor in all the latter's duties and act as a replacement when the Supervisor is absent or prevented from attending to them. The European Data Protection Supervisor shall, in the performance of his or her duties, neither seek nor take instructions from anybody. It was established in 2004 and seats in Brussels. Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data. OJ L 8/1 12.1.2001. Article 1, 42 and 44.

<sup>44</sup> Ibid, VI-36.

<sup>45</sup> The Model Rules, just like the Data Protection Directive, remain silent on the criteria of an independent data protection authority. Ibid, chapter 4., (87). See details: Csatlós, Erzsébet: Fejezetek az EU magyar közigazgatásra gyakorolt hatásából: hogyan legyen egy közigazgatási szerv független? Közjogi Szemle, Vol. VII. No. 4. 2014, pp. 12-17.

<sup>46</sup> Model Rules, VI-36. - VI-37. The legislator may also assign the supervision of the whole data processing in a database either to the EDPS, a national supervisory authority or a group of supervisory authorities (representative supervision) VI-38 (4). The aspects of this option are not regulated in details by the Model Rules.

is free to regulate them, therefore, it rather increase nor decrease the actual fragmentation of this legal area as there are many different solutions.<sup>47</sup>

### *III.3. Common rules for data management activity and legal remedies*

Data-sharing mechanisms and databases require the collaboration and contribution of many national and supranational authorities, thus the delimitation of their competences and responsibilities for data management activity is crucial. In principle, if an information management activity is supported by an IT system a management authority is set up or identified in the basic act or it can be the EU's IT System Agency. In such case, its task includes ensuring the security, continuous and uninterrupted availability, high quality of service for users and the high level of data protection.<sup>48</sup> In case of other data sharing mechanisms, the basic act may also provide that data and information exchanged between authorities shall be verified *ex ante* by a separate verification authority, the Supervisory Authority perhaps.<sup>49</sup>

As *Model Rules* refrain from giving any minimum guidance for responsibility and competence delimitation, the basic act is free to regulate them. For instance, to protect consumers from dangerous non-food products, the RAPEX<sup>50</sup> Contact Point checks and validates all notifications received from the authorities responsible before transmitting them to the Commission and the Commission also checks them before transmitting them to Member States to ensure that they are correct and complete. However, the responsibility for the information provided through RAPEX is taken by RAPEX Contact Point and the authority involved in the notification procedure,<sup>51</sup> while in case of the RASFF, the food and feed alert system, the verification includes the completeness, legibility and correctness of data, where correctness includes the requirement that the data falls into the scope of RASFF or complies with other requirements of its legal basis.<sup>52</sup> As for SIS, the Schengen Information System, the Member State issuing an alert is responsible for ensuring that the data is accurate, up-to-date

---

<sup>47</sup> Ibid, VI-40 (1).

<sup>48</sup> Ibid, VI-8 (2) (a).

<sup>49</sup> Ibid, VI-14 (1).

<sup>50</sup> *The Rapid Alert System for non-food dangerous products* (RAPEX) was established to facilitate the quick exchange of information between Member States and the Commission on measures taken to prevent or restrict the marketing or use of products posing a serious risk to the health and safety of consumers. Member States shall establish or nominate authorities competent to monitor the compliance of products with the general safety requirements and arrange for such authorities to have and use the necessary powers to take the appropriate measures to ensure that products placed on the market are safe. National authorities take measures to prevent or restrict the marketing or use of those dangerous products. Both measures ordered by national authorities, involving modification or lifting of the measures or actions in question, and measures taken by producers and distributors are reported via the system: the authority shall keep the Commission informed, and the Commission shall pass on such information to the other Member States. Therefore, authorities having the same tasks and competences in different Member States are all aware of the relevant information on products on the internal market posing a risk to other public interests protected by EU legislation. See, Commission Regulation No 16/2011 of 10 January 2011 laying down implementing measures for the Rapid alert system for food and feed. OJ L 11/4, 15.1.2012. Article 2-3.

<sup>51</sup> Commission Decision 2010/15/EU of 16 December 2009 laying down guidelines for the management of the Community Rapid Information System 'RAPEX' established under Article 12 and of the notification procedure established under Article 11 of Directive 2001/95/EC [2009] OJ L22/1. Annex II.3.4.; II.3.2.4.

<sup>52</sup> RASFF does the same as RAPEX but for food and feed products. It enables information to be shared efficiently between its members (EU-28 national food safety authorities, Commission, EFSA, ESA, Norway, Liechtenstein, Iceland and Switzerland). RASFF Directive. Rapid Alert System for Food and Feed. Commission Regulation (EU) No 16/2011 of 10 January 2011 laying down implementing measures for the Rapid alert system for food and feed. OJ L6/7 11.1.2011, Article 8.

and entered in the system lawfully and only the Member State issuing an alert is authorised to modify, add to, correct, update or delete data which it has entered.<sup>53</sup>

Altogether, there is no universal normative background to contribute to uniformity and transparency just a variety of basic acts with different provisions.<sup>54</sup> Too many different authorities contribute to the functioning of the system, so the margin for basic act provisions is wider than it should be. Moreover, the *Model Rules* remain silent on the liability for damages of EU institutions, bodies and agencies although in case of Member State authorities it gives a simple guidance on the amount of compensation.<sup>55</sup>

