

## Administrating Data Protection\*

– or the Fort Knox of the European Composite Administration –

### Zusammenfassung

*Nationales Datenschutzrecht wird zunehmend von Regelwerken auf europäischer Ebene beeinflusst. Neben der Europäischen Menschenrechtskonvention des Europarats sind vor allem die Grundrechtecharta der Europäischen Union und die speziellen Vorschriften der europäischen Verträge zu nennen. Dieser Trend spiegelt sich auch im Hinblick auf verwaltungsrechtliche Strukturen des Datenschutzrechts wider. Die Entwicklung zu einem europäischen Verwaltungsverbund innerhalb der Europäischen Union wirft daher verfassungsrechtliche Fragen nach Legitimität, Transparenz und Verantwortlichkeit der handelnden Organe auf. Der Entwurf der Europäischen Kommission zu einer Datenschutz-Grundverordnung ebenso wie die Änderungsvorschläge des Europäischen Parlaments sind Ausdruck einer zusammenwachsenden Verwaltungsstruktur, der verfassungsrechtliche Garantien fehlen. Grundsätzlich wird die Ermächtigung der Europäischen Union zur Schaffung eines europäischen Verwaltungsrechts mit weitreichenden konstitutionellen Implikationen für die Mitgliedstaaten in Frage gestellt.*

### Résumé

*Les législations nationales relatives à la protection des données sont influencées de plus en plus par des réglementations au niveau européen. Outre la Convention européenne des droits de l'homme du Conseil de l'Europe, il convient de mentionner surtout la Charte des droits fondamentaux de l'Union européenne, ainsi que les règles spécifiques prévues par les traités européens. Cette tendance se manifeste de même dans le contexte des structures administratives de la protection des données. Ainsi, le développement vers une Administration européenne composite soulève des questions de droit constitutionnel quand à la légitimité, la transparence et la responsabilité des organismes agissants. Le projet de règlement relatif à la protection des données personnelles de la Commission européenne, ainsi que les modifications proposées par le Parlement européen reflètent une structure administrative intégrée, manquante de garanties con-*

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*stitutionnelles. En principe, le fait d'autoriser l'Union européenne d'instaurer un droit constitutionnel administratif au niveau européen comportant des implications constitutionnelles étendues pour les Etats membres est mis en question.*

## *I. Navigating the legal landscape of data protection*

Data protection in Europe is today realized through a complex setting of rules where national rules are increasingly intertwined with rules at the European level, stemming from the *European Union* as well as from the *Council of Europe*. Most prominent at the European level are in this field the Treaties of the *European Union*, the EU Charter on Fundamental Rights (hereafter the Charter), the Data Protection Directive of the *European Union*<sup>1</sup> and the European Convention on Human Rights and Fundamental Freedoms (ECHR), especially its Article 8, and the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data. These documents have a clear impact on the level and content of national data protection in a very broad manner even though treated in different ways depending on the constitutional structure of the State. The impact is, however, clear and dominant no matter what the constitutional features of the Member State in question. Given the universal impact of the rules, one can conclude that the impact of these rules is found everywhere in society, and in every field of law.

The European rules are however undergoing changes due to constraints relating to modern technologies and globalization, which have been quite manifest in recent times, not least within the political field following the Snowden case. The EU legislator has not hesitated to act in response to these developments.<sup>2</sup> The demands for new rules that are more adapted to present day living conditions, communication and society have led to several new legislative proposals, especially the *European Commission* proposal for a General Data Protection Regulation.<sup>3</sup> The authors are members of two European research projects, *BBMRI.se*<sup>4</sup> and *BiobankCloud*,<sup>5</sup> and have in this capacity had the opportunity to study the proposal in the context of international research collaboration. These two projects attempt to further medical research by creating a workable research infrastructure and IT solutions to process human biological samples including associated medical data. It is noteworthy that researchers in biobanking and epidemiology have

1 Directive 95/46/EC of the *European Parliament* and of the *Council*, 23/11/1995.

2 See for example Press release from the *European Commission* – MEMO/14/60, 27/01/2014.

3 *Commission* proposal for a Regulation of the *European Parliament* and of the *Council* on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), COM (2012) 11 final. The *European Parliament* passed a legislative resolution on 12 March 2014 in its first reading, P7\_TA (2014) 0212, accepting those amendments suggested by the LIBE committees relevant here.

4 The Biobanking and Biomolecular Resources Research Infrastructure (BBMRI.eu), a pan-european research infrastructure financed by the EU, the Member States and associated countries. BBMRI.se is the Swedish branch.

