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Independent administrative authorities and the sectoral 'Europeanisation' of national administrative law : a European Union law perspective

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1. Introduction

The concept of independent administrative authority is not free from controversy in comparative administrative law[2]. Belgian Constitutional Court judge Michel Pâques, clearly sketched this controversy. Contrary to the independence of the judiciary, which is widely accepted in Member States, « [l]'indépendance de l'administration n'est […] pas de principe. Au contraire, le pouvoir hiérarchique ou de tutelle est même une exigence constitutionnelle belge pour qu'un ministre puisse toujours expliquer et justifier devant le parlement ce qui a eu lieu dans le plus sombre bureau du pouvoir. C'est au contraire l'autorité administrative indépendante qui pose problème en droit belge. On l'admet pourtant et cela au bénéficie de l'effet politique déjà signalé de la conception cartésienne, de l'alibi scientifique qui masque la vraie nature des options très politiques de ses décisions et les soustrait à la critique démocratique »[3]. As Michel Pâques rightly observes, the very idea of an independent authority does not seem to correspond to the idea of control and political accountability that should exist in all administrative decision-making in the broad sense. However, independent administrative authorities are on the rise in different Member States of the European Union. Indeed, as those authorities are endowed with diverse powers and organised in an incoherent manner, they have in common that most of them originate directly in European Union law[4]. Despite the legal classification difficulties encountered at Member State level level, the legislator of the European Union (even though it is composed of the governments of the Member States) seems to show little reluctance to extend the obligation to provide for such authorities or to request an extension of their powers. The aim of this contribution will not be to re-analyse the difficulties associated with the establishment of independent authorities in national administrative law. Rather, it will take the perspective of European Union law. To this end, it will first map the extent of European approaches targeting the creation of independent authorities (section 2.) before highlighting the characteristics of the implicit "model" for implementing European Union law which relies on national authorities. The Union justifies its steps in this area by referring (explicitly or implicitly) to its own democratic legislative procedures at supranational

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[2] A ce titre, Y. Marique et E. Slautsky, « Contours d'une indépendance sous pression » dans E. Slautsky, P.-O. de Broux, A. Desmedt et J.-F. Furnémont (eds.), *Les régulateurs des industries de réseau* (Bruxelles, Larcier, 2022), 67-72 (dans le contexte des régulateurs d'électricité) et dans un contexte de droit constitutionnel belge, K. Muylle, 'Het Grondwettelijk delegatieverbod en het Unierecht : welke democratisch verkozen beraadslagende vergadering ?' dans A. Alen et J. Theunis (eds.), *De Europese dimensie in het Belgische publiekrecht – Leuvense staatsrechtelijke standpunten 3* (Bruges, Die Keure, 2012), p. 324-326

[3] M. Pâques, 'Entre géométrie et finesse : le droit administratif réducteur et créateur d'incertitude', *Annales de Droit de Louvain*, 2019, 261.

[4] See. S. De Somer, *Autonomous Public Bodies and the law. A European Perspective* (Cheltenham, Edward Elgar, 2017), 15.

level on the one hand[5] and to the principles of primacy, effectiveness and sincere cooperation intrinsically linked to the proper functioning of its supranational legal order on the other hand[6]. Respect for those founding principles of the Union's legal order would require Member States to comply, in one way or another, with the requirements arising from secondary Union law, which include the establishment of independent authorities. However, the EU legislator never aimed to create a genuine supranational administration at Member State level. The authorities established by Union law therefore remain "Europeanised" State authorities that form an integral part of the national legal order (section 3.). From a legal point of view, this deliberate choice by the Union legislator gives rise to two questions concerning the relationship between Union law and national administrative law, the practical resolution of which will inevitably fall on national and EU courts (section 4.).

2. Sector-specific independent administrative authorities as a requirement imposed by EU secondary legislation

In order to ensure the effective enforcement of EU secondary legislation, the EU legislator increasingly has called upon the Member States to set up sufficiently resourced and well-functioning independent authorities. Over the past three decades, such developments have appeared across different EU policy fields, as the following seven illustrations show.

