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## **Effect of EU Law on National Administration with a New Input of Fundamental Rights Protection**

**Abstract:** *Public administration has always been a domestic affair for EU Member States. However, national public administrations shall implement and apply EU acquis in such a way that European citizens are able to enjoy the rights granted to them by the EU Treaties, irrespective of the country which they are in. Given the fact that the EU relies on Member States to give effect to its legislation, it definitely means that the EU influences the structure, the functioning of national administrative system by general requirements and ensures the proper application of its acts by establishing different mechanism. The paper first defines the role of administrative authorities in the execution of EU policies, then categorizes and analyse the different cooperative mechanisms between administrative authorities which ensure the operation of internal market and finally it focuses on a recent challenge of European administration caused by the fundamental rights requirements for administrative authorities executing the acquis.*

**Key words:** *European administration, networks, fundamental rights protection, good administration*

### **1. Introduction: relationship between national administration and the EU**

Administration and administrative law in EU context generally refers only to the collaboration of national and EU institutions in policy formation but its role in the (re)shaping of the status and structure of national administration is rarely emphasized.

Public administration has always been a domestic affair for EU Member States and harmonisation of national administrative structures has never been the *expressis verbis* aim of the European integration. The Treaty of Lisbon was

a milestone for introducing the expression on the relationship between the European Union and national administration and Article 197 of Treaty on the Functioning of the European Union (TFEU) on administrative cooperation reads as follows:

1. *Effective implementation of Union law by the Member States, which is essential for the proper functioning of the Union, shall be regarded as a matter of common interest.*

2. *The Union may support the efforts of Member States to improve their administrative capacity to implement Union law. Such action may include facilitating the exchange of information and of civil servants as well as supporting training schemes. No Member State shall be obliged to avail itself of such support. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish the necessary measures to this end, excluding any harmonisation of the laws and regulations of the Member States.*

3. *This Article shall be without prejudice to the obligations of the Member States to implement Union law or to the prerogatives and duties of the Commission. It shall also be without prejudice to other provisions of the Treaties providing for administrative cooperation among the Member States and between them and the Union.*<sup>1</sup>

Article 197 TFEU explicitly connects the proper functioning of the EU and effective implementation and application of its law; and it implicitly links the achievement of effective implementation to the administrative capacity of Member States.<sup>2</sup> Direct administration, the set of EU institutions and authorities to execute its policy, is relatively humble and the EU rather relies on national administrative system as its local active hand to execute and enforce EU law and thereby ensure its proper implementation and application. At the same time, it declares that the help and support, which is specified only in the form of *facilitating the exchange of information and of civil servants as well as supporting training schemes*, is not obligatory for member States but the European Parliament and the Council adopts the necessary legislation to obtain the aim of effective execution of EU law without the intent to harmonise this area.

The European Union is built upon democratic States thus administrative justice have always been key driver for improving the effectiveness of EU law.

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<sup>1</sup> Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union - Consolidated version of the Treaty on the Functioning of the European Union - Protocols - Annexes - Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007. Official Journal C 326, 26/10/2012 p. 1 – 390.

<sup>2</sup> Phedon Nicolaides: Administrative Capacity for Effective Implementation of EU Law. EIPA (European Institute of Public Administration Bulletin) No 2012/01. p. 6.

At EU level, certain common principles and rules relevant for its own administrative procedures have been developed progressively and this inevitably results some influence on national administrations when implementing and applying EU law. General requirements for the accessing States were first defined in the pre-accession period of the eastern countries to help them in the transition into a democratic system. These rules aimed to help to improve their administrative capacity and to prepare for the effective execution and enforcement of the *acquis of the EU (the former acquis communautaire)*.<sup>3</sup>

The *European Administrative Space* consists of the shared principles of public administration among EU Member States, the standards like reliability, predictability, accountability; transparency, efficiency, and effectiveness to which EU candidate States are expected to conform in order to align their public administrations – its structure as well as the procedural issues – to those of Member States. These principles are, by the way, also the basic principles for the functioning of the EU institutions and bodies. However, the adaptation period to EU standards does not finish with the declaration of the acceptance of fancy principles, it requires the establishment of new institutions and authorities, broadening the duties and powers of existing ones, connecting to and collaborating in the network of authorities, and of course the necessary harmonisation of the procedural rules to achieve the same results by application of the same EU norms and ensuring the same conditions to practice rights guaranteed by the *acquis*. This process is a continuous interaction not only during the pre-accession period but also thereafter. Individuals and companies need effective public administrations in order to fully enjoy the rights enshrined in EU law. Due to this requirement, the formulation of EU law and the improvement of policies necessarily entail changes and modifications in domestic administrative functions and sometimes in the structure, too. It seems to be a never-ending mechanism to achieve a level of harmonisation even if the text of the Treaty says otherwise.

Hereby, the mechanisms shaping and connecting the national administrative system is presented topped with a recent influencing force: the fundamental rights protection.