5 Funded by the *Commission* under the 7<sup>th</sup> framework decision.

quite a fright on behalf of the proposal for a General Data Protection Regulation,<sup>6</sup> especially the amendments set forward by the LIBE Committee in the *European Parliament* regarding stricter rules for informed consent when health data is used for research purposes.<sup>7</sup> One can conclude that data protection is a crucial part of research, especially in the field of health, even though this has unfortunately not been underlined in the public debate or in the legislative one.

The content and scope of data protection are ultimately decided through the realization of the rights in its practical implementation, i.e. the administrative structure of data protection. The authors have noticed that the suggested administrative structures in the proposal of a Data Protection Regulation raise new questions fundamentally constitutional in character. First of all, how will citizens be able to interact with the new forms of composite administration at the European level and how is this composite administration controlled? Secondly, administrative structures beyond the nation state in themselves may encounter difficulties in responding to traditional legal values such as transparency, participation and accountability. How are European and national public organs to respond to this? Thirdly, the relationship between the administration and national and European democratically elected parliaments, national governments and courts adds more fragments to an already fragmented picture setting old models and views of separation of powers and constitutional organs aside. This is especially the case in the field of data protection as rules decided beyond the nation state have firm implications at the very core of the state and its fundamental values. This in turn leads the way for a questioning of what organs are to be considered as the legislator and executive – and how they can interrelate. In this article we reflect upon some of these matters, as we wonder if a European composite administration for data protection ever can be balanced.

## II. *The development towards a European composite administration*

The realisation of EU law within the Member States has traditionally been a matter for Member States to resolve independently from the EU. According to the principle of loyal cooperation in Article 4.3 TEU and the doctrine of *effet utile*, the Member States are under the obligation to make every effort to see to that EU law is applied correctly and uniformly within each state, but how this is done more precisely is for the Member States to decide. The point of departure thus is that Member States enjoy what is usually referred to as institutional and procedural autonomy.<sup>8</sup> One of the more significant trends

6 Several actions have been undertaken by stakeholders in the biobanking community, for example, a statement from EUORDIS, an organisation for rare diseases in *Europe*, <http://download.eurordis.org/documents/pdf/DataProtectionStatement22Feb2013.pdf>. See also D. Mascalzoni, B.M. Knoppers, S. Aymé, M. Macilotti, H. Dawkins, S. Woods & M.G. Hansson, Rare diseases and now rare data?, *Nature Reviews Genetics*, May 2013, vol. 14 issue 5.

7 Report of the 22 November 2013 on the proposal for a Regulation of the *European Parliament* and of the *Council* on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), Committee on Civil Liberties, Justice and Home Affairs, PE 501.927 v 05-00 A7-0402/2013.

8 See Cases 51-54/71 *International Fruit Company v. Produktschap voor groenten en fruit* [1971] ECR, p. 1107, para. 4, and Case 33/76 *Rewe-Zentralfinanz v. Landwirtschaftskammer für das Saarland* [1976] ECR, p. 1989, para. 5.

in the evolution of European administrative law is that this distinction no longer can be upheld; the previous clear separation of duties has been superseded by forms of administrative co-operation between administrative bodies in the EU and its Member States.<sup>9</sup> This trend can be explained with reference to Article 197.1 Treaty on the Functioning of the *European Union* (TFEU), which states that the effective implementation of EU law by the Member States shall be regarded as a matter of common interest. It is up to Member States to implement EU law, but it is a matter of common interest that – and not seldom how – it is done. Further, even though the competence of the EU to regulate the internal administrative functions of the Member States is limited, it has for long been accepted that the EU may introduce minimum rules of functions and procedures on the basis of substantive EU law, for example, with respect to the Internal Market.

Alongside the effective mechanisms for court control in the form of preliminary rulings, Article 267 TFEU, and mechanisms of institutional control in form of the *Commission* infringement procedures, 258 TFEU, there is today a growing amount of administrative mechanisms to facilitate enforcement of EU law at the national level, either in form of mechanisms for the individual to use vis-à-vis a public authority,<sup>10</sup> or mechanisms to facilitate cooperation between the public authorities.<sup>11</sup> It is in this circumstance of relevancy that the EU's own administration has grown significantly, through the establishment of over 30 independent European authorities. The EU authorities have different characteristics, but most of them, the so-called regulatory agencies, have the overall task of promoting the implementation of EU law in different ways.<sup>12</sup> These factors constitute the central building blocks of a new form of administrative institutional structure, consisting of European and national agencies that cooperate in implementing the policies and legislation enacted by the EU legislator. In legal doctrine, the cooperation is often referred to as an integrated or composite administration, since its basic structure is horizontal, administrative organs at the same level collaborating in a non-hierarchical manner.<sup>13</sup>

