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## ‘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*)

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### 1. Introduction

#### 1.1. The facts of the case *European Commission v. Austria (C-614/10)*

Since 1978 – when Austria adopted, for the first time, a national Data Protection Act – the structure of its national supervisory authority (*Datenschutzkommission*, DSK) thereby established<sup>1</sup> remained unchanged in its essence: following the model of ‘mixed councils’, the *independent administrative tribunals* of the time,<sup>2</sup> it has been composed of one judge, one official of the federal administration, two officials of the civil services of the federal states (*Länder*), and, since 2000,<sup>3</sup> also two members nominated by the social partners. One member has to carry out daily business (‘managing member’), staff and infrastructure have to be provided by the Federal Chancellor (Prime Minister). Membership as such is avocational, but as a rule the federal official among the members, based in the federal chancellery, is not only head of the secretariat, but, in addition, also the ‘managing member’.

Although the DSK itself never referred, under Article 267(2) TFEU or its predecessors, to the Court of Justice, *other* Austrian ‘mixed councils’ – all organized more or less in the same way<sup>4</sup> – *had been accepted by the Court’s case law as fulfilling the necessary requirements of a ‘court or tribunal of a Member State’ within the meaning of this provision;*<sup>5</sup> among the ‘factors’ taken into account for the purpose of that assessment, however, we read also that the body in question has to be ‘*independent*’. So it was not far-fetched to presume that also the DSK, as a ‘mixed council’, is *sufficiently ‘independent’ in the sense of*

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1 In the same year, but some months earlier, the French *Commission Nationale de l’Informatique et des Libertés* (CNIL) was established as an ‘*autorité administrative indépendante*’ (loi No. 78-17 of 6 January 1978, *Journal Officiel de la République Française* of the following day, pp. 227 et seq.). Note the slight difference in category (Austria: DSK as an *administrative tribunal*, France: CNIL as an independent *administrative* authority).

2 The tradition of these ‘mixed councils’ – under the current Constitution (*Bundes-Verfassungsgesetz*, B-VG) based on its Articles 20(2) and 133(4) – can be traced back to at least the mid-19<sup>th</sup> century (see in more detail P. Pernthaler, *Die Kollegialbehörden mit richterlichem Einschlag*, 1977, pp. 11 et seq.); they will, however, soon cease to exist (see Section 1.3, *infra*).

3 With regard to the implementation of Directive 95/46/EC, the original Data Protection Act ex 1978 was replaced by the Data Protection Act 2000 (*Datenschutzgesetz 2000*, DSG 2000), *Federal Law Gazette* (BGBl) I 1999/165), taking effect from 1 January 2000 onwards. On that occasion, but without any material regard to the requirements of the Directive, also the composition of the data protection authority was modified.

4 Not all ‘mixed councils’ are, of course, composed of officials of both the federal and the *Länder* level. But all consist of judges and administrators (mostly lawyers, but sometimes also experts, mainly in medicine or in natural sciences or in engineering); since 1920, there has also been room for civil society representation. And all councils have always been maintained by the general administration.

5 See the case law cited by the Advocate General in his Opinion to C-614/10, point 7, referring to the Austrian statement in C-614/10.

Article 267(2) TFEU; from that finding, however, one could infer that the DSK could ‘act with complete independence’ as required, since the coming into force of the Data Protection Directive, by its Article 28(1)(2), too.

But: by its Judgment of 16 October 2012, C-614/10 (*European Commission v. Austria*), the Court of Justice of the European Union (CJEU) found that Austria had failed to fulfil its obligations under Article 28(1)(2) of Directive 95/46/EC (in the following: the Directive), ‘more specifically by laying down a regulatory framework’ for its national data protection supervisory authority ‘under which

- the managing member of the *Datenschutzkommission* is a federal official subject to supervision,
- the office of the *Datenschutzkommission* is integrated with the departments of the Federal Chancellery, and
- the Federal Chancellor has an unconditional right to information covering all aspects of the work of the *Datenschutzkommission*.<sup>7</sup>

However: whereas the first two indents of the ruling are fully in line with the proposal of the Advocate General, the text of the third indent was modified by the *insertion of the attribute ‘unconditional’*.

In addition, in Paragraph 58 of this Judgment, the Court states:

‘It is, admittedly, true, as the Republic of Austria emphasises, that the DSK *need not be given a separate budget*, such as that provided for in Article 43(3) in Regulation No 45/2001 for the EDPS, in order to be able to satisfy the criterion of independence set out in the second subparagraph of Article 28(1) of Directive 95/46. *Member States are not obliged to reproduce in their national legislation provisions similar to those of Chapter V of Regulation No 45/2001 in order to ensure the total independence* of their respective supervisory authorities and they can therefore provide that, from the point of view of budgetary law, the *supervisory authorities are to come under a specified ministerial department*.’ (emphasis added)

### 1.2. The previous case *European Commission v. Germany (C-518/07)*<sup>6</sup>

The Judgment in *European Commission v. Austria* was not the first one where the Court had the opportunity to interpret the meaning of the notion of ‘complete independence’ enshrined in Article 28(1)(2) of the Directive; already on 9 March 2010, it delivered the landmark<sup>7</sup> Judgment in the case C-518/07 (*Commission v. Germany*). There we find – in sharp contrast to the then Opinion<sup>8</sup> – *statements not repeated in the second Judgment*, namely:

- ‘(...) the supervisory authorities (...) must remain free from *any* external influence, including the direct or *indirect* influence of the State (...)’ (point 25);
- ‘(...) by making the’ data protection ‘authorities ... *subject to State scrutiny*’, Germany had incorrectly transposed the Directive (point 56);
- ‘In view of the fact that Article 44 of Regulation No 45/2001’ (in the following: the Regulation) – the first paragraph of which states the ‘complete independence’ of the European Data Protection Supervisor (EDPS) – ‘and Article 28 of the Directive 95/46 are *based on the same general concept*, those two provisions should be interpreted *homogeneously* (...)’ (point 28). (emphasis added)

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6 For the complex concrete factual background of this case in Germany see E.M. Frenzel, ‘„Völlige Unabhängigkeit“ im demokratischen Rechtsstaat – Der EuGH und die mitgliedstaatliche Verwaltungsorganisation’, 2010 *DÖV*, no. 22, pp. 925 et seq.

7 This attribute seems to be justified, given the amount of attention raised by it immediately thereafter: cf. not only the list in EURlex/doctrine (<<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62007CJ0518:EN:NOT>>, last visited 7 June 2013), but also European Union Agency for Fundamental Rights (FRA), *Data Protection in the European Union. Strengthening the fundamental rights architecture in the European Union II*, 2010, p. 19, and European Union Agency for Fundamental Rights (FRA), *Annual Report. Fundamental rights: challenges and achievements in 2010*, 2011, p. 59. See, however, also below in the main text.

