12

Legal Protection against Fundamental Rights Breaches through Factual Conduct by the European Union

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12.1 INTRODUCTION

Starting from the premise that factual conduct by European Union (EU) institutions, agencies, and bodies (hereafter referred to generically as 'EU bodies' in line with the consistent terminology adopted in this volume) may breach fundamental rights of individuals, this chapter examines what appears to be rather a 'blind spot' in EU law and scholarship, namely the legal protection against factual conduct by the EU. In doing so, the chapter engages first with some conceptual clarifications of the term 'factual conduct' by reference to the concepts of 'legally binding act' and 'legally non-binding act' (or soft law) and provides some illustrations of EU factual conduct potentially infringing fundamental rights. Second, the chapter looks at the system of EU legal remedies (both judicial and non-judicial remedies are included within the scope of this investigation) as enshrined in the Treaty on the Functioning of the European Union (TFEU)[1] and the jurisprudence of the Court of Justice of the European Union (CJEU), as well as in relevant EU secondary legislation, with a view to establishing their potential to address fundamental rights breaches by EU factual conduct. Third, the chapter ends with an assessment of the overall system of legal protection against fundamental rights breaches through factual conduct by the EU, revealing strengths, gaps, and challenges, and suggesting some solutions for improvement, in

* This chapter is dedicated to the memory of my father, Dr Liviu Coman-Kund. The author would like to thank Melanie Fink for the feedback and suggestions on this chapter; the usual disclaimer applies. All websites and electronic sources were last accessed on 25 August 2023.

[1] Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C202/47 (TFEU).

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particular in the form of enhancing, in light of Articles 41 and 47 of the Charter of Fundamental Rights of the EU (CFR),[2] the array of EU administrative/non-judicial mechanisms and remedies with judicially reviewable outcomes.

12.2 EU FACTUAL CONDUCT AND FUNDAMENTAL RIGHTS

12.2.1 *Conceptual Reflections on EU Factual Conduct*

Public administration features as the most prominent form of action legally binding acts, be they of a general or individual application. Yet the bulk of daily public administration also entails a lot of human actions, acts, activities, or conduct that do not amount to formal legally binding acts.[3] Such administrative acts or conduct, though not intended to produce legal effects like a binding legal act, entail nevertheless (sometimes significant) factual and legal consequences; as such, they may also arguably infringe fundamental rights.[4]

The range of administrative forms of action outside the category of formal legally binding acts is broad and diverse. It includes various acts and operations that lead to the adoption[5] or ensure the implementation/enforcement[6]

[2] Charter of Fundamental Rights of the European Union [2016] OJ C202/389.

[3] The term 'formal legally binding act' refers in this context to legal instruments that are explicitly enshrined as acts with binding effects in the relevant legal framework and that normally must meet specific procedural and formal criteria to come into being and produce their binding effects (e.g., regulations, directives, and decisions enshrined in Article 288 TFEU are illustrative of this category); this allows drawing a distinction between such formal binding acts, whereby their form and substance are in principle fully consistent in indicating their binding nature, and genuine legally binding acts identified on the basis of the 'substance prevails over form' test used by the Court of Justice of the European Union (CJEU) since *ERTA* to determine whether a certain action, no matter the label and form, is in fact genuinely producing legal effects vis-à-vis third parties, see Case 22/70 *Commission v Council. European Agreement on Road Transport (ERTA)* [1971] EU:C:1971:32, para. 42. In the latter case, administrative actions, including factual conduct (as discussed later in this chapter), that meet the criteria of the *ERTA* test would amount to genuine legally binding acts even if their form does not correspond to that of a legally binding act; if this is the case, such 'factual conduct' qua form expressing a legally binding act qua nature would be subject to the system of legal review and remedies put in place for legally binding acts.

[4] See Timo Rademacher, 'Factual Administrative Conduct and Judicial Review in EU Law' (2017) 29 (2) European Review of Public Law 399, 401.