The reason for such shortcomings is said to be the lack of legal practice to codify; however, these legal gaps would be the most important to cover by at least a basic regulation.<sup>56</sup> Otherwise, this was the main motif for codification: to reduce fragmentation and ensure a reliable and transparent legislation for administrative procedures but without concrete delimitation of competences and responsibility issues the right to transparent and reliable administration and the effective legal remedy is in also danger.<sup>57</sup> In addition, silence on the responsibility issues between the authority that is in charge of verification of data and the Member State authorities that furnish the information also points out on the gaps of *Model Rules* for data management.<sup>58</sup> This latter is worrisome as according to *Model Rules*, the compensation rights of individuals are based on a system of choice: (1) an individual can either turn directly to the authority which had conducted the unlawful act leading to the damage;<sup>59</sup> or (2) can choose the jurisdiction of residence or of registration. This is a measure protecting individuals against the potential disadvantages of being lost in the maze of varied regulations but might lead to *forum shopping*.<sup>60</sup> As the *Model Rules* states the damages would be calculated and compensated in accordance with the general principles common to the laws of the Member States. Moreover, participating authorities are obliged to take reasonable steps to prevent the damage from occurring, or to minimise its impacts even if they are not the one who are responsible for the breach of data management rules but due to this provision their responsibility is also raised. Guidance for exact delimitation of competences and responsibilities therefore would be indispensable.

#### *IV. Conclusion: the die is cast?*

On 14 January 2013, the *European Commissioner for Administration* welcomed *Berlinguer's report* during a European Parliament plenary debate where the Commission was invited to elaborate a proposal for a future legislation on EU administrative procedural law.<sup>61</sup>

---

<sup>53</sup> SIS II Directive. Schengen Information System. Regulation (EC) No. 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the second generation Schengen Information System OJ L 381, 28.12.2006. Article 34; Niemenkari, Arto: EU/Schengen Requirements for National Border Security Systems. Geneva Centre for the Democratic Control of Armed Forces (DCAF) Working Paper Series – No. 8. 2002, 3., p. 5-6.

<sup>54</sup> See, *Model Rules*, VI-14. (48)-(53).

<sup>55</sup> *Ibid*, VI-40-41.

<sup>56</sup> *Ibid*, VI-14. (54).

<sup>57</sup> Rowe, Gerard C.: Administrative Supervision of Administrative Action in the European Union. In Hofmann, Herwig C. H. – Türk, Alexander H. (eds.) *Legal Challenges in EU Administrative Law. Towards an Integrated Administration*. Edward Elgar, Cheltenham 2009, p. 191. and 194; cf. Türk 2009, pp. 222-228.

<sup>58</sup> *Model Rules*, VI-14. (54).

<sup>59</sup> This is the model currently provided for Visas, Schengen or the EURODAC system. *Ibid*, VI-40 (115).

<sup>60</sup> *Ibid*, VI-40 (116).

<sup>61</sup> EP resolution on EU Administrative Procedure, European Parliament resolution of 15 January 2013 with recommendations to the Commission on a Law of Administrative Procedure of the European Union 2012/2024(INL) <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA->

The report was based on a committee work dated back to 2010 which had been also supported by the ReNEUAL research group. The committee outlined the possible advancement directions in October 2011, one of which was the codification.<sup>62</sup> This latter was accomplished by the ReNEUAL by the end of 2014; even so, it does not mean that the *Model Rules* would be the base for the future legislation. In addition, the Commission was invited to start the legislation procedure only in the topic of direct administration and the ReNEUAL *Model Rules* has a wider scope: it refers not only the aspects of direct administration but is also extends to the path between direct and indirect administration, namely their cooperation and the network they form. The fact that such kind of summary of the existing legal practice was completed for the first time in the history of the integration has an outstanding importance. It contributes to the approximation of EU authorities to the sphere of concrete execution of EU norms by offering a systematized set of norms developed by the natural evolution of integration. Although, Book VI of *Model Rules* has shortcomings, insufficiencies and deficiencies; it is definitely a milestone on the road to a transparent, coherent and reliable European administration and as long as a legal act is born at least it is a reference point as codified practice and it is also guidance for legislator showing the unsolved legal problems. Fundamental rights approach focusing on EU citizens' rights seems to give a new impetus on the development of procedural law; the Commission is invited for a draft, so the die is cast.

---

[2013-4](#) (21.06.2016.); Reply of the Commission to EP: SP(2013)251 - Follow up to the European Parliament resolution with recommendations to the Commission on a Law of Administrative Procedure of the European Union, adopted by the Commission on 24 April 2013. <http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2012/2024%28INI%29#tab-0> (21.06.2016.)

<sup>62</sup> State of Play and Future Prospects for EU Administrative Law. To be submitted to the Committee on Legal Affairs by the Working Group on EU Administrative Law. [http://www.europarl.europa.eu/meetdocs/2009\\_2014/documents/juri/dv/juri\\_wdadministrativelaw\\_/juri\\_wdadministrativelaw\\_en.pdf](http://www.europarl.europa.eu/meetdocs/2009_2014/documents/juri/dv/juri_wdadministrativelaw_/juri_wdadministrativelaw_en.pdf) (21.06.2016.)