8 It is worth mentioning that in both cases (*Commission v. Germany* and *Commission v. Austria*) the Advocate General was Ján Mazák, who took as his basis in the *second* Opinion the position of the *first* Judgment.

It is true that the factual background of the two cases was somewhat different: on the one hand, the German authorities at issue were *fully integrated* into the general administration and, therefore, also *bound by instructions* of their superior authorities; on the other hand, unlike the EDPS and the DSK, they were *only* competent to supervise the *private* sector, not public authorities.<sup>9</sup>

The 'landmark' quality of the Judgment in *Commission v. Germany*, however, is also due to some *general and fundamental statements* which render the core findings of this Judgment also relevant for other, if not all parts of the 'general administration':<sup>10</sup>

- In point 25 (read in conjunction with point 35) it is insinuated that data protection authorities have to be separated from the 'government' as a prerequisite for their ability to 'act objectively and impartially', because the 'government' might '*itself be an interested party*' and neglect the data protection law 'in order to fulfil certain of its' other 'functions, in particular for taxation or law enforcement purposes'.
- In points 43-45 we learn which elements of State influence suffice to preserve the 'democratic legitimacy' of the authorities at issue: the appointment of the management by parliament or the government, the definition of the powers by the legislator, the obligation to report the activities to parliament.
- In point 23, the data protection authorities are addressed as '*guardians of (...) fundamental rights*'; and
- in point 42 we read that 'the existence of *public authorities outside the classic hierarchical administration and more or less independent of the government*' is not precluded by the '*principle of democracy*'; '*such independent public authorities (...) often have regulatory functions or carry out tasks which must be free from political influence (...)*'. (emphasis added)

These statements were, however, not repeated in *Commission v. Austria*, either.

### **1.3. The Austrian reaction**

The Austrian Government reacted immediately, proposing in Parliament three small amendments to the national Data Protection Act,<sup>11</sup> by which

- the DSK is established as a separate authority, with its own staff;<sup>12</sup>
- the right to information of the Federal Chancellor (who remains as the supreme administrative institution competent for the DSK) is limited by the requirement to secure 'complete independence' within the meaning of Article 28(1)(2) of the Directive.<sup>13</sup>

With regard to the major reform of the administrative judiciary which will take effect from 1 January 2014 and by which all the currently existing administrative 'tribunals', among them also *all 'mixed councils', will cease to exist*,<sup>14</sup> the DSK, therefore, needs to be restructured, too. The Government draft bill<sup>15</sup> now

9 There is a long tradition in data protection law to treat both sectors alike (cf. already Article 3(1) of the Council of Europe Data Protection Convention No. 108 of 28 January 1981). Given, however, that the institutional safeguards needed for a public authority to 'act objectively and impartially' (*Commission v. Germany*, point 25) with regard to private persons most probably differ fundamentally from those needed with regard to other, in particular higher ranking public authorities, the German factual situation was by far *not the best occasion* to promote an *excessive* interpretation of 'complete' independence.

10 Cf. also the comment on *Commission v. Germany* recently published (by J. Zemanek, 2012 *CML Rev*, no. 5, pp. 1755-1768) which starts with these quite fundamental questions: 'Do we witness an emerging *ius commune europeum*, a birth of a European administrative union? Is there a *bureaucratic network in being, composed of national and Union bodies outside any democratic control*, which can tend to a threat of abuse of power? Or, are these bodies compatible with peculiarities of the principles of democracy and rule of law within a multi-level system? Is the requirement of "complete independence" a *conditio sine qua non* for separation of the regulatory function from proprietary concerns of the State? Can the *obligation of the Union to exempt supervisory authorities from their executive hierarchies* be based merely on an act of secondary legislation of the Union *without its express authorization in the Treaty*? Is this requirement not in breach of the Union's duty under Article 4(2) TEU (...) to respect the national identity of Member States?' (p. 1762; emphasis in the original).

11 RV 2131 Blg NR XXIV. GP; see now BGBl I 2013/57 (in force since 1 May 2013).

12 Paragraphs 37(2), 61(9) DSG 2000 in the amended version.

13 Paragraph 38(2) DSG 2000 in the amended version.

14 See BGBl I 2012/51.

15 RV 2168 Blg NR XXIV. GP (the parliamentary procedure has just started).

provides, following the model of the EDPS, a monocratic structure; but the elements just mentioned will be preserved.

#### 1.4. The peculiarities of the more recent Judgment

Several elements of the more recent Judgment (*Commission v. Austria*) deserve closer attention, some in particular against the background of the previous Judgment (*Commission v. Germany*):

- Is it really conceivable that the *standard of ‘independence’* of a court or tribunal required by EU law may *fall short of that of a data protection authority* (which, under the scheme of the Directive, and following the French, not the Austrian model,<sup>16</sup> is not a tribunal, but ‘merely’ an *administrative authority*)?
- What are the implications of the insertion of the attribute ‘*unconditional*’, in particular when compared with the ban of ‘*any*’, even ‘*indirect influence of the State*’ or ‘*State scrutiny*’ expressed in *Commission v. Germany*?
- This *previous* ban seems to be further *mitigated* by the explicit concession in the more recent Judgment that Member States are *not* called upon to give their national data protection authorities a ‘*separate budget*’ such as that provided for in Article 43(3) in the Regulation for the EDPS, *although*, according to *Commission v. Germany*, the concept of ‘*independence*’ pursued in the Regulation and in the Directive is the ‘*same*’.

These elements will now be discussed in the subsequent Sections 2 and 3.

The direct ambition is to clarify *which standard of ‘independence’ has to be provided* for national data protection authorities in EU Member States in general, not only in Austria where currently legislation aims to implement the Judgment in *Commission v. Austria*. Given the general and fundamental statements in *Commission v. Germany* mentioned above, however, the results of this discussion might be of *horizontal relevance*, either with regard to national<sup>17</sup> authorities performing ‘*regulatory functions*’<sup>18</sup> or with regard to institutions deemed to protect *other* fundamental rights.<sup>19</sup>

<sup>16</sup> See note 1, *supra*.

<sup>17</sup> With regard to (more or less) independent authorities on the Union level see H. Hofmann & A. Morini, ‘The Pluralisation of EU Executive – Constitutional Aspects of “Agentification”’, 2012 *EL Rev*, no. 4, pp. 419 et seq; M. Wittinger, ‘„Europäische Satelliten“: Anmerkungen zum Europäischen Agentur(un)wesen und zur Vereinbarkeit Europäischer Agenturen mit dem Gemeinschaftsrecht’, 2008 *EuR*, no. 5, pp. 609-626; S. Andoura & P. Timmermann, ‘Governance of the EU: The Reform Debate on European Agencies Reignited’, EPIN Working Paper (<[www.epin.org](http://www.epin.org)>) no. 19/2008, pp. 1 et seq.