Even though the European and national administrative organs collaborate closely, they remain part of their respective constitutional legal order. Thus, the European composite administration is not organised under one coherent political structure. Neither the

9 Schwarze, J., *European Administrative Law*, rev. ed. London, 2006, p. cxiii.

10 For example a right to be heard in connection to free movement of goods, Article 6 Regulation (EC) No 764/2008 of the *European Parliament* and of the *Council* of 9 July 2008 laying down procedures relating to the application of certain national technical rules to products, and the tacit authorization procedure in Article 13 Directive 2006/123/EC of the *European Parliament* and the *Council* of 12 December 2006 on services in the internal market.

11 Several internal market acts contain rules regarding introduction of contact points etc., see product contact points in Article 9 in the above-mentioned Regulation on Goods, 764/2008/EC, and liaison points for mutual cooperation in Article 28 of the Services Directive 2006/123/EC.

12 Communication from the *Commission* to the *European Parliament* and the *Council* of 11 March 2008: *European Agencies – The way forward*, COM(2008) 135 final.

13 Hofmann, H.C.H. & Türk, A.H., *The Development of Integrated Administration in the EU and its Consequences*, ELJ, vol. 13 No. 2 (2007), p. 253-271 and Schmidt-Aßmann, E., *Introduction: European Composite Administration and the Role of European Administrative law*, in Jansen, O. & Schöndorf-Haubold, B. (eds.), *The European Composite Administration*, Cambridge, 2011.

EU nor the Member States can by themselves steer or control the European composite administration as a whole. Instead, the composite administration is part of all 29 constitutional orders at the same time, the EU and the 28 Member States.<sup>14</sup> The developing administrative structures within the composite administration should be seen in the light of this constitutional setting.

### III. *The administrative structure for data protection within the EU*

The administrative features presented above are apparent in the area of EU data protection. The area is harmonized via secondary legislation, also including rather extensive instructions to the Member States on how to organize the administration of privacy rules at the national level. There are several agencies and bodies at the European level which are tasked with monitoring the application of EU privacy rules and to support the application of the rules within the Member States.

#### 1. *The constitutional grounding of the administrative structure for data protection*

An important aspect of the institutional setting within this field is that the independence of the authorities has been given a constitutional denomination. Both Article 16 TFEU and Article 8 Charter state that compliance with data protection rules shall be subject to control by an independent authority. Under the current regime, each Member State is to assign an independent supervisory authority with the responsibility of monitoring the application of the Data Protection Directive.<sup>15</sup> At Union level, a European Data Protection Supervisor has the equivalent task vis-à-vis the EU institutions under Regulation 45/2001.<sup>16</sup> There are also specialized agencies for the surveillance of data protection, such as the two joint supervisory bodies (JSBs) for Europol and Eurojust respectively,<sup>17</sup> and a joint supervisory authority (JSA) for the Schengen agreement.<sup>18</sup> Further, Article 29 of the Data Protection Directive establishes a Working Party on the Protection of Individuals with Regard to the Processing of Personal Data, commonly referred to as the Article 29 Working Party, which has been established as an independent advisory group. Lastly, there is the European Network and Information Security Agency, functioning as a center of expertise in network and information security, with the aim to

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- 14 Reichel, J., *Ansvarutkrävande – svensk förvaltning i EU* [Accountability – Swedish Administration in the EU], Stockholm, 2010, p. 213.
- 15 Art. 28 Data Protection Directive. See Case C-518/07, *European Commission v. Federal Republic of Germany*, 9 March 2010 and Case C-614/10, *European Commission v. Republic of Austria*, 16 October 2012.
- 16 Art. 41 Data Protection Directive.
- 17 Art. 17, 18 and 23 of *Council* Decision of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime and Art. 10 *Council* Decision of 6 April 2009 establishing the *European Police Office (Europol)*.
- 18 Art. 115 Schengen Convention. See further, Hofmann, H. C.H., Rowe, G.C., Türk, A.H., *Administrative Law and Policy of the European Union*, Oxford, 2011, pp. 483-485.

stimulate the cooperation between the public and private sectors.<sup>19</sup> The proposed Data Protection Regulation suggests a further strengthening of these administrative structures in several respects.