[5] E.g., various preparatory documents, proposals, draft rules, reports, and opinions.

[6] E.g., the concrete actions to enter the premises of an undertaking, as well as searching and collecting relevant information and documents following a formal inspection decision adopted by the European Commission under the EU competition rules according to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1; checking identity of

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of a formal legally binding act. It also arguably includes more free-standing acts and factual conduct such as legally non-binding or 'soft law' acts[7] as well as various concrete actions and operations.[8]

From a conceptual point of view, the term 'factual conduct' can be understood in two different ways.[9] In one sense, it can be construed as an act of conduct or as a legal fact in the shape of human behaviour that is not intended per se to produce legally binding effects, but which nevertheless may entail certain legal and practical consequences according to law.[10] According to this understanding, 'factual conduct' would broadly encompass all administrative acts (forms of action) outside the category of formal legally binding acts. In a second sense, 'factual conduct' is to be understood as a specific form of administrative action. According to this second, more specific, understanding, it encompasses administrative actions and operations that amount broadly speaking to 'physical acts'[11] or measures of a factual nature. Such acts express the conduct of a public authority or its servants in the outside world in a factual manner, their legal relevance (as legally binding acts or mere acts of conduct having some legal relevance) being determined by the applicable legal framework.[12] Factual conduct can thus

persons, body searches, confiscation of goods/items in the implementation of an operational decision during a joint operation at the Union's external borders.

7 E.g., recommendations and opinions based on Article 288 TFEU, communications, white papers, green papers, letters, resolutions, guidelines, codes of conduct, etc.

8 E.g., data collection and processing operations, accessing and searching an EU database, drawing up the agenda and minutes of an official meeting, publication of notices of information, questions and answers, 'naming and shaming' practices, for instance, by the so-called European Supervisory Authorities (ESAs) in the context of the implementation and enforcement of the EU financial governance framework (for a recent example of such practices regarding the European Banking Authority, see European Banking Authority, Regulatory Technical Standards on a central database on AML/CFT in the EU (European Banking Authority, 20 December 2021) <www.eba.europa.eu/regulation-and-policy/anti-money-laundering-and-countering-financing-terrorism/regulatory-technical-standards-central-database-amlcft-eu#pane-new-ed8f3c99-9589-454a-a87e-37f2578a1783>; and The Compliance Lady, European Banking Authority's "Name & Shame" Database To Be Operational In January 2022 (Compliance Lady, 21 December 2021) <https://thecompliancelady.com/2021/12/21/european-banking-authoritys-name-shame-database-to-be-operational-in-january-2022/>.

9 For an interesting conceptual framework regarding EU factual conduct and its potential legal effects, see Napoleon Xanthoulis, 'Administrative Factual Conduct: Legal Effects and Judicial Control in EU Law' (2019) 12 Review of European Administrative Law 39, 45–56.

10 Rademacher (n 4) 399–400; see also Herwig C H Hofmann, Gerard C Rowe, and Alexander H Türk, *Administrative Law and Policy of the European Union* (Oxford University Press 2011) 667–672.

11 See Case 53/85 *AKZO Chemie BV and AKZO Chemie UK Ltd v Commission* [1986] ECLI:EU:C:1986:256, para 17.

12 Hence, factual conduct does not cover formal legally binding acts or formal non-binding acts and instruments adopted by the EU administration according to prescribed procedures and

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include various physical acts and operations, either free-standing or connected to the adoption and implementation/enforcement of a formal legal act (binding or non-binding). Examples include: publishing/handling information, collecting and processing personal data, feeding a database with information or extracting information therefrom, providing an answer to a request or a petition, preparing a draft legal act, preparing and submitting a report or letter, publishing a legal act in the official journal/communicating the legal act to interested persons, entering business premises, searching for information, collecting and sealing documents and other items during an inspection/investigation, and using police executive powers.[13]