<sup>18</sup> Cf. *Commission v. Germany*, point 42. W.-D. Grussmann, ‘Staatsorganisation und Unionsrecht. Ein Beitrag zur Autonomie der Verfassungsordnungen der Mitgliedsstaaten’, 2011 *ZöR* 66, no. 2, pp. 151-166, p. 153, mentions, apart from Article 28(1) of Directive 95/46/EC here at issue and from public procurement (control of which is, in my view, not so much a regulatory function but quasi-judicial) the following regulatory bodies:

Article 35(4) and (5) of Directive 009/72/EC (*electricity*),

Article 39(4) and (5) of Directive 2009/73/EC (*gas*),

Article 22(1) of Directive 97/67/EC (as amended by Directive 2008/6/EC; *postal services*),

Article 30(1) of Directive 2001/14/EC and Article 16(1) of Directive 2004/49/EC (*railway infrastructure*),

Article 30 of Directive 2010/13/EC (*media*),

Article 3(2), (3) and (3a) of Directive 2002/21/EC (as amended by Directive 2009/140/EC; *telecommunication*).

Cf. also Frenzel, *supra* note 6, p. 929, who provides evidence that the *requirements as to independence have been increased* over the last few years.

<sup>19</sup> Cf. *Commission v. Germany*, point 23. See, for the already existing concept of ‘National Human Rights Institutions’, Section 3.1.4.iii, *infra*. And indeed, is there, under the principle of equal treatment (see note 21, *infra*), any ‘objective justification’ not to extend the specific institutional safeguards developed for data protection authorities also to *other*, even *higher ranking* fundamental rights? As the Court itself put it, ‘the right to the protection of personal data is not (...) an absolute right, but must be considered in relation to its function in society’ (Judgment of 9 November 2010, C-92/09, *Schecke*, point 48, referring to ECJ Judgment of 12 June 2003, C112/00, *Schmidberger*, point 80 and the case law cited there). In contrast, there are indeed fundamental rights of an (at least almost) ‘absolute’ character, like the prohibition of torture (cf. the references compiled only recently by A. Müller, ‘Der Grundrechtseingriff und Art 3 EMRK. Von den Grenzen der Harmonisierung der Grundrechtsdogmatik’, 2012 *ZöR* 67, no. 3, pp. 475-500, p. 477 note 7) where neither limitations nor derogations in case of an emergency apply (cf. Article 15(2) ECHR).

## 2. The standard of 'independence' of a court in relation to that of an administrative authority

### 2.1. The principle of 'separation'

In his Opinion to *Commission v. Austria*, the Advocate General Ján Mazák stated that 'the Court conceives the *independence of supervisory authorities as being separate vis-à-vis the independence of courts or tribunals* within the terms of Article 267 TFEU' (point 25, emphasis added). In the corresponding footnote 10 he added:

'I am well aware that this risks leading to a situation in which a national authority could be regarded as *sufficiently independent to be a court* or tribunal for the purposes of Article 267 TFEU, but *not sufficiently independent to be a supervisory authority for the purposes of Article 28(1) of Directive 95/46*. This is the unavoidable consequence of the independent interpretation of Article 28(1) of Directive 95/46.' (emphasis added)

The following Judgment upheld this position explicitly.<sup>20</sup>

### 2.2. The fundamental inconsistency and its implications

#### 2.2.1. The inconsistency

At first sight, it is perfectly acceptable to apply *different levels* of 'independence' to *different kinds of institutions*; what is more, these differences in treatment by the legislator might even be required by the second element of the principle of equal treatment (now also enshrined in Article 20 EUCFR), whereby 'different situations must not be treated in the same way'.<sup>21</sup>

What is striking, however, is that the 'completely independent' data protection authorities and the judiciary are not simply 'different', but are *linked together* in a very specific way:

According to Article 8(3) in conjunction with Article 47(1) of the EUCFR as well as according to Articles 22 and 28(3)(3) of the Directive, data protection authorities, as administrative bodies, *are subordinated to all those courts* where an action may be lodged against all 'decisions by the supervisory authority which give rise to complaints'.<sup>22</sup>

In my view, it is simply unconceivable to grant to *those* courts competent to deal with actions against decisions of data protection authorities a *lower* level of independence than to the data protection authorities themselves: The very fact that the data protection authorities are subject to judicial review by bodies of lower independence would *affect their 'independence' indirectly but effectively*, because the State could influence the decisions of data protection authorities *via influencing the outcome of the less protected judicial review*.

What is true for data protection authorities with regard to 'their' reviewing courts, however, must also apply with regard to *all other independent administrative authorities*<sup>23</sup> and the *judicial review provided with regard to them*.

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20 Point 40 runs: '(...) the words "with complete independence" in the second subparagraph of Article 28(1) of Directive 95/46 must be given an *autonomous interpretation, independent of Article 267 TFEU*, based on the actual wording of that provision and on the aims and scheme of Directive 95/46' (reference to its Judgment C-518/07, points 17 and 29, emphasis added).

21 For a recent example of the standard formula defining this principle see CJ Judgment of 19 July 2012, C-250/11, *Lietuvos geležinkiai AB*, point 44.

22 Article 28(3)(3) of the Directive; cf. also Article 74 of the Draft EU General Data Protection Regulation of 25 January 2012, COM(2012) 11 final, 2012/0011 (COD) (<[http://ec.europa.eu/justice/data-protection/document/review2012/com\\_2012\\_11\\_en.pdf](http://ec.europa.eu/justice/data-protection/document/review2012/com_2012_11_en.pdf)>, last visited 7 June 2013).

23 See note 18, supra. Cf. also F. Kauff-Gazin, 'Vers une conception européenne de l'indépendance des autorités de régulation?', 2010 *Europe*, étude 9, pp. 12-16; F. Fabbrini, 'Il diritto dell'Ue e l'indipendenza delle autorità nazionali garanti della protezione dei dati', 2010 *Giornale di diritto amministrativo*, pp. 1028-1033, p. 1032 note 27; Zemanek, supra note 10, p. 1763; L. Fabiano, 'Chi controlla il controllore? Sulla (illegittimità, secondo la Corte di giustizia, della) vigilanza (statale) delle autorità di controllo', 2010 *Diritto pubblico comparato ed europeo*, pp. 944-947, p. 945, and, quite recently, M. Szydło, 'Independent Discretion or Democratic Legitimation? The Relations between National Regulatory Authorities and National Parliaments under EU Regulatory Framework for Network-Bound Sectors', 2012 *ELJ* 18, no. 6, pp. 793-820.

### 2.2.2. The implications

This *argumentum a fortiori* forces us to overthrow the premiss (i.e. the ‘principle of separation’ mentioned above) and, consequently, to treat (at least<sup>24</sup>) ‘equally’ *all*<sup>25</sup> courts with data protection authorities with respect to the level of independence; the question to which extent members of an independent institution as well as their staff may, by the legal framework of their appointment/employment, *depend to institutions outside the sphere of independence, in particular to the government* will, therefore, receive relevance also for the *whole range of the judiciary*.