First, in the framework of the liberalisation of so-called network industries (energy, telecommunications, rail, postal services), EU secondary legislation imposed the establishment of regulatory authorities[7]. In the energy sector, the EU required that regulatory authorities independent from both States (which often still had a stake in energy companies) and private interests were created. More generally, EU law demanded the separation of network operators and network owners so as to allow for more effective competition between those operators. 2003 and 2009 Directives required independent regulatory authorities to oversee that process[8]. Each Member State is therefore obliged to designate a single regulatory authority at the national level, with the option of creating additional regional authorities and the establishment of specific regulatory authorities for small systems on a geographically separate region[9]. Those authorities have to be legally distinct and functionally independent from any other public or

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[5] P. Nihoul, 'Le droit dérivé de l'Union européenne, justification d'une législation prétendument inconstitutionnelle ?' dans P. d'Argent, D. Renders et M. Verdussen (eds.), *Les visages de l'Etat. Liber Amicorum Yves Lejeune* (Bruxelles, Larcier, 2017), 615-616.

[6] By way of example, CJEU, C-518/07, *Commission v Germany*, EU:C:2010:125.

[7] See on that notion, A. De Streel, A. Gautier and X. Wauthy, 'La régulation des industries de réseau en Belgique', *Reflets et perspectives de la vie économique* (2011), 73-92.

[8] Article 23 Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC, [2003] OJ L176/37 and Article 25 of Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in gas and repealing Directive 98/30/EC, [2003] OJ L176/57 and Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, [2009] OJ L211/53 (and Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC, [2009] OJ L211/94 (2009 Natural Gas Directive). The 2009 Electricity Directive was replaced in 2019 by Directive 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU, [2019] OJ L158/125 (2019 Electricity Directive).

[9] Article 39(1) 2009 Natural Gas Directive and Article 57(1) 2019 Electricity Directive. See also Article 57(2), stating that the designation of a single authority shall be without prejudice to the designation of other regulatory authorities at regional level within Member States. For general objectives, see Article 40 2009 Natural Gas Directive and Article 58 2019 Electricity Directive.

private entity and should act independently from any market interest[10]. They cannot seek or take direct instructions from any government or other public or private entity when carrying out regulatory tasks. In addition, they should equally exercise their powers impartially and transparently[11]. Member States' regulatory authorities have to be able to issue binding decisions on electricity and natural gas undertakings, carry out investigations into the functioning of electricity and gas markets and impose effective, proportionate and dissuasive penalties on undertakings[12]. They convene in the framework of the Agency for the Cooperation of Energy Regulators (ACER)[13] which functions as a network of national regulators[14]. In the framework of the liberalisation of telecommunications and electronic communications markets, independent authorities have also been tasked by the EU legislator to oversee the liberalisation process. EU secondary legislation in that context also prescribes that such authorities have to be legally distinct and functionally independent from any other public or private entity and should act independently from any market interest[15]. As a result, they cannot seek or take direct instructions from any government or other public or private entity when carrying out regulatory tasks. Those tasks should additionally be exercised impartially and transparently[16]. Those regulators need to have powers similar to the ones applying to energy regulators[17]. A Board of European Regulators of Electronic Communications (BEREC[18]) allows the different authorities to meet and exchange information and best practices, coordinated by the European Commission. Although framed in a less detailed manner, similar provisions have been adopted in the framework of the liberalisation of postal[19] and rail[20] services.

Second, the field of personal data protection offers a good illustration of the EU's reliance on independent authorities beyond liberalised network industries. The 1995 Data Protection Directive required independent data protection supervisors to be set up at Member State level in order for the newly harmonised rules of protection to be properly respected across all different Member States[21]. In addition, Article 8(2) of the Charter of Fundamental Rights of the European Union directly confirmed that data protection guarantees need to be enforced by