Relying mainly on the second sense of the term for the purpose of this chapter, as in our view it analytically depicts more accurately the phenomenon under consideration, we note that factual conduct is very much present in the activity of the EU public administration. All EU bodies handle personal and non-personal data and information, publish and exchange information and various documents, undertake preparatory operations and actions for the purpose of adopting a formal legal act, and carry out various operations and actions for ensuring their implementation. It is less common for EU bodies to carry out physical implementation and enforcement of EU law, as these matters are normally reserved for the Member States' administrations. Yet there are notable examples of EU bodies doing this (see also Chapter 11). These include the European Commission in competition law[14] and, more recently, the European Central Bank (ECB) in its supervisory role within the Single Supervisory Mechanism (SSM),[15] the European Border and Coast

formats (the latter being also called 'soft law'). As to the latter, though they have no binding force, formal recommendations and opinions adopted by the EU institutions (in particular the Council and the Commission) based on Article 288 TFEU are technically included in the category of 'legal acts of the Union'; the same seems to apply, at least according to scholarly and some official sources, for communications, guidelines, notices, resolutions, etc. that are not listed under Article 288 TFEU, and therefore are labelled as 'atypical acts', see Florin Coman-Kund and Corina Andone, 'Persuasive Rather than 'Binding' EU Soft Law? Towards an Argumentative Template for European Commission's Recommendations' in Petra Láncos, Napoleon Xanthoulis, and Luis Arroyo Jiménez (eds), *The Legal Effects of EU Soft Law: Theory, Language and Sectoral Insights into EU Multi-level Governance* (Edward Elgar 2023) 150; and Opinion of Advocate-General Bobek in Case C-16/16P *Belgium v Commission* [2017] ECLI:EU:C:2017:959, paras 55–62.

[13] E.g., operating an arrest, use of firearms, body and identity checks, placing a visa stamp in a passport, operating a patrol vessel during a joint operation at EU external borders, using physical force to prevent crossing of borders, etc.

[14] See Regulation 1/2003.

[15] Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions [2013] OJ L287/63 (SSM Regulation).

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Guard Agency (Frontex) with its new direct operational powers in joint operations at the Union's external borders,[16] and the European Public Prosecutor's Office (EPPO) with its wide-ranging investigation powers.[17] This trend is likely to continue in view of the ongoing phenomenon of EU administrative integration and hybridisation, with more EU bodies being granted (gradually increasing) direct enforcement and implementing powers, often exercised within rather intricate composite (EU and national) legal frameworks and in complex relationship with national competent authorities.[18]

12.2.2 *Risks for Fundamental Rights from EU Factual Conduct*

EU factual conduct (understood as acts of 'physical' conduct by EU institutions, agencies and bodies, and their staff) may directly or indirectly affect fundamental rights of natural and legal persons. Examples are abundant in this respect. For instance, personal data processing operations by EU bodies may breach directly or indirectly the data protection rights (enshrined in Article 8 CFR and further given substance in Regulation 2018/1725)[19] as well as the right to respect for private and family life (Article 7 CFR) of the individual. Abusive or inappropriate personal data processing by Europol as regards persons suspected of being involved in serious crime might ultimately result in unlawful arrests and home searches by enforcement authorities in the Member States, in breach of the right to liberty and security of the person (Article 6 CFR) and/or the right to respect for private and family life (Article 7 CFR). Disseminating/publishing abusive defamatory information about individuals and legal persons may affect their reputation and consequently result

[16] Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624 [2019] OJ L295/1 (EBCG Regulation).

[17] Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO') [2017] OJ L283/1 (EPPO Regulation).

[18] See generally Deirdre Curtin, *Executive Power of the European Union. Law, Practices and the Living Constitution* (Oxford University Press 2009) 65–66; regarding EU law enforcement, see Miroslava Scholten and Michiel Luchtman (eds), *Law Enforcement by EU Authorities. Implications for Political and Judicial Accountability* (Edward Elgar 2017) 19; regarding specifically physical conduct in EU composite procedures, see Xanthoulis (n 9) 69–71.