<sup>3</sup>Support for Improvement in Governance and Management in Central and Eastern European Countries (SIGMA) is a joint initiative of the OECD and the European Union. The initiative supported public administration reform efforts in thirteen countries in transition, and is principally financed by the European Union's Phare Programme in order to meet EU accession requirements for the effective enforcement of EU law. "European Principles for Public Administration", SIGMA Papers, No. 27, OECD Publishing. <http://dx.doi.org/10.1787/5kml60zwd7h-en> (20.03.1015.) See also "Preparing Public Administrations for the European Administrative Space", SIGMA Papers, No. 23, OECD Publishing. <http://dx.doi.org/10.1787/5kml6143zd8p-en> (20.03.1015.)

## **2. Cooperation between administrative authorities of Member State having the same competence**

The EU supports the efforts of Member States to improve their administrative capacity to implement and apply EU law and the EU itself has established various mechanisms for administrative co-operation. The effective enforcement and execution of the *acquis* cannot always be ensured by the setting of common principles to be respected during procedures. Sometimes the implementation and execution requires not only adaption to procedural changes and the respect of principles but structural ones, too.

### *2.1. Legal institutions “facilitating the exchange of information”*

Opening of borders and the establishment of integral market created situations with cross-border features which inevitably connects authorities of different Member States.

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.<sup>4</sup> 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.<sup>5</sup> Therefore, authorities having the same

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<sup>4</sup> Food, pharmaceutical and medical devices fall out of the scope of RAPEX as they are covered by other mechanisms. Any defect in a medicinal product under their authorisation that could result in a recall or abnormal restriction on supply shall be communicated using the Rapid Alert Procedure. See, Article 40 of directive 2001/83/EC OF the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use. OJ L 311/67, 28.11.2001, and Article 44 of Directive 2001/82/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to veterinary medicinal products. OJ L 311/1, 28.11.2001, The mechanism of *Rapid Alert System for Food and Feed* is governed by 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, 15.1.2002.

<sup>5</sup> Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety. OJ L 11, 15.1.2002, [General Product Safety Directive (GPSD)] Article 6. and ANNEX II. See, Stephen Weatherill: *EU Consumer Law and Policy*. Edward Elgar Publishing, Cheltenham, 2013. p. 273-276.

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. On the basis of the decision of the Dangerous products can thus be withdrawn from the market and recalled from consumers everywhere in the European Economic Area thus the same level of EU law enforcement can be achieved without carrying out the same administrative procedure everywhere. This mechanism contributes to the activity of national consumer protection authority as alerts substitute for the whole procedure of an official control and the decision-making. Namely, rules concerning safety of products under the scope of the General Product Safety Directive shall be the same everywhere in the EU (and in the European Economic Area) thus in the particular case when a national authority declares that a product is not in conformity with the EU law, this decision is therefore normative for all the national authorities in all the Member States in which that product is on the market.

*In Hungary, the Hungarian Authority for Consumer Protection is responsible to cooperate in the RAPEX system. During this year, 41 alerts have already been shared.<sup>6</sup> Just for illustration: a toy pushchair named "Love Baby My Lovely" was withdrawn from the market because the product does not comply with the requirements of the Toy Safety Directive and the relevant European standards. In fact the safety lock and the frame are not sufficiently resistant to load and can easily release and break respectively; causing the pushchair to collapse and thus this may cause injuries to children.<sup>7</sup>*

## 2.2. Linking national authorities for a better application of EU law: horizontal cooperation

TFEU sets out the aim of abolishing all obstacles to free movement of goods, persons, services and capital between the Member States to create the internal market.<sup>8</sup> By the way, in 2001 *White Paper on European Governance* has already called the attention to help citizens and businesses to enjoy their rights created by EU law and it also affirms the responsibility of national administrations for enforcing and applying it correctly.<sup>9</sup>

<sup>6</sup> Between 1st January and 17 March 2015. Source of information: RAPEX Search Notification. <http://ec.europa.eu/consumers/safety/rapex/alerts/main/index.cfm?event=main.search> (17. 03.2015.)

<sup>7</sup> See: Notification Reference: A11/0010/15. [http://ec.europa.eu/consumers/safety/rapex/alerts/main/index.cfm?event=main.notification&search\\_term=A11/0010/15&exclude\\_search\\_term=0&search\\_year=2015](http://ec.europa.eu/consumers/safety/rapex/alerts/main/index.cfm?event=main.notification&search_term=A11/0010/15&exclude_search_term=0&search_year=2015) (17. 03.2015.)

<sup>8</sup> TFEU Article 26 (2).

<sup>9</sup> Communication from the Commission of 25 July 2001 "European governance - A white paper" COM(2001) 428 final, OJ C 287, 12.10.2001. p. 20-21.