## 2. Delegated and implementing powers

In the current regime under the Data Protection Directive, the powers of the *Commission* to enact delegated or implementing acts are limited to the areas of transfer of data to third countries. The *Commission* may, together with a comitology committee,<sup>20</sup> assess the level of protection of data in third countries, conclude that it is adequate<sup>21</sup> and may draft standard contractual clauses for the purpose of transfer of data to third countries.<sup>22</sup> In contrast, the proposal for a Data Protection Regulation contains delegated powers in vast areas.<sup>23</sup> If this will be the case also in the final draft of the Regulation remains to be seen. It is in this connection interesting to note that the LIBE committee in the *European Parliament* has added a new dimension to the central role of the *Commission*, by proposing that the *Commission* should be given the task of defining the area in which the Member States may allow non-consented personal health data to be used for research. According to Article 81.2 a in the LIBE working paper<sup>24</sup>, the Member States may allow processing of health data in research, without previous consent from the patient, only if the research in question is of "high public interest". However, in Article 81.3 it is stated that it is the *Commission* that decides what is to be considered "high public interest". Since this would – most likely – also cover the possibility to re-use health data for further research purposes than covered by the initial consent, a practice that today is widely used and allowed under the current regime as long as appropriate safeguards are in place,<sup>25</sup> this position gives the *Commission* great influence over the Member States' ability to govern their research policies in this field.

19 Regulation (EU) No 526/2013 of the *European Parliament* and of the *Council* of 21 May 2013 concerning the *European Union Agency for Network and Information Security* (ENISA) and repealing Regulation (EC) No 460/2004.

20 Art. 31 Data Protection Directive.

21 Art. 24.4 and 6 Data Protection Directive.

22 Art. 25.6 Data Protection Directive.

23 Art. 86 Data Protection Regulation lists the cases where the *Commission* may enact delegated acts, around 25. Further, around 20 Articles provide that the *Commission* may enact implementing acts.

24 Report of 22 November 2013 on the proposal for a Regulation of the *European Parliament* and of the *Council* on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), *Committee on Civil Liberties, Justice and Home Affairs*, PE 501.927 v 05-00 A7-0402/2013. The amendment was accepted by the *European Parliament* in its legislative resolution on 12 March 2014, P7\_TA (2014) 0212.

25 Art. 6 b Data Protection Directive.

### 3. *Enforcement tools for the individual*

One of the tasks of the independent supervisory authorities is to act on behalf of the individual data subject whose rights under the Data Protection Directive may have been infringed. The Data Protection Directive states that each supervisory authority shall hear claims lodged by any person, or by an association representing that person, concerning the protection of his rights and freedoms in regard to the processing of personal data.<sup>26</sup> In the Draft Data Protection Regulation the right for any body, organization or association to lodge complaints has been extended in such a manner that it no longer is necessary that an infringement be connected to an individual data subject.<sup>27</sup> Data subjects may in addition take judicial actions against any infringements of their rights.<sup>28</sup> The proposed Regulation also foresees the difficulties that may arise when data subjects are involved in cross border data processing, whereby a data subject may be subject to or concerned by a decision taken by a supervisory authority in another Member State. According to Article 74.4 of the Regulation, the data subject may in such a case request the supervisory authority of his or her own Member State to bring proceedings on his or her behalf. Another novelty regarding the availability of individual enforcement tools is the introduction of a failure to act procedure in the Regulation, granting the data subject a judicial remedy obliging the supervisory authority to act on a complaint.

It is clear from this short description that the aim of both the current Directive, and even more so, the proposed Regulation, is to provide the data subject, or association acting on his or her behalf, with instruments and tools to enable an effective application of the data protection legislation at the administrative level. The principles of institutional and procedural autonomy are thus limited. Even though the national authorities are under the obligation to take all necessary action to ensure the correct and uniform application of EU law, these tools will definitely be helpful for individuals to rely on in their contacts with the supervisory authorities, and indirectly, with other public authorities processing data, as well as with private parties.