[10] Article 39(4)(a) 2009 Natural Gas Directive; Article 57(4)(a) 2019 Electricity Directive.
[11] Article 39(4), first sentence 2009 Natural Gas Directive; .Article 57(4), first sentence 2019 Electricity Directive; See also Case C-718/18, *Commission v Germany,* EU:C:2021:662 and A-K Kaufhold, 'Complete, Yet Limited: The Guarantee of Independence for National Regulatory Authorities in the Energy Sector: Commission v. Germany' 59 *Common Market Law Review* (2022) 1853.
[12] Article 41(4) 2009 Natural Gas Directive; Article 59(3) 2019 Electricity Directive.
[13] https://www.acer.europa.eu/the-agency/about-acer.
[14] Article 2(1) Regulation 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators, [2009] OJ L211/1; this Regulation has been recast into Regulation 2019/942 of the European Parliament and of the Council of 5 June 2019 establishing a European Union Agency for the Cooperation of Energy Regulators, [2019] OJ L158/22.
[15] Originally Article 3 of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), [2002] OJ L108/33, currently featuring in Articles 5 to 7 of Directive 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (Recast), [2018] OJ L321/36.
[16] Article 6(1) of Directive 2018/1972.
[17] Article 5(1) Directive 2018/1972.
[18] https://www.berec.europa.eu/en.
[19] Article 1(20) of Directive 2008/6/EC of the European Parliament and of the Council of 20 February 2008 amending Directive 97/67/EC with regard to the full accomplishment of the internal market of Community postal services, [2008] OJ L53/3.
[20] Article 55 of Directive Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area, [2012] OJ L343/32.
[21] Recitals 62-64 and Article 28 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, [1995] OJ L281/31.

independent authorities. In doing so, EU primary law directly requires data protection authorities to be independent. For its part, the Court of Justice confirmed that authorities have to be independent bodies from every public or private actor, although they may depend on their budget on Parliaments[22]. The 2016 General Data Protection Regulation (GDPR) further specified those requirements[23]. That Regulation also contains a detailed list of minimum enforcement powers each data protection authority must have in place[24], which must also include the power to impose administrative fines[25]. In addition, authorities must be structured in such a manner that they can assist each other in joint cross-border investigations[26]. To that extent, the different national authorities meet in the framework of the European Data Protection Board (EDPB), which itself functions independently from public or private interests.[27] The EDPB can take binding decisions in case of conflict between national authorities[28].

Third, the enhanced budgetary surveillance programmes imposed on Member States and set up in the wake of the 2010-2012 sovereign debt crises resulted in similar surveillance and oversight obligations being imposed on Member States. Regulation 473/2013 in that regard requires the establishment of structurally independent or at least functionally autonomous oversight bodies vis-à-vis the budgetary authorities of the Member State. Those bodies have to monitor compliance with EU budgetary rules put in place and act accordingly in cases of failure to do so[29]. Despite the presence of those bodies, it is the European Commission which is tasked ultimately with controlling and enforcing budgetary rules against the Member States[30].

Fourth, in competition law, Directive 2019/1 imposed direct independence requirements on national competition authorities whenever those authorities are obliged to apply EU provisions prohibiting anticompetitive agreements or abuses of a dominant economic position (Articles 101 and 102 TFEU). The Directive invokes the need for the effective application and enforcement of those provisions to justify the imposition of new institutional design obligations[31]. Among those obligations, transparent selection procedures for decision-making members of an authority have to be foreseen[32]. In general terms, 'Member States shall ensure that such authorities perform their duties and exercise their powers impartially and in the interests of the effective and uniform application of [Articles 101 and 102 TFEU], subject to proportionate accountability requirements[33]. The Directive additionally harmonises Member States' authorities' inspection, decision-making and sanctioning powers[34]. For cross-border cases where multiple national authorities may be involved, cases can be allocated to one

[22] CJEU, Case C-518/07, *Commission v Germany*, EU:C:2010:125; Case C-614/10, *Commission v Austria*, EU:C:2012:63 and Case C-718/18, *Commission v Germany*, EU:C:2021:662.
[23] Articles 51- 52 Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), [2016] OJ L119/1 (GDPR).
[24] Article 58 GDPR.
[25] Article 83 GDPR.
[26] Articles 60-61 GDPR.
[27] Article 69 GDPR.
[28] Articles 65-66 GDPR.
[29] Article 5 Regulation 473/2013 of the European Parliament and of the Council of 21 May 2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area, [2013] OJ L140/11.
[30] Article 6 Regulation 473/2013.
[31] Directive 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, [2019] OJ L11/3.
[32] Article 4(4) Directive 2019/1.
[33] Article 4(1) Directive 2019/1.
[34] Articles 6 to 16 Directive 2019/1.

Member State in the framework of a European Competition Network (ECN) composed of the representatives of different competition authorities and is chaired by the European Commission[35].