*Horizontal cooperation* of national authorities means the procedure between national administrations or authorities aiming to solve problems related to the rights and obligations issuing from the four freedoms of internal market. Organs are created or assigned to cooperate as a part of a network on behalf of a citizen whose rights under EU law are breached by an authority of another Member State or by any other organs, service providers, companies which are obliged by the relevant EU rules. Organs of the network forms part of the administrative structure of the Member State however, they do not act with authority power; their main aim is to make connection between the individual and the party which is alleged to breach the EU law and then mediate between them. The procedure serves for the correction of misinterpretation of EU law or its wrong application and avoids judicial dispute resolution. This kind of mediation between the parties not only help people to exercise their rights guaranteed by EU law but eliminates difficulties, like distance and language, arising from the cross-border element. On the other hand, such mechanism also contributes to the proper execution of EU law by highlighting its improper application and interpretation by national administrative authorities and therefore it prevents unnecessary court proceedings and perhaps avoids infringement procedures.

SOLVIT is such network for informal problem resolution. Originally, it was established by a communication from the Commission which counted on an existing network of coordination centres in Member State created in 1997 to deal with internal market problem cases.<sup>10</sup> It aims to help EU citizens to enjoy their right guaranteed by EU in the internal market when the citizen or business faces extra obstacles in another member State. The applicant has the right to launch such proceedings at any time before the national SOLVIT centre which then will contact the SOLVIT centre of the Member State of that authority which allegedly breached EU law. Where other effective cross-border problem-solving mechanisms exist and are effective, SOLVIT is not intended to replace them, but to direct appropriate cases to those mechanisms.<sup>11</sup>

*The home centre of SOLVIT in Hungary is administered by the Minister for Justice.<sup>12</sup> A Hungarian citizen had worked for 20 years in Romania*

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<sup>10</sup> Framework Contract for projects relating to Evaluation and Impact Assessment activities of Directorate General for Internal Market and Services Evaluation of SOLVIT. Final Report November 2011. Centre for Strategy and Evaluation Services,[SOLVIT Report of 2011] p. 3.

<sup>11</sup> See Commission Recommendation of 7 December 2001 on principles for using "SOLVIT" – the Internal Market Problem Solving Network (Text with EEA relevance) (notified under document number C(2001) 3901, OJ L 331 , 15.12.2001. p. 79-82. SOLVIT Report of 2011. p. 13., Dacian C. Dragos - Bogdana Neamtu (eds.): *Alternative Dispute Resolution in European Administrative Law*. Springer, Heidelberg, 2014. p. 351-352.

<sup>12</sup> Art. 82 (8)ce of Government Decree No. 52/2014. (VI. 6.) on the tasks and competences of the Ministers; Before, the SOLVIT center was operated by the Minister of Foreign Affairs.

*and 18 in Hungary. When he applied for his pension in Hungary, the Hungarian authorities asked Romania to calculate his pension rights for the 18 years he worked there. Despite several reminders, no answer was received for almost a year. Owing to the intervention of the Romanian SOLVIT centre, the Romanian pension authority fulfilled its duty in accordance with the social rules of the EU and the problem was solved in 2 weeks.<sup>13</sup>*

SOLVIT is a general mechanism, but for special fields of law. The *Consumer Protection Cooperation Network* connects public authorities in all EU Member States (and EEA countries) who are responsible for the enforcement of EU rules for consumer protection. The network and the cooperation mechanism enable national consumer protection authorities to call on their counterpart in any of the Member State where the trader is located and ask for action to stop the infringement.<sup>14</sup> The problem solving mechanism has four actors, namely (1) the consumer, (2) the European Consumer Centre (ECC) of the State of the consumer's residence, (3) the ECC of the State where the enterprise is registered and (4) the foreign enterprise (registered in any EU Member State, Norway, or Iceland).

*The European Consumer Centre of Hungary is hosted by the Hungarian Authority for Consumer Protection, the central administrative authority of consumer protection. A Slovakian consumer bought a machine for household use from a Hungarian seller which broke down more times within a short time. The consumer notified the enterprise that he did not need further repair; he wanted to exercise the right of withdrawal and claimed for the refund of the purchase price. As the seller refused the claim, the consumer turned to the ECC and due to its intervention, the seller changed his mind quickly and reimbursed the purchase price after taking over the product.*

### *2.3. Linking national authorities with the EU for a better execution of the acquis: vertical cooperation*

*Vertical cooperation* takes place between national administrations and EU institutions and agencies and means sharing of tasks and competences between

Article 116 (1) m) of Government Decree No. 212/2010. (VII. 1.) on the tasks and competences of the Ministers and that of the State Secretary leading the Prime Minister's Office.