[19] Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC [2018] OJ L295/39.

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in a breach of human dignity (Article 1 CFR)[20] or the freedom to conduct a business (Article 16 CFR).[21] Irregularities committed by Commission officials implementing EU competition law, officials of the European Anti-Fraud Office (OLAF) under Regulation 883/2013,[22] or ECB officials in the implementation of the SSM Regulation during an inspection at the premises of an undertaking, might result in a breach of Article 7 CFR (protection of 'home', including business premises)[23] or a breach of the right to property (Article 17 CFR).[24] Last but not least, the exercise of executive powers by Frontex operational staff during joint operations at sea and/or land borders[25] could amount to a breach of the right to life (Article 2 CFR), the right to the integrity of the person (Article 3 CFR), prohibition of torture and inhuman or degrading treatment or punishment (Article 4 CFR), or the right to asylum (Article 18 CFR) and non-refoulement (Article 19 CFR).

The ability of EU factual conduct to directly and indirectly breach fundamental rights raises in turn the issue of ensuring adequate legal protection and remedies against such conduct. Are legal safeguards and remedies necessary and, if so, sufficiently available to address fundamental rights breaches by EU factual conduct?

[20] See, for instance, the so-called *Tillack* judgments, Case T-193/04 *Tillack v Commission* [2006] ECLI:EU:T:2006:292; and Case C-521/04 PR *Tillack v Commission* [2005] ECLI:EU:C:2005:240.

[21] For instance, EBA's 'naming and shaming' register in the AML/CFT database, see European Banking Authority, Final report on draft regulatory technical standards under Article 9a (1) and (3) of Regulation (EU) No 1093/2010 setting up an AML/CFT central database and specifying the materiality of weaknesses, the type of information collected, the practical implementation of the information collection and the analysis and dissemination of the information contained therein (European Banking Authority, 20 December 2021).

[22] Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999 as amended by Regulation (EU, Euratom) 2016/2030 of the European Parliament and of the Council of 26 October 2016 amending Regulation (EU, Euratom) No 883/2013, as regards the secretariat of the Supervisory Committee of the European Anti-Fraud Office (OLAF) [2016] OJ L317/1.

[23] See Case C-94/00 *Roquette Frères SA v Directeur général de la concurrence, de la consommation et de la répression des fraudes, and Commission of the European Communities* [2002] ECLI:EU:C:2002:603; and Case C-583/13 P *Deutsche Bahn AG and Others v Commission* [2015] ECLI:EU:C:2015:404.

[24] E.g., if during the inspection certain belongings (e.g., computers, hardware, furniture, etc.) of the company investigated are damaged.

[25] E.g., use of firearms, the use of force with a view to immobilising persons crossing the Union's external borders or to preclude persons from entering the EU territory, the forced confinement of a person within a specific area, or the refusal to offer support to persons in distress.

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12.3 LEGAL PROTECTION AGAINST FUNDAMENTAL RIGHTS BREACHES BY EU FACTUAL CONDUCT

Factual conduct by EU bodies is prescribed and confined by law. The relevant legal framework provides rules and principles establishing when, how, under what conditions, and by whom factual conduct can occur in order to conduce to the legal effects assigned to it by legal norms.[26] In other words, factual conduct, just like formal legal acts, needs to abide by the principle of legality of administrative action[27] as a specific reflection of the rule of law underpinning the EU legal order.[28] According to some, 'the test of the legality of factual conduct should not differ from that applicable to formal measures taken by the administration'.[29] In this respect, EU factual conduct must occur within the boundaries of the competence of the relevant EU actor and it must observe all relevant substantive and procedural rules applicable. Moreover, it should meet 'the standards of the general principles of law which generally govern the legality of EU acts, such as the principles of good administration, proportionality, and the protection of fundamental rights'.[30] EU factual conduct meeting these legality standards should not in principle result by itself in breaches of fundamental rights. On the contrary, EU factual conduct that does not meet the legality standards mentioned previously could entail breaches of fundamental rights, as already shown earlier in this chapter. In this context, legitimate questions arise as to how legal review of such conduct can be ensured and whether there is adequate legal protection for