### 4. *Enforcement tools within the composite administration*

There are several factors in the current data protection regime contributing to the strong position of public authorities involved in the composite administration connected to data privacy. First, the emphasis on the independence of the supervisory authorities enables them to focus entirely on the tasks they have been given without having to take instructions from others. Secondly, the supervisory authorities at the national level have been equipped with both investigative powers and effective powers of intervention.<sup>29</sup> These powers have been strengthened in the proposed Regulation. According to Articles 53.4 and 79, the supervisory authority may impose fines up to an amount of € 1 000 000, or, in the case of an enterprise, up to 2 % of its annual worldwide turnover, depending on the type of infringement. Thirdly, the supervisory authorities and the *Commission*

26 Art. 28.4 Data Protection Directive.

27 Art. 73 Data Protection Regulation.

28 Art. 22, 74 and 75 Data Protection Regulation.

29 Art. 28 Data Protection Directive and Art. 53 Data Protection Regulation.

cooperate with a composite decision-making procedure when assessing whether the conditions for transferring data to third states are met.<sup>30</sup> Lastly, it may be assumed that the supervisory authorities are available to exert some influence to policy-making at the Union level due to their central position in the EU administrative structure. The national supervisory authorities are all represented in the current Article 29 Working Party, which is suggested to be replaced by a European Data Protection Board that is to have a central position as an advisor to the *Commission*.<sup>31</sup> Both the current and the proposed data protection legislation further contain rules on comitology committees,<sup>32</sup> where the competent authorities at the national level often are represented.<sup>33</sup>

Of specific interest here are the functions and tools available to the supervisory authorities within the mutual cooperation of authorities in the EU. Already the current regime obliges the supervisory authorities to cooperate with each other.<sup>34</sup> In the proposed Regulation, the cooperation between the authorities is developed considerably with the introduction of specific obligations concerning cooperation, mutual assistance and procedures for joint operations.<sup>35</sup> The main novelty, however, is the “consistency mechanism” to be applied in matters having a cross-border element, or otherwise having an EU-wide impact.<sup>36</sup>

In such cases, the European Data Protection Board and the *Commission* will also be involved in the handling of the matter according to a specific scheme laid down in the Draft Regulation. The first step is to refer the matter to the Board. This can be done either by the supervisory authority first handling the matter, or on the request of any other supervisory authority or by the Board itself. The Board and, as the case may be, the *Commission* then issue(s) an opinion that must be taken into account by the national authority handling the matter. If the *Commission* or the Board have “serious doubts as to whether the measure would ensure the correct application of the regulation”, the *Commission* may require the supervisory authority to suspend the draft measure by a maximum of 12 months. Finally, as a last step, the *Commission* may enact an implementing act, for ‘deciding on the correct application of this Regulation in accordance with its objectives and requirements’.<sup>37</sup> There is further a special procedure introduced in cases of emergency.<sup>38</sup>

On its webpage, the *Commission* has published further explanations why it is important that the *Commission* is closely engaged in the administration of privacy at the Member State level.<sup>39</sup> The *Commission* relates to its roles as a backstop, a baseball-term referring to the person who plays the position of catcher. The *Commission* holds that its role is that of a key supranational element; without it the Board would be an intergo-

30 Art. 25-26 Data Protection Directive and Art. 42-43 Data Protection Regulation.

31 Art. 29 Data Protection Directive and Art. 66 Data Protection Regulation.

32 Art. 31 Data Protection Directive and Art. 87 Data Protection Regulation.

33 Bergström, C.F., *Comitology: delegation of powers in the EU and the committee system*, Oxford, 2005.

34 Art. 28.6-28.7 Data Protection Directive.

35 Art. 46.1 and 55-56 Data Protection Regulation.

36 Art. 57-60 Data Protection Regulation.

37 *Ibid.* at Art. 62.1 a.

38 *Ibid.* at Art. 61.

39 [http://ec.europa.eu/justice/newsroom/data-protection/news/130206\\_en.htm](http://ec.europa.eu/justice/newsroom/data-protection/news/130206_en.htm). The text was published on 6/2/2013 (webpage last visited 30/1/2014).

vernmental club. The presence of the *Commission* ensures ‘that the Board acts decisively and protects the right to data protection enshrined in the Charter of Fundamental Rights. The threat of action by the *Commission* ensures that DPAs [data protection authorities] do not shy away from difficult cases.’ Further, the *Commission* highlights its role as guardian of the internal market as a whole, stating that ‘the Regulation will not be properly applied based on knowledge of data protection laws alone.’

It is in this regard interesting to note that the LIBE committee within the *European Parliament* has suggested amendments to the consistency mechanism going even further in developing a composite administrative decision-making procedure. In the LIBE version, it is the European Data Protection Board that can enact a decision, binding to the national data supervisory authority, in case the administrative bodies involved cannot agree on a common understanding.<sup>40</sup>

The European administrative structure built around the policy area of data protection is in summary independent, with efficient tools of cooperation and equipped with the possibility to issue forceful sanctions.