<sup>13</sup> See: Pension rights from different countries honoured. [http://ec.europa.eu/solvit/problems-solved/pension/index\\_en.htm](http://ec.europa.eu/solvit/problems-solved/pension/index_en.htm) (17.03.2015)

<sup>14</sup> See, Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws. OJ L 364, 9.12.2004, p. 1.



the EU and national authorities. The most significant example is the shared competence in competition law area.<sup>15</sup>

The European Commission and the national competition authorities in all EU Member States cooperate with each other through the *European Competition Network* (ECN). Through the ECN, the competition authorities inform each other of proposed decisions and take on board comments from the other competition authorities. In this way, the ECN allows the competition authorities to pool their experience and identify best practices but what is additional to a simple information network is the specificity of competition rules of the EU.<sup>16</sup> Beside cooperation, exchanging evidence and other information and coordinating investigations via the network, the collaboration may lead to the transfer of tasks and competences to the better competent authority or if it is a complicated case or the economic importance of it is above the EU threshold, the Commission is entitled to take over the procedure.<sup>17</sup>

Other EU agencies are set up to promote cooperation between national authorities with the leadership of an EU institution or other kind of organ. Frontex, the *European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union*, for example, was established in 2004 to help border authorities from different EU States work together.<sup>18</sup> Based on the principle of subsidiary, each national authority is obliged to perform its state specific border security tasks within its territory but those tasks which require a centralised solution such as the training, situation analysis, belongs to the centrum.<sup>19</sup> So the central body coordinates and determines tasks and the national border authorities execute them.

*Hungary accessed to the Schengen area on 21 December 2007 and became the participant of the Frontex.*<sup>20</sup> *The system connects National*

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<sup>15</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. OJ L 1, 4.1.2003, p. 1–25.

<sup>16</sup> Ioannis Lianos - Damien Geradin: *Handbook on European Competition Law: Enforcement and Procedure*. Edward Elgar Publishing, Cheltenham, 2013. p. 182–183.

<sup>17</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. OJ L 1, 4.1.2003, Article 11. Joint Statement of the Council and the Commission on the Functioning of the Network of Competition Authorities. 15435/02 ADD 1 DG C II, points 11–19.

<sup>18</sup> Sergio Carrera: *The EU Border Management Strategy FRONTEX and the Challenges of Irregular Immigration in the Canary Islands*. CEPS Working Document No. 261/March 2007. p. 4–5.

<sup>19</sup> Hélène Jorjy: *Construction of a European Institutional Model for Managing Operational Cooperation at the EU's External Borders: Is the FRONTEX Agency a decisive step forward?* CEPS Working Document No. 6/March 2007 p. 61.

<sup>20</sup> Report on the results of the negotiations on the accession of Cyprus, Malta, Hungary, Poland, the Slovak Republic, Latvia, Estonia, Lithuania, the Czech Republic and Slovenia to the European Union, prepared by the Commission's departments. See, <http://ec.europa.eu/enlarge->

*Frontex Point of Contacts with the Management Board of Frontex which is the central body with two representatives of the Commission (Directorate General Migration and Home Affairs). In Hungary, the Hungarian Police Aliens Division charged with the public order and public security, the protection of the state border, control of border traffic and maintenance of order at the state border, an armed law enforcement administrative authority, is the national contact point.*<sup>21</sup>

Vertical cooperation is a complex system because it organically connects authorities; it concerns scope of functions and powers. It is not only a mechanism for sharing information, it goes beyond. While horizontal cooperation might be considered as a simple form of information management, vertical cooperation means a complete structural cooperation with a central body and its local elements.<sup>22</sup>

### 3. Emerging new priorities: fundamental law protection shaping the structure of domestic administration

Why is that a different category? Respecting fundamental rights has been present since long in the history of the European integration and in its jurisdiction; however fundamental rights protection has been given renewed impetus with the Lisbon Treaty providing binding force to the *Charter of Fundamental Rights of the European Union* (Charter) and declaring the accession of the EU to the European Convention on Human Rights. Since then, fundamental rights issues evaluated in the execution of EU law.

Since the entry into force of the Charter on 1 December 2009, the protection of such rights has even evaluated as its Article 41 on the *good administration*<sup>23</sup> and all the other rights guaranteed to citizens are now legally binding

ment/archives/pdf/enlargement\_process/future\_prospects/negotiations/eu10\_bulgaria\_romania/negotiations\_report\_to\_ep\_en.pdf (20.03.2015) p. 60.

<sup>21</sup> Frontex National Authorities. <http://frontex.europa.eu/partners/national-authorities/> (20.03.2015)

<sup>22</sup> ReNEUAL Model Rules on EU Administrative Procedure. (eds.: Herwig C. H. Hofmann, Jens-Peter Schneider and Jacques Ziller et al.) Research Network on EU Administrative Law, 2014 Version for online publication [http://www.reneual.eu/publications/ReNEUAL%20Model%20Rules%202014/ReNEUAL-%20Model%20Rules-Compilation%20Books%20I\\_VI\\_2014-09-03.pdf](http://www.reneual.eu/publications/ReNEUAL%20Model%20Rules%202014/ReNEUAL-%20Model%20Rules-Compilation%20Books%20I_VI_2014-09-03.pdf) (30.03.2015.) [ReNEUAL Model Rules] Book VI. I. (1). "(1) Book VI applies to the following information management activities of public authorities based on EU law.