[26] E.g., Regulation 1/2003 provides detailed rules according to which the Commission's investigations and inspections of undertakings suspected of breaches of Articles 101–102 TFEU are to take place; similarly, Regulation 2018/1725, and more specific legal acts, such as the EPPO Regulation, Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA [2016] OJ L135/53 (Europol Regulation); and Regulation (EU) 2018/1862 of the European Parliament and of the Council of 28 November 2018 on the establishment, operation and use of the Schengen Information System (SIS) in the field of police cooperation and judicial cooperation in criminal matters, amending and repealing Council Decision 2007/533/JHA, and repealing Regulation (EC) No 1986/2006 of the European Parliament and of the Council and Commission Decision 2010/261/EU [2018] OJ L312/56 (SIS Regulation), as regards, for instance, access by Europol to the 'SIS' database (Article 48), lay down detailed rules and safeguards pertaining to the exercise of processing data operations by EU bodies as controllers and processors.

[27] See Hofmann, Rowe, and Türk (n 10) 151–153; and Xanthoulis (n 9) 72–73.

[28] Case C-294/83 *Les Verts v Parliament* [1986] ECLI:EU:C:1986:166, para 23.

[29] Hofmann, Rowe, and Türk (n 10) 672.

[30] Ibid; see also Case C-583/11 P. *Inuit Tapiriit Kanatami and Others v Parliament and Council* [2013] ECLI:EU:C:2013:625, para 91.

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the person affected against such breaches in light inter alia of the rights to an effective legal remedy enshrined in Article 47 CFR.[31]

The legal protection, and, in this context, also the legal review of EU factual conduct affecting fundamental rights is examined in a more overarching fashion in Sections 12.4 and 12.5, by looking first at available judicial remedies in light of Article 47 CFR and, second, by considering additional EU administrative/non-judicial mechanisms and remedies that might offer redress for fundamental rights breaches.

12.4 JUDICIAL REMEDIES

12.4.1 *The Right to an Effective Judicial Remedy for Fundamental Rights Breaches*

Article 47 CFR proclaims the right to an effective remedy before a tribunal for 'everyone whose rights and freedoms guaranteed by the law of the Union are violated'. This provision does not expressly specify or limit the ways in which rights and freedoms could be violated, which would imply that any type of violation, be it through a formal legal act or factual conduct, should be covered by the right to an effective (judicial) remedy. The view that factual conduct comes within the scope of Article 47 CFR and that, as a result, it should be matched by full legal protection in the form of appropriate judicial remedies, finds support in legal scholarship.[32] As for the Court of Justice, one may wonder whether its rather restrictive 'dependent approach'[33] to Article 47 CFR could entail limitations on judicial review of factual conduct and, implicitly, on the remedies the individual whose fundamental rights have been breached might effectively rely on. More specifically, drawing on the non-binding Explanations relating to the Charter of Fundamental Rights,[34] the Court affirmed in its landmark *Inuit* judgment,[35] that Article 47 CFR 'is not intended to change the system of judicial review laid down by the Treaties, and particularly the rules relating to the admissibility of direct actions brought

[31] Though legal review of EU administrative action (focusing on the question of whether the conduct of administration takes place in accordance with applicable law, without being necessary per se that that conduct also results in breaches of fundamental rights) is an important means to ensure effective protection of fundamental rights, it is not to be equated, however, with legal protection/remedies enabling a person to prevent or remedy a breach of his/her rights.