If that is true, however, it is indeed the *organizational structure of the data protection authorities* which will, in the future, *set* the relevant yardstick of ‘independence’ *for the judiciary, too*.

This result seems somewhat strange given the general mandate and the long tradition of the judiciary, compared with the quite new and specialized phenomenon of data protection authorities. At least one would recommend – against the background of the general principle ‘*quod omnes tangit debet ab omnibus approbari*’<sup>26</sup> which has been reiterated, in a moderate form, in Article 11(3) TEU – that *representatives of the judiciary ‘concerned’ be thoroughly consulted beforehand* in order to reach consistency<sup>27</sup> and coherence<sup>28</sup> (which, as far as can be seen, has not yet been the case).

Finally: what would be the consequence for the Court of Justice and the general system of *protection of EU law itself*?

If there are indeed ‘courts or tribunals’ which have, up to now, been granted only a level of independence *below* the standards set out in *Commission v. Austria*<sup>29</sup> for data protection authorities,<sup>30</sup> the *argumentum a fortiori* would, due to that very fact, require that references under Article 267(2) TEU of these bodies be declared inadmissible in the future. Given the well-known high relevance of this type of procedure for the coherence and proper implementation of EU law,<sup>31</sup> however, this horizontal negative impact seems to be a price which is (too) high for a ‘premium class’ institutional protection of *one* single fundamental right (which does *not* even belong to the *indispensable* essence of human rights<sup>32</sup>). So already this finding seems to be a strong argument against an excessive interpretation of the element of ‘*complete* independence’ enshrined in Article 28(1)(2) of the Directive or, to put it differently, in favour of an interpretation which is *coherent with* the level of ‘independence’ found to be sufficient<sup>33</sup> for the judiciary.<sup>34</sup>

24 Note that Article 51(3) of the Draft Regulation, *supra* note 22 intends to exempt courts from data protection authorities’ supervision ‘in order to safeguard the independence of judges in the performance of their judicial tasks’ (recital 99). This provision is evidently based on the assumption that the level of judicial independence is *at least equivalent* to that of data protection authorities.

25 At first sight, the ‘principle of equal treatment’ will only apply to these courts or tribunals competent to deal with formal actions against decisions of all the ‘independent authorities’ in question. When looking closer, however, neither penal courts (competent to deal with charges of abuse of power) nor private law courts (competent for State liability) can be excluded; so in the end *all branches of the judiciary will have to be treated alike*.

26 Cf. P. Linglois, *Quinquaginta Decisiones Imperatoris Justiniani*, 1622, p. 81.

27 Since the Treaty of Lisbon, the new format of the Council ‘General Affairs’ has the specific task ‘to ensure consistency in the work of the different Council configurations’ (Article 16(6)(2) TEU). So it could be a wise idea to discuss this issue of horizontal relevance there.

28 The obligation of the Commission under Article 11(3) TEU ‘to carry out broad consultations with parties concerned’ is motivated, in the first place, ‘in order to ensure that the Union’s actions are coherent (...)’. ‘Coherence’ and ‘consistency’ seem to be used *promiscue*, given that in the German version in Article 11(3) as well as in Article 16(6)(2), (3) TEU the *same term* (‘Kohärenz’) is used.

29 In particular the requirement that no member of the authority may be ‘subject to supervision and the prohibition that the ‘office’ is ‘integrated’ with a ministry (see Section 1.1, *supra*).

30 At least in *Austria*, according to Article 87(2) B-VG (i.e. the Constitution, see note 2, *supra*) *all judges may be bound by instructions* of the respective minister as far as not the content of the judgement itself, but administrative issues (*Justizverwaltungssachen*) are concerned. So in principle *decisions on non-judicial staff, premises and financial resources are at the ‘complete’ disposal of the minister*. Some years ago, the Austrian Constitutional Court (*Verfassungsgerichtshof*, VfGH) ruled that this dependency of courts was unconstitutional with regard to the Supreme Administrative Court (*Verwaltungsgerichtshof*, VwGH) and to itself (Judgment of 10 March 2000, G 19/99, *Official Collection* [VfSlg] No. 15.762), but, up to now, it has refused to extend this topos to other courts and tribunals.

31 Cf., *parte pro toto*, M. Kotzur, comment on Article 267 TFEU, point 1, in R. Geiger et al., *EUV/AEU. Kommentar*<sup>5</sup>, 2010.

32 See note 19, *supra*.

33 In its Judgment of 1 March 2012, C-393/10, *O’Brien*, the CJ accepted that judges (in the UK) ‘are expected to work during defined times and periods, even though this can be managed by the judges themselves with a *greater degree of flexibility* than members of other professions’ (point 45, emphasis added) and ‘might’ therefore ‘be regarded as workers’ (point 47). However, does this status not inevitably imply at least some elements of that sort of ‘supervision’ declared incompatible with ‘independence’ in *Commission v. Austria*?

34 As a precondition, we would need reliable data – i.e. a *horizontal survey of the different systems of the administration of justice* which was, apparently, not done yet: Even the excellent survey ‘Les Juridictions des Etats Membres de l’Union Européenne. Structure et Organisation’, 2009, edited by the CJEU and available on its website (<<http://curia.europa.eu/jcms/upload/docs/application/pdf/2008-11/qd7707226fr.pdf>>, last visited 7 June 2013), hardly ever tackles these questions; cf. also Council of Europe, Venice Commission,

### 3. 'State scrutiny' and State responsibility for the overall budget

The statements made in *Commission v. Germany* cited above would, taken literally, mean that in the end *all* administrative authorities would have to enjoy 'complete independence' and had, therefore, to be freed from 'any', even 'indirect' influence of the government of the Member State concerned – although established as a public body, vested with public law competences and maintained by public means.

Against this line of thinking serious legal and comparative objections can be raised which are outlined below (3.1); it seems, however, that the position taken in *Commission v. Austria* is now a far more moderate one (3.2).