- (a) exchange of information according to a structured information mechanism,
- (b) exchange of information under a duty to inform without prior request,
- (c) establishment and use of a database."

<sup>23</sup> See on this right especially: Chronowski, Nóra: Mikor megfelelő az ügyintézés? Uniós és magyar alapjogvédelmi megfontolások. (When is Administration Carried out Appropriately?

obligations addressed not only to the institutions and bodies of the EU but also to the administrative authorities of Member States when they are implementing and applying EU law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.<sup>24</sup>

Hereby, two examples are presented to highlight the influence of fundamental law protection on national administration. One recent challenge is the data protection which requires that the compliance with the relevant rules of the Charter shall be subject to control by an independent authority.<sup>25</sup>

### *3.1. The structure and status of a national administrative authority: data protection authorities in the view of EU requirements*

The 1995 directive on the protection of individuals regarding the processing of personal data and the free movement of such data was a vital instrument which ordered that data protection authorities must be able to act with “*complete independence*” [Art. 28(1)]. The meaning of complete independence was neither clarified, nor important for years and the characteristic of an independent authority has just been clarified some years ago in the occasion of two other infringement procedures in the same context: the independence of the data protection authority in Germany and in Austria.

In the German infringement procedure opened in 2007 and closed in 2009 independence was found to have been infringed by a system in which the federal state (*Länder*) data protection officers were subject to parliamentary oversight and therefore, theoretically susceptible to having their actions controlled by politicians.<sup>26</sup> Two years later, in an Austrian case, independence was also found to be infringed. The reason was the location of data protection officer within the Federal Chancellery, who remains as the supreme administrative institution competent for the national supervisory authority, assisted by a civil service staff reporting up through the Federal Chancellery to a minister.<sup>27</sup>

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Considerations Related to the EU and Hungarian Protection of Fundamental Rights) *Magyar Jog*, Vol. 64, No. 3, 2014, p. 137-141.

<sup>24</sup> Charter of Fundamental Rights of the European Union, OJ C83/389, 30.3. 2010, [Charter] Article 51.

<sup>25</sup> Charter Article 8 (3).

<sup>26</sup> Case C-518/07, 9 March 2010. Alexander Balthasar: ‘Complete Independence’ of National Data Protection Supervisory Authorities – Second Try: Comments on the Judgment of the CJEU of 16 October 2012, C-614/10 (European Commission v. Austria), with Due Regard to its Previous Judgment of 9 March 2010, C-518/07 (European Commission v. Germany). *Utrecht Law Review*, Volume 9, Issue 3 (July) 2013. p. 26.

<sup>27</sup> Case C-614/10, 16 October 2012; Balthasar 26-27.

In both cases, the any compromise of the independence of the office was theoretical; concrete interference with the independence of the data protection authority was not alleged.<sup>28</sup> However, the main characteristic of an independent authority was declared by the ECJ: the lack of possibility of political influence. Two more years later, in the case of Hungary, this criteria was violated by the re-establishment of the institution of data protection in a way that a new person in charge was appointed to the head of the new authority by indirect political forces, while the former one was removed suddenly, without being able to finish his 6 year-term.

*In Hungary, the ombudsman was in charge for data protection at that time, which was appointed by a previous parliament and was mid-way through a six-year term in 2011 when his office was terminated and a new data protection authority belonging to the executive power of the State was established with a new person in charge as the president of the authority. The new person responsible for the representation of data protection was appointed by the President of the Republic upon the nomination of the prime minister.*<sup>29</sup>

The European Court of Justice declared this structural change incompatible with EU standards of data protection expressed in secondary sources and in the Charter itself. For Hungary, the judgment was rather a notice, but in the two other States the structure of the data protection authorities need to be re-organized. Beside the fact, that for Hungary the judgment was only declarative upon the method of the change of data protection model, all in all, the protection of the fundamental law concerning data protection gained better protection by the ECJ through the summarizing of the requirements of independence.

### *3.2. Administrative procedure and fundamental rights: national Frontex procedure and the right to make a complaint against it*

In addition to the independent status of data protection authorities, other fundamental right issues emerged which put a highlight on structural problems of administrative authorities. In both data protection cases, internal remedy was available: “an alteration of the reporting relationships to get the data protection offices out from under direct political oversight”.<sup>30</sup> The administrative proce-

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<sup>28</sup> See, Kim Lane Scheppele: Making Infringement Procedures More Effective: A Comment on Commission v. Hungary, Case C-288/12 (8 April 2014). *Eutopia law* April 29 2014. [http://eutopialaw.com/2014/04/29/making-infringement-procedures-more-effective-a-comment-on-commission-v-hungary-case-c-28812-8-april-2014-grand-chamber/\(20.03.2015\)](http://eutopialaw.com/2014/04/29/making-infringement-procedures-more-effective-a-comment-on-commission-v-hungary-case-c-28812-8-april-2014-grand-chamber/(20.03.2015))

<sup>29</sup> Article 40 (1) of Act CXII of 2011 on the Right of Informational Self-Determination and on Freedom of Information (Info Act).