#### IV. How to handle competing interest within the composite administration?

The administrative structures for implementing EU law can be compared with another structure for ensuring the correct and efficient enforcement of law, namely the courts. The *Court of Justice of the European Union* (CJEU) is mandated by the TEU to ensure that the law is observed in the interpretation and application of the Treaties.<sup>41</sup> The mechanism of preliminary rulings allows the CJEU to communicate with national courts and to provide guidance regarding the interpretation of the Treaties as well as the validity and interpretation of secondary EU law.<sup>42</sup> As explained by the CJEU in the famous *Les Verts*-case, the EU is a union based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the questions whether measures adopted by them are in conformity with the basic constitutional charter, the Treaty.<sup>43</sup> In order to channel all relevant legal questions to the CJEU, a ‘complete system of legal remedies’ has been established by the Treaties. There is no parallel system in the EU composite administration, providing mechanisms to establish one definite interpretation of the policies within the Union.

First, it is important to underline the differences in functions and tasks of the administration and the judiciary within a democratic society. While the function of the courts can be said to be to decide in individual cases, to give the ultimate decision in a specific

40 Report of 22 November 2013 on the proposal for a Regulation of the *European Parliament* and of the *Council* on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), *Committee on Civil Liberties, Justice and Home Affairs*, PE 501.927 v 05-00 A7-0402/2013, at Art. 58 a and recital 106 a. The amendment was accepted by the *Parliament* in its legislative resolution on 12 March 2014, P7\_TA (2014) 0212.

41 Art. 19 TEU.

42 Art. 267 TFEU.

43 Case 294/83 *Parti écologiste “Les Verts” v. European Parliament* [1986] ECR p. 1339, para. 23.

legal matter and to monitor that the legal system is coherent and consistent, the function of the administration is to realize the politics as chosen by the democratically-elected parliament and the government. The courts are to be independent from political powers, whereas the administration is to be loyal to government and act on its behalf. In order to allow for democratic accountability, mechanisms must be in place allowing the government to command and control the public authorities. From the perspective of the Member States, it is therefore more sensitive to tie the national authorities to the EU in a composite administrative structure, than to allow the national courts to cooperate with the CJEU.

An important distinction between national administration and the composite European administration is thus that the composite administration is not organized under one coherent political structure. In contrast to the ‘complete system of legal remedies’ channeling legal questions to one last instance for the EU as a whole, there is no equivalent mechanism for the administration. As noted above, neither the EU nor the Member States can by themselves command or control the European composite administration as a whole. Instead, the composite administration is a part of 29 constitutional orders at the same time, the EU and the 28 Member States. A specific feature of this administration is its fragmented structure. The organization and inter-relationships between its constituent bodies vary from one policy area to another.<sup>44</sup> This heterogeneous administrative model, with its indistinct boundaries between the European and national, as well as between the public and the private, is not an ideal arena for resolving difficult balancing acts, for example, as between privacy and transparency. There is an obvious risk that organs within one area of the composite administration will view matters coming before them merely in their own perspective, leading to a fragmentation within the legal orders. As will be discussed further in part 5, the development of a coherent administrative structure, with all-embracing mechanisms to establish a definite interpretation of policies at the EU level would on the other hand entail a gigantic step towards federalism and a common political structure for the EU and the Member States.

These characteristics of the composite administration are also relevant to its democratic legitimacy. As stated in above, administrative structures beyond the nation state may in themselves have difficulties responding to traditional legal values such as transparency, participation and accountability. When acting in a European composite administrative structure, the national authorities will necessarily depart from the national administrative structures, with risks of becoming less adaptive to steering signals from their own governments.<sup>45</sup> As formulated by Bignami, governments renounce unilateral control over policymaking in their territories by the expectation that their officials will reveal their national policies and enforcement practices and will cooperate with other officials by assisting foreign enforcement actions and adopting “best practice” regulatory standards.<sup>46</sup> In this sense, the composite administrative structure is cut loose from

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44 Hofmann, H. C.H., Rowe, G.C., Türk, A.H. *Administrative Law and Policy of the European Union*, Oxford, 2011, p. 908.

45 Egeberg, M., *Europe's Executive Branch of Government in the Melting Pot: an Overview*, in Egeberg (ed.), *Multilevel Union Administration: the Transformation of Executive Politics in Europe* Basingstoke, 2006, p. 14.