#### 3.1. *Commission v. Germany, taken literally; objections*<sup>35</sup>

##### 3.1.1. *The future scope of the 'general administration' of Member States*

If the 'government' or the 'general administration' *cannot be trusted* 'to act objectively' with regard to data protection issues, 'in particular' (!) not 'for (...) law enforcement purposes'<sup>36</sup> – why should the 'government' or the 'general administration' fulfil *any other* of its tasks 'objectively'? And if in fact they do not, *which tasks could then be conferred to them at all?* The ultimate consequence of this reasoning would be that 'government' is restricted to general politics; in contrast, all parts of 'law enforcement', including administrative procedures and the whole range of administrative police (i.e. state oversight over private behaviour), would have to be organized in 'complete independence' from the 'government' as defined by the Court, allowing the 'government' (parliament included) nothing more than setting the legal framework of the independent institution, appointing the management and receiving reports.<sup>37</sup>

Evidently such a demand would bear a strong tension

- to the '*national identities*, inherent in' the Member States' 'fundamental structures, political and constitutional', the respect of which is now explicitly enshrined in *Article 4(2) TEU*,<sup>38</sup> at least insofar as granting this 'complete independence' to public authorities is not yet rooted in the constitutional system of a Member State,<sup>39</sup> and, in particular,
- to the '*value*' of '*democracy*' which is, according to *Article 2 TEU*, 'common to the Member States';<sup>40</sup> because it is, clearly enough, mainly the *governments*, not so much the independent authorities, which

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*Report on the Independence of the Judicial System Part I: The Independence of Judges*, of 16 March 2010, CDL-AD(2010)004, Study No. 494/2008, in particular Section III/7 (relating to the budget; as far as can be seen, this report did not even address issues like a) the legal status of the non-judicial staff of courts or b) limits of the right to information of the Ministry). See, however, as a first step, G. Scherthanner, 'Internationaler Rechtsvergleich über die Organisation der Spitzen der Justizverwaltung aller 25 EU-Mitgliedsstaaten', in Vereinigung der Österreichischen Richterinnen und Richter (eds.), *Gewaltenteilung im demokratischen Rechtsstaat*, 2006, pp. 91 et seq.

<sup>35</sup> See in more detail A. Balthasar, 'Was heißt „völlige Unabhängigkeit“ bei einer staatlichen Verwaltungsbehörde? Zugleich eine Auseinandersetzung mit dem Urteil des EuGH vom 09.03.2010, C-518/07 (Kommission/Deutschland)', 2012 *ZöR* 67, no. 1, pp. 5-45.

<sup>36</sup> Kauff-Gazin, supra note 23, p. 14, speaks of 'une méfiance structurelle à l'égard de l'Etat'. Cf. also H. P. Bull, 'Die „völlig unabhängige“ Aufsichtsbehörde', 2010 *Europäische Zeitschrift für Wirtschaftsrecht* 21, no. 13, pp. 488-494, p. 491.

<sup>37</sup> Points 43-45, see Section 1.2, supra.

<sup>38</sup> References by the CJEU to this principle are still fairly rare, cf. CJ Judgements C-393/10, point 49, of 12 May 2011, C-391/09, *Runevič-Vardyn*, point 86, of 22 December 2010, C208/09, *Sayn-Wittgenstein*, point 92; Opinion of 2 October 2012, C-399/11, *Melloni*, points 137-140. For a recent scholarly analysis, see G. van der Schyff, 'The Constitutional Relationship between the European Union and its Member States: The Role of National Identity in Article 4(2) TEU', 2012 *EL Rev*, no. 5, pp. 563 et seq. Admittedly we do not yet dispose of precise results as to the meaning and range of this provision; but the relationship between 'government' and 'independent authorities' could very well, at least in Austria and in Germany (the administrative structures of which are rooted in the same tradition), amount to such a 'fundamental structure' (cf. the famous Judgment of the Austrian Constitutional Court of 14 October 1987, B 267/86, Official Collection [VfSlg] No. 11.500, where this Court pondered on the possibility that following the interpretation of the ECHR on Article 6 ECHR in the field of administrative law would amount to a *fundamental change of the Austrian Constitution*).

<sup>39</sup> See more closely for that debate the references given by Kauff-Gazin, supra note 23, p. 15, in particular in notes 24 and 26; Frenzel, supra note 6, p. 930.

<sup>40</sup> In the first line, however, it is the *Union itself* which is (now) founded on this value. But when remembering that European integration was originally much more focused on 'the idea of economic governance (...) based upon the rule of law – and *protected from political interference* –' (C. Shore, '"European Governance" or Governmentality? The European Commission and the Future of Democratic Government', 2011 *ELJ* 17, no. 3, pp. 287-303, p. 289 (emphasis added); cf. also A. Follesdal & S. Hix, 'Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik', European Governance Papers [EUROGOV] 2005, C-05-02, p. 7), we understand that Bull, supra note 36, p. 492 qualifies the approach undertaken in *Commission v. Germany* as the *establishment of technocratic rule* and that also I. Spiecker (Anmerkung [to *Commission v. Germany*], 2010 *Juristenzeitung*, pp. 787 et seq., p. 789) strongly favours a much more

are, as required by the principle of ‘representative democracy’ (Article 10(1) TEU), ‘*democratically accountable* either to their national Parliaments, or to their citizens’.

These two general considerations had indeed, among others, been put forward by the Member State concerned,<sup>41</sup> but dealt with in *Commission v. Germany* only in a very cursory and non-convincing manner:

- When stating that the principle of democracy is in line with *some* independence (‘*more or less independent of the government*’),<sup>42</sup> this finding does not cover in the least the ‘*completeness of independence*’ – which, according to the Court,<sup>43</sup> forbids even ‘*any*’ ‘*indirect*’ influence – at issue.
- The Court was satisfied that ‘the interpretation of the requirement of independence enshrined in the second subparagraph of Article 28(1) of the Directive as meaning that it precludes State scrutiny does *not go beyond what is necessary* to achieve the objectives of the EC Treaty’;<sup>44</sup> in doing so, it paid tribute to neither the second and third sentence of Article 7 of the Protocol on the application of the principles of subsidiarity and proportionality (the pre-Lisbon version)<sup>45</sup> nor to the current Article 4(2) TEU (already in force when the Judgment was delivered) which is not identical to Article 5(3) TEU, but an *additional safeguard*.

Already this *de facto disregard of core primary law* may raise severe doubts as to the stringent consistency of the reasoning and of the result reached in *Commission v. Germany*; and there has already been concern that the underlying aim of Union law to establish authorities which are ‘completely independent’ of Member States’ governments for the purpose of supervising the implementation of Union law is only a first step to *direct administration by Union authorities*, and therefore a *political aim not fully backed by the Treaties*.<sup>46</sup>

### 3.1.2. The international responsibility of a State

#### i. In general

As cited above, the Court pointed out the possibility that ‘the government’ might neglect data protection law; but: general experience tells us that *no institution whatsoever*, not even an institution destined to secure compliance of other institutions with fundamental rights<sup>47</sup> *is immune a priori* from committing infringements of law.<sup>48</sup> In such a situation, however, it is still *the State in its entirety* which is *held responsible* for any violation of international law, including human rights law (in particular: of the ECHR) and EU law.<sup>49</sup> As a consequence, actions under Articles 258 and 259 TFEU as well as complaints under Articles 33 and 34 ECHR are directed against the respective State as such, and it is, under Article 260 TFEU or

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*theoretical reflection on the principle of democracy on the Union level.*

41 See points 39, 47 and 52-54 of *Commission v. Germany*.

42 First sentence of point 42.

43 *Commission v. Germany*, point 25; see Section 1.2, supra.