Fifth, EU equality and non-discrimination law asks Member States to provide for bodies ensuring assistance to victims of discriminatory treatment[36]. Such assistance must in any case be independent and effective[37]. Although the Directives do not explicitly impose the creation of independent bodies, the European Commission recommends the Member States to set up such bodies[38]. In order to strengthen those obligations, the European Commission proposed new legislation that would include binding standards with regard to the organisation of those bodies[39]. If and when adopted, EU secondary legislation would mandate much more directly the setting up of independent bodies[40]. An information exchange focused European Network of Equality bodies (Equinet) coordinates the enforcement actions between the Member States[41].

Sixth, the 2018 Audiovisual Media Services Directive Regulation also requires Member States to designate one or more independent competent authorities as responsible for its application and enforcement of their rules. Media regulators have to be independent and have at their disposal sufficient resources and minimum decision-making powers[42]. They also need to be structured in such a way as to allow for effective participation in the European Regulators' Group for Audiovisual Media Services (ERGA), through which best practices can be exchanged between Member States[43].

Seventh, the 2022 Digital Services Act Regulation (DSA) also requires Member States to set up an enforcement framework along similar lines. As part of the DSA, independent competent authorities have to be designated, each benefitting from a minimum amount of resources and decision-making powers[44]. In addition, one of those authorities has to be designated as Digital

[35] https://competition-policy.ec.europa.eu/antitrust-and-cartels/european-competition-network_en.

[36] Article 13(1) Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, [2000] OJ L180/22; Article 12(1) Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, [2004] OJ L373/37; Article 20(1) Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, [2006] OJ L204/23; Article 11(1) Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC, [2010] OJ L180/1.

[37] Article 13(2) Directive 2000/43/EC; Article 12(2) Directive 2004/113/EC; Article 20(2) Directive 2006/54/EC; Article 11(2) Directive 2010/41/EU.

[38] Commission Recommendation C(2018) 3850 final of 22 June 2018 on standards for national equality bodies. See for the text of this 2018 Commission Recommendation, https://ec.europa.eu/info/files/commission-recommendation-standards-equality-bodies-0_en.

[39] See Proposal for a Directive of the European Parliament and of the Council on standards for equality bodies in the field of equal treatment and equal opportunities between women and men in matters of employment and occupation, and deleting Article 20 of Directive 2006/54/EC and Article 11 of Directive 2010/41/EU, COM/2022/688 final, available at https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/combatting-discrimination/tackling-discrimination/equality-bodies_en.

[40] See Article 3 of the proposed Directive (COM/2022/688 final).

[41] See for more information and background on the specifics of this network, https://equineteurope.org/.

[42] Article 30 Directive 2010/13 Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), [2010] OJ L95/1, modified by Directive 2018/1808, [2018] OJ L303/69.

[43] Article 30(4) Directive 2010/13, see also https://erga-online.eu/.

[44] Articles 49 and 51 Regulation 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act), [2022] OJ L227/1 (DSA).

Services Coordinator[45]. Those Digital Services Coordinators need to perform their tasks under this Regulation in an impartial, transparent and timely manner. In practice, they need to act with complete independence and are required to remain free from any external influence, whether direct or indirect or from instructions from any other public authority or any private party[46]. The Regulation outlines in a detailed manner the powers and enforcement procedures digital services coordinators and other competent authorities would have to respect[47]. Digital Services Coordinators take part in a European Board for Digital Services[48]. The Board's role consists in exchanging information, to ensure coordinated enforcement and decision-making[49].

3. An enforcement framework justified by the principles of primacy, effectiveness and sincere cooperation in EU law

The overview made in the previous section shows the increasingly wide EU legislative impact on the establishment and functioning of independent administrative authorities. Despite sector-specific differences, it is submitted that a common 'governance template' accompanying the emergence of national independent administrative authorities based on EU secondary legislation has emerged. Although that template significantly limits Member States' administrative autonomy, the EU's willingness to ensure the primacy, unity and effectiveness of its own rules applied at Member State level provides a pragmatic justification for maintaining and even extending it. In essence, the template comprises three building blocks.

First, the actual legal form that an authority required by EU law needs to take is left to the Member States, as long as it is legally distinct or (functionally or completely) independent. It is to be emphasised, however, that such independence is never absolute[50]. Despite imposing increasingly detailed requirements on the appointment and conditions of authorities' leadership, even a body or authority that would be considered completely independent, can be made subject to some kind of scrutiny. Different EU legislative instruments demand that Member States' governments or parliaments receive an annual activity report or allow the parliament to approve the budget allocated to the authority concerned. In practice, this results in the creation of at times hybrid legal bodies, especially in Member States where no general framework for independent or regulatory authorities exists as a matter of administrative or constitutional law[51]. As long as the Member States guarantee the independence of the authority concerned, Member States remain free to choose the specific legal form of the authority.