46 Bignami, Francesca, *Transgovernmental Networks v. Democracy: The Case of the European Information Privacy Network*, *Michigan Journal of International Law*, vol. 26, 2005, p. 834.

its foundation in the national as well as the European constitutional legal orders. The problem seems to be that it is cut loose in bits and pieces, and that the communication between the pieces is hampered. There is an obvious risk that the often informal forms for meeting and cooperation within the composite administration will undermine transparency, making it difficult for stakeholders to participate in the rule-making procedures and the national parliaments to hold the national actors accountable.

## V. Concluding remarks

In order to sum up the arguments put forward in this article, we now return to the questions outlined in the introduction. First of all, how will citizens be able to interact with the new forms of composite administration at the European level? Transparency is a central concept in a democratic state governed under the rule of law, both in regards to the right of the individual to access to public information in individual cases, but also on an institutional/administrative level, in order for the individual to be able to identify what public organs are responsible for carrying out the enforcement of a specific policy area. As has been described above, in section III.3, one of the tasks of the independent supervisory authorities, under both the current Directive and even more elaborately, under the proposed Regulation, is to act on behalf of the individual data subject whose rights according to the legislation may have been infringed. How about the individuals interested in accessing personal data, for example within research? Would the supervisory authorities also use their investigative powers against someone that is hindering access to personal data for the lawful and legitimate use? A similar question arose in the *Gillberg* case before the *European Court of Human Rights*, even though this case did not include data protection aspects.<sup>47</sup> Gillberg, a professor specialising in child and adult psychiatry at the University of Gothenburg, refused to allow two individuals, a researcher in sociology and a medical doctor, access to public documents in form of research material on children, since Gillberg found that this would entail a breach of confidence vis-à-vis his patients and research subject. The *European Court of Human Rights* however found that the right of the sociology researcher and the doctor to access the information outweighed the interest of confidentiality in this case, especially since adequate safeguard on confidentiality was in place. The question is if the administrative structure that surrounds data protection would be able to perform the equivalent balancing test in an objective and impartial manner or if the interest to protect the data subject always would be assessed more favorably? The risk that an administrative composite structure built around one single question – in this case data protection – will have a myopic perspective should not be underestimated.

Secondly, how do European and national public organs respond to the new situations arising from the move of administrative law beyond the state? Roles, functions and loyalties of the administrative actors will be affected. Administrative actors acting at the global or even European level risk becoming detached from their national constitutional setting, and the policies they pursue are more difficult to align with neighboring

47 *Gillberg v. Sweden*, European Court of Human Rights, judgment of 3 April 2012, Application no. 41723/06 (Grand Chamber).

and competing interests at the national level. The first question targeted issues of how individuals could interact with the European composite administration, and one aspect of this is evidentially related to traditional legal values such as transparency, participation and accountability. The complex web of administrative actors built around the European organs and the set of 28 national administrative systems, may in itself be difficult to decipher for an individual wanting to take part in the administrative proceedings.

Regarding accountability, the development described in this article raises question both on a European and national level. As set out above, the point of departure for implementing EU law at the Member State level is that this is an issue for the Member States to resolve independently from the EU. National authorities remain within the constitutional setting of their respective Member States and remain under control of their national government and parliament. Even with the development towards a European composite administration, the EU has not taken over the competence or functions of holding the national authorities accountable for their actions – or inactions – within the composite administration. In the administrative setting proposed by the suggested Data Protection Regulation and its consistency mechanism, the supervisory authorities are closely coupled to the *Commission* and the Data Protection Board. The *Commission* can even enact an implementing act to be applied by the national supervisory authority within the handling of an individual matter. The *Commission* defends its role by emphasizing its role as guardian of the internal market as a whole, and its overall perspective of enforcing EU law. Indeed, by placing the *Commission* as the central engine and motor of the entire EU machinery, risks of fragmentation could to some extent be expected to be countered. As held by the *Commission*, the proposed Regulation could not be properly applied based on knowledge of data protection laws alone. Together with the vast delegated powers the Draft Data Protection Regulation bestows on the *Commission*, the role of the *Commission* becomes very strong. The *Commission* could actually become a central, unifying organ within a common political structure for data protection, equipped with effective tools to supervise the national authorities within the field.