<sup>30</sup> Scheppele: *supra*.

ture of the data protection authority in Hungary is at one level, only the judicial supervision of the decision is available; there is no appeal in the organization of the public administration system, there is no internal remedy only external, judicial one is available according to the general rules of procedures.<sup>31</sup> Recently, a similar problem has occurred in the structure of the integrated information exchange mechanism. In fact, the EU Ombudsman, the supervisor of the EU administration,<sup>32</sup> conducted an investigation into the compliance of Frontex with human rights obligations under Regulation 1168/2011/EU and the European Charter. It criticised Frontex for not establishing an *internal complaints* mechanism to deal with alleged individual fundamental rights breaches in the course of its work. Frontex has decided not to rectify this, arguing that hearing individual complaints is the obligation of the relevant individual Member State whose officer was in charge when the decision in question was taken.<sup>33</sup>

*Regulation 1168/2011/EU explicitly provides that it shall fulfil its tasks in full compliance with the Charter of Fundamental Rights and requires Frontex to put in place certain administrative mechanisms and instruments to promote and monitor compliance with its obligations as regards respect for fundamental rights. As to the possibility of providing for a complaints mechanism for persons affected by its activities, Frontex pointed out that, first, it has no executive power and second, its task is only to coordinate the cooperation of the EU Member States and the Schengen Area, the executive power is vested in Member State authorities so only they can perform activities which may affect individuals' rights. As Frontex sees, persons claiming that their rights have been violated by these authorities may therefore make use of both national and EU mechanisms to file a complaint.*<sup>34</sup>

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<sup>31</sup> Info Act Article 22. (1) See, Kim Lane Scheppele: Making Infringement Procedures More Effective: A Comment on Commission v. Hungary, Case C-288/12 (8 April 2014). *EUtopia law* April 29 2014. [http://eutopialaw.com/2014/04/29/making-infringement-procedures-more-effective-a-comment-on-commission-v-hungary-case-c-28812-8-april-2014-grand-chamber/\(20.03.2015\)](http://eutopialaw.com/2014/04/29/making-infringement-procedures-more-effective-a-comment-on-commission-v-hungary-case-c-28812-8-april-2014-grand-chamber/(20.03.2015))

<sup>32</sup> See in details: Linda C. Reif: *The Ombudsman, Good Governance, and the International Human Rights System*. Martinus Nijhoff Publishers, Leiden, 2004. p. 373-375.

<sup>33</sup> European Ombudsman Special Report to the European Parliament concerning Frontex refusal to introduce an internal complaints mechanism. [http://www.asylumlawdatabase.eu/en/content/european-ombudsman-special-report-european-parliament-concerning-frontex-refusal-introduce/\(20.03.2015\)](http://www.asylumlawdatabase.eu/en/content/european-ombudsman-special-report-european-parliament-concerning-frontex-refusal-introduce/(20.03.2015))

<sup>34</sup> Decision of the European Ombudsman closing own-initiative inquiry OI/5/2012/BEH-MHZ concerning the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex) 12 Nov 2013.[Ombudsman decision 2013] point 22. [http://www.ombudsman.europa.eu/en/cases/decision.faces/en/52477/html.bookmark/\(20.03.2015\)](http://www.ombudsman.europa.eu/en/cases/decision.faces/en/52477/html.bookmark/(20.03.2015))

Nevertheless, Frontex provides for internal procedures allowing for individuals to inform it of possible infringements of fundamental rights. First, there is a reporting obligation imposed on participants in Frontex activities; second, there is an incident reporting system, and third, a new standard operating procedure is established requiring full consideration of reports, from any source and submitted via any means, of possible fundamental rights violations in Frontex coordinated activities.<sup>35</sup> The Frontex also submitted that their *Fundamental Rights Officer* (FRO) is an independent staff member who reports directly to the Management Board and performs a *monitoring role*. Fundamental rights protection is therefore continuously verified.<sup>36</sup>

The Ombudsman suggested that *reporting obligations* and *complaints mechanisms* are not alternatives; they are just complementary means to guarantee the effective protection of fundamental rights.<sup>37</sup> The Ombudsman suggested FRO considering dealing with individual complaints about fundamental rights infringements.