44 Point 55 (emphasis added).

45 The text ran: ‘While respecting Community law, care should be taken to *respect well established national arrangements and the organisation and working of Member States’ legal systems*. Where appropriate and subject to the need for proper enforcement, Community measures should provide Member States with alternative ways to achieve the objectives of the measures.’ (emphasis added)

46 Cf. K. Stöger, ‘Gedanken zur institutionellen Autonomie der Mitgliedsstaaten am Beispiel der neuen Energieregulierungsbehörden’, 2010 *ZöR* 65, no. 2, pp. 247-267, pp. 250, 261 et seq. And W. Ziebarth, ‘Demokratische Legitimation und Unabhängigkeit der deutschen Datenschutzbehörden’, 2013 *Computer und Recht*, pp. 60 et seq., strongly criticises Articles 57 et seq. of the Draft EU General Data Protection Regulation (see note 22, supra) for aiming to replace the only recently gained independence from national government by tutelage of the Commission.

47 So even with regard to these institutions the old question ‘*Quis custodiet ipsos custodes?*’ (Juvenalis, *Saturae VI*, p. 347) remains a valid one. See, therefore, for that question in the given context also Fabiano, supra note 23, pp. 944 et seq.

48 Or, to put it in a more colloquial way: nobody is perfect. Cf. also Bull, supra note 36, p. 491.

49 Cf. ECJ Judgment of 30 September 2003, C-224/01, *Köbler*, point 32: ‘In international law a State which incurs liability for breach of an international commitment is viewed as a single entity, irrespective of whether the breach which gave rise to the damage is attributable to the legislature, the judiciary or the executive. That principle must apply a fortiori in the Community legal order since all State authorities, including the legislature, are bound in performing their tasks to comply with the rules laid down by Community law which directly govern the situation of individuals (Brasserie du Pêcheur and Factortame (...), paragraph 34).’



Article 46 ECHR, the duty of this State *as such* to comply with the ruling. This is fully in line with the general provision of *Article 27 VCLT*, stipulating (as part of the general principle of '*pacta sunt servanda*')

'A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.'

So international law in general as well as in particular EU primary law do seem indeed to require that the State as such – i.e. the central government – *keeps enough competences* also vis-à-vis an 'independent' institution in order to be able, if needed, *to enforce international rulings also against the will of this institution*.

This result is, by the way, perfectly in line with the – 'timeless'<sup>50</sup> – idea of 'checks and balances' or 'accountability', rooted in the principle (or, now, 'value' within the meaning of Article 2 TEU) of the 'rule of law'.<sup>51</sup>

ii. The responsibility of EU Member States for the overall budgetary situation

What is true in general is also true with specific regard to the Member State's responsibility under Article 126(1) TFEU, stating that

*'Member States shall avoid excessive government deficits.'* (emphasis added)

In particular against the common background of the level of public debt in almost all Member States it is simply indispensable that the ultimate responsibility for the distribution of public funding lies with the 'government' (and/or parliament), not with the independent authority – even if it were true that the proper performance of the tasks conferred on that authority would justify the allocation of more budget (and, therefore, the denial of further means has a negative impact on the activities of the independent authority). Otherwise the capability of the Member State as such to react to 'recommendations' under Article 126(7) TFEU would be restricted to those fields of State activity which are not yet conferred upon 'completely independent' bodies.

Such a consequence, however, could not only lead to serious distortions among the large amount of public interests<sup>52</sup> but also severely hamper the room for manoeuvre of a Member State under Article 126 TFEU.

3.1.3. *Why judicial review is not enough*

The arguments put forward in the previous subsection (3.1.2.i) would lose much of their convincing force *if judicial control* – to which all these 'independent' administrative authorities have to be subjected, now pursuant to Article 47 EUCFR – *were sufficient* to prevent all conceivable kinds of maladministration. This is, however, not the case:

First, we see that more often than not the judiciary is *lacking formal enforcement* powers, in particular with regard to public bodies, so that *compliance is left to the public bodies themselves*.<sup>53</sup> In such a system, the democratically accountable *government must retain*, at least as a last resort, the *legal competence to force also an 'independent' authority to comply with court judgments*.

In addition, there are always situations where a *case is not brought to or fails in court*, although the challenged decision of the issuing authority is not fully in line with the substantive law. So the competences

50 So Bull, supra note 36, p. 492.

51 Cf., e.g., U. Everling, 'Die Europäische Union als föderaler Zusammenschluss von Staaten und Bürgern', in A. v. Bogdandy & J. Bast (eds.), *Europäisches Verfassungsrecht*<sup>2</sup>, 2009, pp. 961 et seq., p. 991; S. Stimson, 'Constitutionalism and the Rule of Law', in J. Dryzek et al. (eds.), *The Oxford Handbook of Political Theory*, 2006, pp. 317 et seq., p. 321 et seq.; T. Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law*, 2001. Cf. also Council of Europe, Venice Commission, 'Report on the Rule of Law of 4 April 2011', CDL-AD(2011)003rev, Study No. 512/2009, point 25, referring to the Report of the UN Secretary-General Kofi Annan of 23 August 2004, Doc. S/2004/616.

52 It would hardly be in line with the principle of equal treatment if those public interests the protection of which is not yet conferred to independent authorities had to confine themselves to the rest of the public budget which is left after prior-ranking distribution of the available means to independent authorities according to *their* discretion.

53 The law confines itself stating an obligation which is at least not directly enforceable.

of (supreme) State authorities to ‘cancel’ or ‘replace’, purely on their *own motion* or after having been addressed by *petition*,<sup>54</sup> decisions even of ‘independent’ authorities, for reasons of ‘lawfulness’ (including compliance with the principle of proportionality) or simply of ‘rationality’, should not be demonized a priori, the less so because *also* these *supervisory decisions* would be, in their turn, *subject to judicial control*.<sup>55</sup>

#### 3.1.4. Empirical evidence

In *Commission v. Germany*, the Court referred explicitly to the standard of independence granted to the EDPS by the Regulation as the relevant yardstick also for national data protection authorities. So this standard shall be analyzed below (i). In addition, we may take a comparative look at the first authority of that kind, the French CNIL (ii), and at a similar legal framework, the famous ‘Paris Principles’ (iii):

##### i. The limited independence of the EDPS

It is true that the EDPS shall, according to Article 44(1) of the Regulation, ‘act in complete independence in the performance of his or her duties’ and that ‘(...) in the performance of his or her duties, (s)he shall ‘neither seek nor take instructions from anybody’ (Paragraph 2).

For the purpose of clarifying the relevant content (and the implicit limitations) of the legal notion of ‘complete independence’ used in Article 44(1), however, it is appropriate to also take a look at the two preceding articles:

- ‘The European Parliament and the Council shall appoint by common accord the European Data Protection Supervisor for a term of five years, on the basis
- of a list drawn up by the Commission (...)’ (Article 42(1)), ‘reappointment’ is allowed (Paragraph 3).
- ‘The budget authority shall ensure that the European Data Protection Supervisor is provided with the human and financial resources necessary for the performance of his or her tasks’ (Article 43(2)).
- ‘The European Data Protection Supervisor shall be assisted by a Secretariat. The officials and the other staff members of the Secretariat shall be appointed by the European Data Protection Supervisor; their superior shall be the European Data Protection Supervisor and they shall be subject exclusively to his or her direction. Their numbers shall be decided each year as part of the budgetary procedure’ (Article 43(4)). ‘The officials and the other staff members of the European Data Protection Supervisor’s Secretariat shall be subject to the rules and regulations applicable to officials and other servants of the European Communities’ (Article 43(5)).