[32] Rademacher (n 4) 419–421.

[33] Ibid 412–413.

[34] Explanations relating to the Charter of Fundamental Rights [2007] OJ C303/17, 29.

[35] *Inuit* (n 30) para 97.

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before the Courts of the European Union'. As a result, it appears that Article 47 CFR cannot be relied upon to establish new judicial remedies/review avenues or to amend those enshrined in the TFEU.[36]

However, within these confines, it is argued that Article 47 TFEU, giving expression to the principle of effective judicial protection and enshrining it as a fundamental right, could be used creatively by EU courts. It should be relied upon as a canon of interpretation regarding access to the judicial remedies laid down in the Treaties for persons invoking breaches of their fundamental rights by EU acts and measures. Such an approach could arguably offer a quick fix to the potential gaps within the current EU system of judicial remedies regarding violations of fundamental rights, until the more far-reaching solutions suggested by the Court – that is, the use of the formal amendment procedure of the Founding Treaties,[37] and the Member States' duties 'to establish a system of legal remedies and procedures which ensure respect for the fundamental right to effective judicial protection'[38] – have fully addressed the issue.

Against this background, one needs to consider how far the judicial remedies available for individuals enshrined in the Treaties and carved out through CJEU jurisprudence are effective in addressing the breaches of fundamental rights caused by EU factual conduct. The following judicial remedies are briefly examined for the purpose of this query: action for annulment (Article 263 TFEU), failure to act (Article 265 TFEU), preliminary reference procedure (Article 267 TFEU), action for damages (Article 268 *juncto* Article 340 TFEU), and plea of illegality (Article 277 TFEU).

12.4.2 *The Action for Annulment*

The action for annulment appears to raise particular challenges with regard to EU factual conduct in view of its admissibility conditions. Especially the fact

[36] In particular, TFEU arts 263 (action for annulment), 265 (action for failure to act), 267 (preliminary reference), 277 (plea of illegality), and 268 *juncto* 340 (action for damages); for a view criticising the Court's reading of Article 47 CFR, and further suggesting creative judicial remedies and review mechanisms with regard to the factual conduct by EU administration, see Rademacher (n 4) 421–424.

[37] Case C-50/00 P *Unión de Pequeños Agricultores (UPA)* [2002] ECLI:EU:C:2002:462, para 45.

[38] *Inuit* (n 30) paras 100–104. Regarding the Member States' duty to ensure respect for the fundamental right to effective judicial protection, Rademacher carefully concluded, based on a comparative overview of four national legal systems (Germany, France, Austria, and the UK, as a former EU Member State) that there is a trend in the EU Member States to increasingly extend judicial protection to factual conduct, see Rademacher (n 4) 426–428. Yet it is difficult to see how legal remedies in the Member States could be effective against factual conduct by EU bodies, whose actions can in principle be reviewed only by EU courts.

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that only acts of EU bodies that are 'intended to produce legal effects *vis-à-vis* third parties' are judicially reviewable arguably creates a considerable hurdle for persons willing to challenge before the CJEU EU factual conduct infringing their rights. As recently reconfirmed by the CJEU, 'it is settled case-law of the Court that actions for annulment, provided for under Article 263 TFEU, are available in the case of all measures adopted by the institutions, bodies, offices and agencies of the European Union, whatever their form, *which are intended to have binding legal effects*' (emphasis added).[39] This means that unless EU factual conduct qualifies as an act or measure intended to have binding legal effects, it cannot be directly challenged under Article 263 TFEU. This observation raises two questions: (1) Could EU factual conduct qualify under certain circumstances as 'an act or measure intended to have binding legal effects'? and (2) Is there any (indirect) way to review the legality of EU factual conduct that does not qualify as 'an act or measure intended to have binding legal effects' under Article 263 TFEU?