*As for fundamental rights infringements, there are three scenarios. (1) When it is committed by officers who are not staff members of Frontex, including guest officers who act under the responsibility of the relevant Member States but wear a Frontex armlet, Frontex could not deal with the substance. However, it could assist complainants by forwarding complaints rapidly to the competent authority of the Member State(s) concerned, such as, for instance, national Ombudsmen.<sup>38</sup> Handling complaints by the FRO could mean, at least, transferring the complaints to the competent Member State authority or to a national ombudsman supervising that authority. In this respect, the Ombudsman noted that a monitoring mechanism for fundamental rights breaches should be established at the EU level. (2) When it is due to the Frontex's staff, the Ombudsman could accept that they are deployed for coordination tasks only, but this could not absolve Frontex from responsibility for acts performed by its staff in exercising their coordination role.<sup>39</sup> For their conducts, Frontex must take re-*

<sup>35</sup> Decision of the European Ombudsman closing own-initiative inquiry OI/5/2012/BEH-MHZ concerning the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex) 12 Nov 2013. [Ombudsman decision 2013] point 22. <http://www.ombudsman.europa.eu/en/cases/decision.faces/en/52477/html.bookmark> (20.03.2015.)

<sup>36</sup> Ombudsman decision 2013 point 27.

<sup>37</sup> Special Report of the European Ombudsman in own-initiative inquiry OI/5/2012/BEH-MHZ concerning Frontex. <http://www.ombudsman.europa.eu/en/cases/specialreport.faces/en/52465/html.bookmark> (20.03.2015.) 12 Nov 2013, [Special Report of the European Ombudsman] point 23.

<sup>38</sup> Special Report of the European Ombudsman point 39.

<sup>39</sup> Special Report of the European Ombudsman points 28-29.

sponsibility.<sup>40</sup> (3) *When the complaint is about the organisation, execution or consequences of a joint operation, which do not refer to the conduct of specific individuals, the procedure depends on the specific complaint. In all cases, Frontex is in a better position than the potential complainant to identify who should have responsibility for answering on the substance of the complaint. For such cases, Frontex has already undertook to promote a swift processing of potential complaints lodged by migrants with the respective Member State authorities in the course of joint operations.*<sup>41</sup>

The Ombudsman considered that the broad mandate of FRO would allow Frontex to entrust the FRO with the power to deal with individual complaints and the fact that the FRO has no executive powers as such certainly does not stand in the way of dealing with complaints.<sup>42</sup> Nevertheless, in order to fulfil its fundamental rights responsibilities in accordance with principles of good administration articulated in Article 41 of the Charter, Frontex should establish a complaints mechanism.<sup>43</sup>

During the procedure, Frontex took efforts to clarify the disputed parts of its Fundamental Rights Strategy and Code of Conducts, and the Ombudsman declared that Frontex had adequately addressed the Ombudsman's recommendations except for one. Regarding the effective complaint mechanism the Ombudsman stated again that reporting obligations and complaints mechanisms are not alternatives. *"They constitute rather complementary means to guarantee the effective protection of fundamental rights. In the Ombudsman's view, without the latter, compliance cannot ultimately be effective."*<sup>44</sup> In connection with the recommendation stating that Frontex could consider taking the following further action as regards the FRO *"(i) taking any possible action to enable the FRO to consider dealing with complaints on infringements of fundamental rights in all Frontex activities submitted by persons individually affected by the infringements and also in the public interest, and (ii) providing adequate administrative support for that"*,<sup>45</sup> the Ombudsman made a special report to Parliament.<sup>46</sup>

<sup>40</sup> Special Report of the European Ombudsman point 38.

<sup>41</sup> Special Report of the European Ombudsman points 38-39.

<sup>42</sup> Special Report of the European Ombudsman points 47-48.

<sup>43</sup> Special Report of the European Ombudsman point 51.

<sup>44</sup> Decision of the European Ombudsman closing own-initiative inquiry OI/5/2012/BEH-MHZ concerning the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex) <http://www.ombudsman.europa.eu/hu/cases/decision.faces> (20.03.2015) [Decision of the European Ombudsman closing own-initiative inquiry] p. 86-138. point F. Conclusion

<sup>45</sup> Decision of the European Ombudsman closing own-initiative inquiry point M.

<sup>46</sup> Presentation by the European Ombudsman, Emily O'Reilly, to Committee on Petitions, European Parliament, of the Special Report following own-initiative inquiry OI/5/2012/BEH-

#### 4. Future challenges in the view of fundamental rights

Even the future procedural code of the EU administration emphasizes the necessity of the proper guarantee of procedural rights. It recognize the right of the parties, without prejudice to the existing legal remedies, *"to file a complaint against the responsible official, the deciding authority, or any other official who takes part in the procedure where they fail to comply with their obligations under the model rules, whether intentionally or through negligence."*<sup>47</sup> Given the fact that this requirement has already been reinforced by the Court of Justice<sup>48</sup> and thus the Model Rules only codifies it. Following the example of the Frontex, all collaboration mechanism between EU institutions and agencies (direct administration) and national authorities (indirect administration) could be supervised systematically in the view of compatibility of fundamental rights and whether the structure of authorities or the procedural rules of cooperative mechanisms, in summary, the execution of the EU acquit is in conformity with the fundamental values.