Second, in addition to having to set up an independent (or legally distinct) authority, EU secondary legislation generally also endows said authorities with minimum inspection, decision-making and sanctioning powers. Although the level of detail of those powers varies as well, it is clear that as a matter of EU law, independent regulatory authorities must have the ability to adopt individual or regulatory decisions, impose sanctions and conduct investigations. In the same way, they have to be able to exchange information with their counterparts in other Member States and, in the framework of personal data protection and competition law, take part

[45] Article 49(2) and 50 DSA.
[46] Article 50(2) DSA.
[47] Article 51 DSA.
[48] Article 48 DSA.
[49] Article 61 DSA.
[50] See to that extent, by analogy, Opinion of Advocate General Bobek in Case C-530/16, *Commission v Poland*, para 33.
[51] S. De Somer, *Autonomous Public Bodies and the law. A European perspective*, 59-60.

in joint investigations[52]. In addition and more generally, the different Member States' authorities have to collaborate and meet in EU-framed institutionalised networks (agencies, groups, networks or boards), which are in practice ensuring regular interactions between the authorities and the European Commission. As such, the decision-making practices and activities of independent authorities become are made dependent on their adequate insertion within the networks set up at EU level.

Third, despite independence from public and private parties being imposed as a matter of EU law, the authorities thus established or designated are not completely unaccountable. The different instruments of EU law provide for judicial review or independent appeal mechanisms to be provided against decisions taken by the authorities[53]. As a result, individuals or interested parties affected by such decisions are entitled to obtain a review of that measure by the national judge. Although EU law generally leaves it to the Member States to decide which judge (administrative or other) shall be competent and which procedural rules shall apply, judges are to play an important role in ensuring that authorities' decisions comply with the rule of law[54]. By entrusting more decision-making tasks to independent authorities, the EU legislator implicitly also requires effective judicial control to be exercised over authorities' decisions. The responsibility for exercising such judicial control falls upon the competent jurisdictions at Member State level[55]. Those jurisdictions need to make sure that decisions are effectively reviewed in compliance with the EU principle of effective judicial protection. In practice, however, the EU standards of effective judicial protection largely correspond with those flowing from Article 6 of the European Convention on Human Rights. As a result, Member States complying with the latter provision will also comply with the judicial review requirements flowing from EU law[56].

It follows from the foregoing analysis that this template is meant above all to establish, at the level of the Member States, harmonised enforcement structures that would ensure a more coherent application of specific rules of EU secondary legislation. The establishment of authorities independent from Member States' governments (despite being financed by Member States' budgets) directly serves the purpose of applying EU secondary legislation as uniformly and coordinated as possible. Any independence requirements posited by EU law are therefore justified, from an EU law perspective, by the need to guarantee the effective application of EU law. The need for authorities to take part in networks at EU level further confirms this. Those authorities do not operate in a vacuum, but form part of an intricate network coordinated at supranational level. The need for such coordination relating to the effective or uniform application of EU secondary legislation is therefore also invoked as a justification for changes or exceptions that may have to be made to Member States' administrative law systems and principles. Member States' principles or rules that would object against this possibility would have to be set aside in accordance with the principle of primacy of EU law as recognised by the

[52] H. Hoffmann and L. Mustert, 'Data Protection' in M. Scholten, *Research Handbook on the enforcement of EU law* (Cheltenham, Edward Elgar, 2023), 466.
[53] By way of example, Article 60(7) and (8) 2019 Electricity Directive.
[54] In general, see K. Lenaerts, 'The *Rule of Law* and the Coherence of the Judicial System of the European Union', 44 *Common Market Law Review* (2007), 1625.
[55] S. Lavrijssen, 'Towards a European Principle of Independence: The Ongoing Constitutionalisation of an Independent Energy Regulator' 16 *Climate Change Law* Review (2022), 33.
[56] This also flows from ECtHR, 30 June 2005, Application 45036/98, *Bosphorus*, ECHR:2005:0630JUD004503698; see also Article 52(3) of the Charter of Fundamental Rights of the European Union (Charter).