Taken together, these provisions imply:

- the first appointment as well as maybe any reappointments<sup>56</sup> are not only conferred upon political institutions as such, but to exactly those institutions which decide, on an annual basis, also on the budget of the EDPS;<sup>57</sup>
- neither Article 314 TFEU nor Regulation (EC, Euratom) No. 1605/2002<sup>58</sup> grant any co-decisive role for the EDPS with regard to its share of the Union’s budget;
- as to the staff, EDPS is free to choose the individuals, but only within the quantitative (and, thus, also qualitative) limits set by the budget authority; moreover, after appointment, the general staff regulations apply which means that it is rather difficult to remove staff members.

54 Here we may have in mind *direct individual petitions* as well as suggestions of an *ombudsperson*.

55 This elementary consequence of Article 47 EUCFR was completely neglected in *Commission v. Germany*.

56 The *five-year term*, in combination with the current pension scheme and the obligation enshrined in Article 44(4) of the Regulation (‘The European Data Protection Supervisor shall, after his or her term of office, behave with integrity and discretion as regards the acceptance of appointments and benefits’), may create a *considerable dependency* of EDPS.

57 Cf. Articles 310(1)(2), 314 TFEU.

58 Cf. in particular Articles 33 (calling only on the Commission to establish a draft budget) and 35(2), second sentence (‘The Council shall attach to that draft budget an explanatory memorandum defining its reasons for departing from the preliminary draft budget’).

This finding, in turn, means that the 'independence' of EDPS is directly limited by the annual competences of the 'budget authority' as to budget and staff, and, furthermore, indirectly by the fact that the same institutions which form the budget authority are also competent to decide on the reappointment after a five-year term. In sum, these restrictions, while being perhaps perfectly sensible from a general institutional perspective, reduce the 'independence' enjoyed by the EDPS to a level far below 'completeness'.

ii. The limitations of the independence of the CNIL

In sum<sup>59</sup> the same assessment is to be made when looking at the level of independence granted to the French data protection authority, of particular importance insofar as it seems that it had served as a model for Article 28(1) of the Directive.<sup>60</sup>

According to the original version of loi No. 78-17,<sup>61</sup> the budget of the CNIL (one of the 'independent administrative authorities'<sup>62</sup>) formed part of the budget of the ministry of Justice (Article 7(1) first sentence). Since the amendment of 2004,<sup>63</sup> the new Article 12, first sentence, states, more generally:

*'La Commission nationale de l'informatique et des libertés dispose des crédits nécessaires à l'accomplissement de ses missions.'*

That allows more flexibility within the budget preparation process, but still does not mean that it is now the CNIL itself which decides on what is 'necessary': exactly the opposite may be inferred from a comparative study conducted by the EU Fundamental Rights Agency (FRA) in 2010<sup>64</sup> where 'the lack of adequate funding' was highlighted as a problem in several Member States, and among those also in France.

iii. The implementation of the 'Paris Principles'

Data protection being only one fundamental (human) right among a multitude of others (some of which seem to be even more important, such as the right to life or the prohibition of torture<sup>65</sup>), there exists also a *general device* to secure and promote human rights: the national human rights institutions (NHRI) as recommended by the famous 'Paris Principles'.<sup>66</sup> Clearly enough, also these institutions should have 'real independence';<sup>67</sup> in particular, Principle No. 5<sup>68</sup> states:

*'The national institution shall have an infrastructure which is suited to the smooth conduct of its activities, in particular adequate funding. The purpose of this funding should be to enable it to have its own staff and premises, in order to be independent of the Government and not be subject to financial control which might affect its independence.'*

When it comes to implementation we see, however, that almost all NHRIs, even those of the highest ranking, are dependent on their respective governments as to their budget.<sup>69</sup> This allows the conclusion

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59 On the one hand, the appointment procedure of the members of the CNIL is not only conferred upon political institutions, but includes other independent institutions like judicial courts and the Court of Auditors (Article 13 of the current law (see note 63, *infra*), amended version) which is an advantage, compared with the EDPS appointment procedure; on the other hand, Article 18 (amended version) still provides the presence of a 'commissaire du gouvernement, désigné par le Premier ministre', with a suspensive veto competence (!).

60 The former head of the data protection unit within the Commission, Ulf Brühmann, usually simply referred to the French provisions when explaining, in his jurisprudential contributions, the mandatory components of the 'independence' of a national data protection authority (see Balthasar, *supra* note 35, p. 25 note 87).

61 See note 1, *supra*.

62 Article 8(1) (original version) respectively Article 11 first sentence (amended version).

63 Loi No. 2004-801, *Journal Officiel de la République Française* of 7 August 2004, pp. 14063.

64 *Data Protection in the European Union: the role of National Data Protection Authorities*, p. 20.

65 See note 19, *supra*.

66 Annex to the Resolution of the UN General Assembly of 4 March 1994, No. 48/134.

67 Principle No. 6 (= Principle No. 3 of the section 'Composition and guarantees of independence and pluralism').

68 Or Principle No. 2 of the section 'Composition and guarantees of independence and pluralism'.

69 Cf. FRA, *National Human Rights Institutions in the EU Member States. Strengthening the fundamental rights architecture in the EU I*, 2010, p. 32.

that even the NHRIs themselves<sup>70</sup> (which had also drafted the ‘Paris Principles’<sup>71</sup>) do not uphold an unreasonably extended understanding of ‘financial (...) independence’.

### 3.2. *The modifications in Commission v. Austria*

#### 3.2.1. *As to the right to information*

Given the ‘history’ of the case, it is highly remarkable that the CJ did *not* declare outright *any* governmental right to information to be incompatible with the requirement of ‘complete independence’, but refrained itself to censuring the ‘*unconditional* right to information covering *all* aspects’.

Under *certain* conditions and with respect to at least *some* aspects, therefore, the government *does* have a ‘right to information’ also with regard to ‘completely’ independent institutions. Although we still lack guidelines as to for *which* conditions and *which* aspects this right may be used, it is perfectly clear that the *purpose of this right* is not the private amusement of the government, but the exercise of *State scrutiny* (oversight). This right triggers, therefore, *in principle* also the *legitimacy of other means of State scrutiny*, if needed to secure the compliance of the independent institution with the general legal order.