The inquiry of the Ombudsman highlighted a significant influence of fundamental rights on the status of administration. Principles of administrative law can also be classified as procedural human rights that guarantee fairness and administrative justice.<sup>49</sup> The execution of EU tasks and competences so as the cooperation of direct and indirect administration is now facing a new challenge. Fundamental rights protection has gained legal force by the Lisbon Treaty and

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MHZ concerning FRONTEX. Brussels, 26 November 2013. <http://www.ombudsman.europa.eu/en/activities/speech.faces/en/52654/html.bookmark> (20.03.2015) Report in accordance with Article 3. 7. of Decision of the European Parliament on the regulations and general conditions governing the performance of the Ombudsman's duties. Adopted by Parliament on 9 March 1994 (OJ L 113, 4.5.1994, p. 15) and amended by its decisions of 14 March 2002 (OJ L 92, 9.4.2002, p. 13) and 18 June 2008 (OJ L 189, 17.7.2008, p. 25. Reif: supra, p. 377.

<sup>47</sup> ReNeual Model Rules, Book III-8 Management of procedures and procedural rights

<sup>48</sup> Cases cited by the ReNEUAL Model Rules p. 107-108.: Ley 30/1992, de 26 de noviembre, de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común (BOE núm. 285, de 27.11.1992), modificada por última vez por la Ley 27/2013, de 27 de diciembre, de racionalización y sostenibilidad de la Administración Local (BOE núm. 312, de 30.12.2013), Arts 35(j), 41(2); Council of Europe Recommendation CM/Rec(2007)7 of the Committee of Ministers to member states on good administration, Art 23(4). The material liability standard is taken from Regulation 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community ('Staff Regulations') [1962] OJ 45 last amended by Regulation (EU, Euratom) 1023/2013 of the European Parliament and of the Council of 22 October 2013 amending the Staff Regulations of Officials of the European Union and the Conditions of Employment of Other Servants of the European Union [2013] OJ L287/15, Art 86(1) on disciplinary liability of EU officials.

<sup>49</sup> Reif: supra, p. 380.



got a new place in the legal order of the EU. Although the jurisdiction of the EU has always put emphasize on respecting the common fundamental values of Member States but now, with a reloaded impetus, fundamental rights protection predicts important implications for both direct and indirect administrative structure of the EU and that is why the meaning of Article 197 of TFEU needs to be interpreted in the view of a continuous shaping mechanism caused by the non-stop development of the EU itself.

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## **Az EU jog hatása a nemzeti közigazgatásra különös tekintettel az alapjogvédelemben megtestesült új kihívásra**

**Összefoglalás:** A közigazgatás mindig is a tagállamok hatáskörébe tartozó terület volt, ugyanakkor a nemzeti közigazgatásnak olyan módon kell az uniós jogot érvényre juttatni, hogy az európai polgárok bármelyik tagállamban ugyanolyan eredménnyel gyakorolhassák az EU által garantált jogaikat. Tekintettel arra, hogy az EU joganyaga a tagállami közigazgatási struktúrára támaszkodva érvényesül, ez egyúttal azt is jelenti, hogy az Unió a nemzeti közigazgatás szervezetét és működését általános elvárások révén befolyásolja, valamint a joganyagának megfelelő érvényesítése, végrehajtása érdekében különböző mechanizmusokat dolgoz ki. A tanulmány először a tagállami közigazgatási hatóságok EU jog végrehajtásában játszott szerepéről szól, majd kategorizálja és elemzi azok különböző, belső piacot körülfonó együttműködési mechanizmusait, végül pedig az alapjogvédelemben megtestesült legújabb kihívásokat mutatja be, amelyekkel a tagállami közigazgatási hatóság az uniós jog érvényesítése és végrehajtása vonatkozásában szembesülnek.

**Kulcsszavak:** európai közigazgatás, hálózatok, alapjogvédelem, jó közigazgatás

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## **Утицај права Европске уније на јавну управу у државама чланицама, с посебним освртом на изазове у вези са заштитом људских права и слобода**

**Сажетак:** Јавна управа се одувек смањрала облашћу која сјада у надлежност држава чланица Европске уније. Међутим, орјани управе у државама чланицама имају обавезу да комунијарно право примењују на онај начин, који омоћућава грађанима Уније осћваривање својих права, јарантиованих комунијарним правом, са идентичним правним последицама у било којој држави чланици. С обзиром на то да се комунијарно право осћварује уз помоћ јавне управе у државама чланицама, Унија настоји да иућем начелних очекивања ућиче на орјанизацију и делатност јавне управе у државама чланицама и развија различите правне механизме којима се иосћиже задовољавајућа примена комунијарног права у државама чланицама. У раду се најпре размајра улога националних орјана јавне управе у примени комунијарног права. Након тога се врши катероризација и анализа различитих механизма сарадње, којима се иежи заштити унуирашње иржине. На крају рада даје се приказ најновијих изазова у вези са заштитом људских права и слобода, са којима се орјани јавне управе у државама чланицама суочавају ириком осћваривања и примене комунијарног права.

**Кључне речи:** европска јавна управа, мреже сарадње, заштита људских права и слобода, добра управа