Court of Justice. That Court in that context indeed posited that the primacy, unity and effectiveness of EU law justify that Member States' own regulatory or procedural standards be set aside, even when those standards are protected under national constitutional law[57]. In addition, the principle of sincere cooperation laid down in Article 4(3) TEU additionally requires Member States to assist constructively in the implementation of EU law[58]. The setup of independent authorities and their required participation in EU-structured networks is therefore considered above all an instrument of to increase the coherent and effective enforcement of EU law at Member State level. Member States' administrative law traditions or principles seemingly have to be set aside to make this happen.

4. EU law gaps in the sectoral Europeanisation of national administrative law setup

The previous section concluded that principles of primacy, effectiveness and of sincere cooperation are invoked as reasons to justify an increased involvement of the EU legislator in the administrative organisation and functioning of the Member States. However, those principles alone do not result in the creation of a separate EU administration completely detached from national administrative law. In practice, the different authorities designated or created essentially still form part of the Member State legal order and function therefore predominantly in compliance with national administrative law principles. Despite EU law having primacy over national law, the EU legislator does not regulate every aspect of an authority's functioning. As a result, those authorities also apply national administrative law when voids are left by the EU legislator. As a consequence, EU rules and national administrative law principles have to interact in practice in order to adopt an appropriate and legitimate administrative decision. In the abstract and at the outset, it nevertheless remains unclear how far EU law goes in limiting or determining the conditions for such interaction. That lack of clarity manifests itself particularly on two levels.

First, when requiring independent authorities to be created, EU secondary legislation generally does not exclude that those authorities are also conferred additional tasks under national administrative law. When that is the case, national authorities essentially wear a double hat: enforcer of EU legal norms on the one hand and of national norms on the other hand. In that last case, national authorities will normally be considered to act outside the scope of European Union law. As a result, general principles of EU good administration and effective judicial review would not apply to those procedures under national law. Those processes would remain governed by national law. As a result, dual standards in terms of decision-making and in terms of administratees' effective legal protection may appear[59]. By way of example, in competition law enforcement, it remains perfectly possible for authorities acting under national law alone to have different investigation and decision-making powers than when applying Articles 101 and 102 TFEU directly[60]. In the same way, the procedural guarantees accompanying national concentration control procedures (distinct from EU procedures in this field, which are conducted only by the European Commission) could be governed by other procedural

[57] See already CJEU, Case 11-70, *Internationale Handelsgesellschaft,* EU:C:1970:114, para 3 *;* CJEU, C-399/11*, Melloni,* EU:C:2013:107, para 60.
[58] M. Klamert, *The Principle of Loyalty in EU law*, Oxford, Oxford University Press, 2014, 327 p.
[59] M. Botta, The draft Directive on the powers of national competition authorities: the glass half empty and half full', 38 *European Competition Law Review* (2017), 474.
[60] That is not the case, however, when they apply national law in parallel with Articles 101 and 102 TFEU in one and the same case, see Article 2(2) Directive 2019/1.

guarantees than EU law-based procedures[61]. EU law's acceptance of double administrative law standards maintained by one and the same national authority in different kinds of procedures in practice requires that those authorities need to be very attentive as to which standard to apply in which case. That in itself may not be problematic, but it is an additional factor of complication in administrative authorities' decision-making processes directly resulting from the EU legislator's involvement in those processes.

Second, even when national administrative authorities are acting within the scope of EU law, the room left for (more protective) administrative law principles remains a source of uncertainty. The different sector-specific instruments of EU law in essence always require that general principles of EU law, including principles of good administration, are respected in that regard. According to Article 41 of the Charter of Fundamental Rights of the European Union, very person has the right to have his or her affairs handled impartially, fairly and within a reasonable time. That includes at least the right of every person to be heard, before any individual measure which would affect him or her adversely is taken, the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy and the obligation of the administration to give reasons for its decisions[62]. Those principles form part of the Member States' administrative law traditions as well, at the very least in the format of general principles of good administration. However, in some specific procedures based on EU law, the application of national administrative law could offer guarantees that offer more protection to the administratees than the principles of EU law themselves. One could by way of example consider the principle of legitimate expectations. To the extent that, under national law, legitimate expectations are more rapidly deemed present than under EU law, the application of the national administrative law standard may result in more protection for the administratee than the EU law standard. In that situation, questions arise as to whether that more protective standard could still be applied in procedures which take place before Member States' authorities but which have been foreseen in an instrument of EU secondary legislation. EU law does not seem to provide a generally applicable single answer to that question[63]. According to the Court of Justice, whenever those more protective principles would threaten the primacy, unity and effectiveness of EU law, they should not be applied[64]. By contrast, when that is not the case, more protective national administrative law standards may very well govern procedures taking place at Member State level but falling within the scope of EU law[65]. In practice, however, it is not always clear at first sight when the primacy, unity or effectiveness is threatened. Except for some scarce references