Evidently, a fair balance – taking into due account also the general principle of proportionality<sup>72</sup> – has still to be found between this principal legitimacy of State oversight and the requirements of the institution to perform its tasks independently. And we may doubt whether national legislation may confine itself just to state this requirement (as was done by the most recent amendment to the Austrian Data Protection Act<sup>73</sup>) instead of defining concrete elements providing precise guidance to the government.

But what really matters is that the CJ did accept, in *Commission v. Austria*, the *principle* that there is no ‘complete independence’ in the literal sense of the term, but that we have to recognize *implicit limits*.<sup>74</sup>

#### 3.2.2. *As to budget autonomy*

Also with regard to the implications of ‘complete’<sup>75</sup> independence for the responsibility of a Member State for the general budget the CJ’s new realism<sup>76</sup> can only be welcomed – although the CJ itself did *not* give any *reasons* for its remarkable change of position.<sup>77</sup>

Nevertheless, one should not overlook the *clausula salvatoria* added to the same point:<sup>78</sup>

‘However, the attribution of the necessary equipment and staff to such authorities *must not prevent them from acting “with complete independence” in exercising the functions entrusted to them* within the meaning of the second subparagraph of Article 28(1) of Directive 95/46’.

Also here the CJ’s formula still *lacks precision* as to how in fact the two opposing principles of integration (arg. ‘under!’)<sup>79</sup> in traditional governmental structures and ‘complete independence’ are to be reconciled. Future *horizontal law-making* will here find an *ample field of activity*.

70 Note that the ranking of NHRIs is done by a committee of the NHRIs themselves.

71 Cf. G. de Beco, ‘National Human Rights Institutions in Europe’, CRIDHO Working Paper 2007/01, 5; Secretary-General of the UN, Report of 19 January 2005, E/CN.4/2005/107, to the (then still existing) Commission on Human Rights (‘Effective Functioning of Human Rights Mechanisms ...’), point 5.

72 See, *parte pro toto*, A. Dashwood et al., *Wyatt and Dashwood’s European Union Law*<sup>6</sup>, 2011, pp. 325 et seq..

73 See Section 1.3, *supra*.

74 Cf., in this respect, also, quite recently, Ziebarth, *supra* note 46, pp. 65 et seq.

75 Or ‘total’, as the CJ put it, maybe only due to a *lapsus linguae*, in *Commission v. Austria*, point 58 (see Section 1.1, *supra*).

76 Point 58 of *Commission v. Austria*, see Section 1.1, *supra*.

77 Note that the Draft General Data Protection Regulation, *supra* note 22, proposes, on the basis of its understanding of *Commission v. Germany* (cf. its Explanatory Memorandum, 12), in its Article 47(7), second sentence: ‘Member States shall ensure that the supervisory authority has *separate annual budgets*’. Cf. also A. Epiney, ‘Zu den Anforderungen an die Unabhängigkeit der Kontrollstellen im Bereich des Datenschutzes. Zum Urteil des EuGH vom 9. März 2010 (...) C-518/07 und seinen Auswirkungen auf die Schweiz’, 2010 *Aktuelle juristische Praxis*, pp. 659 et seq., p. 662, who thought that compliance with the standards set out in that Judgment required a ‘*global budget*’ to be conferred on the independent authority.

78 Point 58, last sentence (emphasis added).

79 In Paragraph 58 of the Judgment in *Commission v. Austria*, the Court accepts that ‘Member States (...) can (...) provide that, from the point of view of budgetary law, the supervisory authorities are to come *under* a specified ministerial department.’ (emphasis added). See Section 1.1, *supra*.

What can already be said at this point in time, however, are two remarks:

First: the CJ's caveat could strengthen awareness that we need more *consistency between substantive law and the budgetary means available*. That lesson will, in present times of severe general budgetary restraints, have to be learnt in particular by lawyers accustomed more to enlarge State obligations by innovative interpretation (or corresponding implementing legislation) of fundamental rights than to take care that the necessary funding is provided.

Second: the fact that the independent authority need not to be given a separate budget, but 'may come under a specified ministerial department' *obviously* implies that

- not only the *original distribution* of funding remains *in principle* within governmental competence, but that
- also usual means of *internal auditing* (as to the correct/effective/efficient use of the distributed means) are compatible with the 'complete independence' of the revised institution.

### 3.2.3. Compliance with the Charter?

The requirement that data protection must be guaranteed by an independent authority is not only enshrined in Article 28(1)(2) of the Directive, but also, since 1 December 2009, on a primary law level in Article 8(3) of the EU Charter of Fundamental Rights.

Given that data protection is the only Charter right which is, by a Charter provision itself, secured by a specialized institution, it is striking that none of the two Judgments at issue (neither *Commission v. Germany* nor *Commission v. Austria*) referred anywhere to Article 8(3) EUCFR.

When looking more closely, however, we see a significant difference between the two provisions:

Whereas Article 28(1)(2) of the Directive has the attribute 'complete', this term is *lacking* in the Charter provision, which reads:

'Compliance with these rules shall be subject to control by an independent authority.'

Could it be that the 'new realism' of the CJ demonstrated in *Commission v. Austria* was, at least also, motivated by this more recent – and, at the same time, more realistic – wording of the Charter?<sup>80</sup>

## 4. Résumé

Data protection is, of course, an important fundamental right. Nevertheless, when it comes to the issue of securing adequate protection by institutional means, we are leaving the substantive part of this specific right and are dealing with State organization – which is a very horizontal and interdependent matter needing more *careful balancing* than the bold pushing forward of one single perspective.

In this respect, *Commission v. Austria* is indeed a major step forward, when considering the two mitigations dealt with above.<sup>81</sup>

This step forward, however, is at the same time only a step back to the Court's previous case law:

Already in its Judgment of 10 July 2003, C-11/00 (*Commission v. European Central Bank*), the Court had stated that granting 'independence' to an institution (in this case to the ECB) 'does *not* have the consequence of *separating it entirely* from the' overall organization it forms part of.<sup>82</sup>

In my view, this solid and keen insight should be preserved. ¶

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80 When it is true that the element of 'complete' independence enshrined in secondary law is doubtful without an explicit legal basis in the Treaties (see Zemanek, *supra* note 10 and Stöger, *supra* note 46), then the *omission of this well-known attribute in the most recent Charter provision* is in fact not an indication in favour of an extensive understanding of this attribute. In addition, M. Schmidl (2012 *European Law Reporter*, p. 292) points out that this attribute did *not yet form part of the Commission proposal* of the Directive, but was inserted only at a later stage of the then legislative process, apparently following a language developed in *specific data protection fora within the Council of Europe*.

81 See points 3.2.1. and 3.2.2.

82 Point 135 of that Judgment (emphasis added). Most interestingly, *Commission v. ECB* did not play any visible role in the reasoning of *Commission v. Germany* or *Commission v. Austria*: the CJ did not refer to it at all, and even the Attorney General, although it would have backed his first position, only cited it once, in a purely formal way, in point 12 of his first Opinion (to *Commission v. Germany*).