The impact of these federalist tendencies on the constitutional framework of both EU and the Member States will be addressed in reflecting upon the third and last question posed in the introduction, regarding the relationship between the composite administration and national and European constitutional organs. Accordingly, the question may be asked whether the interrelations between the administrations and legislator at the European and national level can be described as circular. The fragmented nature of the composite European administration within data protection may lead to further fragmentation at all constitutional levels, European as well as national. The *Commission's* new constitutional position in the Proposal for a Data Protection Regulation includes, as we have seen, a strong legislative power that is not expressed in Article 17 TEU, since it suggests that it would be possible to delegate to the *Commission* all-embracing competencies. This in turn, would lead to a shift in the separation of powers, or balancing of powers, that is crucial to the functioning of the *European Union*. This constitutional picture is given even more complexity when we add the new European authorities that will be held at an arm's length of the *Commission*. When the *Commission* enacts an implementing act directed to a national authority, or as in the LIBE version, when the European Data Protection Board enacts a decision that binds the national authority, what constitutional sphere can the public power of the decision be said to be governed under?

The roles given within the EU system would accordingly shift, and that would lead to a shift in the functioning of other constitutional tasks that the other institutions are obliged to fulfil. The Member States are also part of this complex constitutional setting and a different and more legislative oriented position for the *Commission* leads to a different position for the States. The interplay between the States and the EU, as well as between the bodies of the EU would be affected. This in turn would lead to uncertainties regarding the fundamental values of the constitutional structure. Where can this administrative structure find its legitimation, if the powers of the *Commission* in the vast field of data protection seem to go beyond what is explicitly stated in the Treaties of the *Union*? Within the nation state, the task of the administrative body should ideally be well defined and be realized in an efficient manner. The allocation of tasks in a fragmented, composite administration could be, as we have seen, difficult to foresee. The same thing could be stated in relation to efficiency.

As we can see, these late events in the creation of an administrative structure for realizing data protection open up even more questions deeply constitutional in character. So what can be considered as possible paths forward? As seen above, the role of the administration can be identified as to realize the politics as chosen by the democratically-elected parliament and the government. In order to achieve this, there must be mechanisms to steer and control the administration. A composite and fragmented administration cannot be steered and controlled separately and independently from the 29 legal orders of the Member States and the EU. In the case of the composite administration, these mechanisms must be able to function beyond each constitutional setting and to handle more than simply one question at the time.

It is, however, utterly clear that this new constitutional setting of the composite administration calls for new views on how to organize forms of democratic representation in order to steer and control. Directly-elected parliaments are commonly perceived as the basic democratic form of communication between a people and decision-makers. The parliament, in the form of the legislature, is bestowed democratic legitimation which the government, its administration and the courts can rely on when enforcing the enacted legislation. The issue at hand here is how to match these functions to the realities of the composite administration. The level of matching indicates also, in turn, how well this administration can interact with Member States, citizens and parliaments. As has been discussed in this article, the composite administration emerging from the proposed Data Protection Regulation suggests very limited points of interaction. We risk seeing the creation of a very closed administration which at the same time includes features of powers that normally are separated or at least controlled by an exterior body. The legislature, the executive and also certain aspects of the judiciary, the fining and sanctioning, of data protection are created and held within a closed, yet composite, structure.

Through the enactment of the Lisbon Treaty, the democratic basis of the EU is clearly laid down. The traditional representative democracy, via the *European Parliament* and the national parliaments is found in Article 10 TEU. What is interesting to our discussion is that this form of democracy is complemented with further forms, the participatory democracy in Article 11 TEU and a new basis for national parliaments to engage in the political and legislative of the EU in Article 12 TEU. The national parliaments are collectively given the task to 'contribute actively to the good functioning of the *Union*', through the means of being informed, surveying the principle of subsidiarity and

by taking part in different aspects of the EU. This could perhaps be a way forward. The European composite administration is in need of a constitutional foundation, where national and European constitutional orders may be connected in order to allow for effective public participation and workable means of both democratic and judicial accountability. Interesting enough, this also means that it is the *European Union* that has turned to the national parliaments asking them to contribute to a new form of European democracy. The national parliaments are asked to contribute and to fill a gap in the EU system. Since that is the case, the mechanisms of Articles 11 and 12 could be powerful tools in order to guarantee a certain level of control of the composite administration and opening up the potential Fort Knox of the European composite administration that risks to focus in a narrow minded way on privacy, not taking into account other constitutional values.

In this article, we have done some tentative investigations regarding the development of the composite administration in the field of data protection in Europe as of today. The different matters discussed in the present article are interlinked and have in common the underlying question if the EU could be given the constitutional mandate to organize a European administration. As of today, the principle of conferred powers and the principle of subsidiarity would render such development difficult. At the same time, a development in this direction already seems to be present, at least in some policy areas and in the far reaching field of data protection.