[61] EU law in that regard nevertheless requires, in accordance with the principle of equivalence, that enforcement procedures relied on to implement EU law are not less favourable than the onese relied on to enforce national law. As a result, national procedures could be less generous than EU law procedures. However, the opposite scenario is not accepted, see L. Feilhès, , *Le principe d'équivalence en droit de l'Union européenne* (Brussels, Bruylant, 2023), p. 35-36.

[62] Art. 41 Charter of Fundamental Rights of the European Union. On the notion of good administration in this context, see also R. Bousta, 'Pour une approche conceptuelle de la notion de bonne administration', 21 *Revista Digital de Derecho Administrativo* (2019), 23-45.

[63] In addition, we deliberately leave aside in this short contribution the issue of so-called composite administrative procedures, i.e. procedures where both national authorities and EU bodies or agencies take some decisions or steps to arrive at a final administrative decision at Member State level. On those procedures and the difficult role of courts, see M. Eliantonio, 'Access to justice in composite administrative procedures for the implementation of EU law : the story so far' in P. Van Cleynenbreugel and J. Wildemeersch, *Selected issues in European business law – 60 years of EU legal studies at Liège*, Bruxelles, Bruylant, 2023, 189-220.

[64] CJEU, Case C-399/11, *Melloni*, EU:C:2013:107, para 60.

[65] CJEU, Case C-42/17, *Criminal proceedings against M.A.S. and M.B. (Taricco II),* EU:C:2017:936, para 61.

in EU secondary legislation[66], the EU legislator does not explain either when more protective national standards can be applied beyond what is required at EU level. The assessment thus remains to be made by national authorities on a case-by-case basis and, in case of dispute, it will fall upon the reviewing judge, helped by the Court of Justice, to settle the dispute. That framework established and sanctioned by EU law is certainly not conducive to legal certainty.

It follows from those observations that the setup by EU secondary legislation of structured enforcement frameworks at Member State level at the very least raises practical questions with regard to the decision-making processes of those authorities. Those questions will in any case have to be resolved by judges. Although that is characteristic of the EU legal order, it may require national administrative law systems to adapt to this new reality. The ease with which the EU legislator assumes that the primacy of EU law and the principle of sincere cooperation will result in a more streamlined enforcement of EU norms at Member State level therefore needs to be nuanced. Absent a more general framework, the answers addressing the issues outlined in this section are only likely to arrive gradually if and when judges are called upon to review certain problematic situations. One could legitimately question whether such approach is fully compatible with the requirements of legal certainty characteristic of many administrative law systems[67].

5. Conclusion

The aim of this short contribution has been to map and explore the different fields of European Union law in which the EU legislator increasingly demands the establishment of independent administrative authorities. Although the existence of such authorities is justified rather swiftly based on the primacy and effectiveness of EU law, their integration in administrative law systems raises problems and open questions. The purpose of this contribution has been to highlight where EU law stands and to map the transversal, cross-sector open questions triggered by the EU legislator's choices in that regard. Addressing the gaps thus created is not an easy task. It requires administrative law specialists to be versed in both national and EU norms and principles and to be aware where the scope of EU law begins, where overlaps with national administrative law principles are authorised and where the principles of primacy and effectiveness of EU law demand that national norms, principles or practices are set aside. It is clear that, because of the EU legislator's increased involvement in sector-specific administrative regulation, the task for future national administrative lawyers is becoming increasingly complicated.

[66] By way of example, see Art. 41(14) 2009 Energy Directive.

[67] See however, from the point of view of EU law, the fact that legal certainty is more aligned with trust and the effective application of EU rules across Member States, J. Van Meerbeeck, 'The Principle of Legal Certainty in the Case Law of the European Court of Justice: From Certainty to Trust', 41 *European law review* (2016), 275-288.