The answer to the first question could be positive, especially if Article 263 TFEU is read in light of Article 47 CFR, as suggested earlier. After all, the Court considers reviewable under Article 263 TFEU any EU measures intended to have binding legal effects, *whatever their form* (emphasis added). In this respect, the Court was quite creative in the past in inferring from a physical act directly affecting the situation of the applicant the existence of a tacit administrative decision that could be reviewed under the annulment procedure.[40] In such a case, one may wonder whether factual conduct is in itself the expression of the challengeable tacit or implicit legal act or whether it is a mere indication of the existence of a previous tacit administrative decision that is being implemented via the physical act. By referring in *Akzo and Akcros* to 'the tacit rejection decision *expressed through* (emphasis added) the physical act of seizing and placing those documents on the file without placing them in a sealed envelope',[41] the CJEU seems to show a slight preference for the first scenario. In this vein, one could consider the factual conduct directly affecting the legal situation of the individual, similarly to a formal legal binding act, as some sort of '*instant*' implicit decision, whereby

[39] Case C-911/19 *Fédération bancaire française (FBF) v Autorité de contrôle prudentiel et de résolution (ACPR)* [2021] ECLI:EU:C:2021:599, para 36; this judgment largely confirms the CJEU's long-standing view on acts challengeable under the annulment procedure, see, for instance, Joined Cases T-125/03 and T-253/03 *Akzo Nobel Chemicals Ltd, and Akcros Chemicals Ltd v Commission* [2007] ECLI:EU:T:2007:287, para 45; and Case C-60/81 *IBM v Commission* [1981] ECLI:EU:C:1981:264, para 9.

[40] See *Akzo and Akcros* (n 39) paras 49 and 52.

[41] Ibid para 52.

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the physical act itself amounts to a legally binding act. Such a legal construct, reflecting a more extensive understanding of the concept of 'act intended to produce legal effects *vis-à-vis* third parties' read in light of Article 47 CFR, could capture various situations in which free-standing EU factual conduct directly breaches fundamental rights.[42] While the concept of 'instant implicit decision' might still need to gain ground, EU legal scholars highlight, more in line with the second scenario, that the notion of a tacit or implicit decision '*underpinning* [emphasis added] a physical act or factual measure is common in the administrative law of the Member States', and they argue for its extended application to ensure more effective protection of fundamental rights against EU factual conduct.[43] In any case, if free-standing factual conduct does not amount somehow to an act intended to have binding legal effects, it cannot be reviewed under Article 263 TFEU.

This brings us to the second question: Is there any (indirect) way to review the legality of EU factual conduct that does not qualify as 'an act or measure intended to have binding legal effects'? Legal review of factual conduct could in principle be ensured incidentally, in view of the relationship of such conduct with a legal act reviewable under Article 263 TFEU. Most obviously, factual conduct that can be qualified as 'preparatory acts' of a legally reviewable act can be reviewed by the Court in the context of the challenge brought to the latter act.[44] This, however, raises the question whether such legal review does not sometimes come too late, as the relevant factual conduct might have produced legal and practical consequences well before the adoption of the legal act.[45] Furthermore, if no legally binding act is finally adopted, then any 'preparatory' factual conduct carried out prior to that will not be in principle judicially reviewable,[46] unless such factual conduct represents 'the culmination of a special procedure ... and which produce binding legal effects such as to affect the interests of an applicant, by bringing about a distinct change in his legal position'.[47] As for the factual conduct that *implements* legally binding

[42] In Rademacher's view, the CJEU's *AKZO* line of case law – *AKZO* (n 11) and *Akzo and Akcros* (n 39) – marks a more flexible approach to the admissibility conditions for annulment, underpinned by the concern to offer judicial protection against breaches of fundamental rights and legal interests by EU actions, and entailing that 'any act capable of violating an applicant's right or legally protected interest was considered to be – for this very reason – binding on him or her or it', see Rademacher (n 4) 407.

[43] Hofmann, Rowe, and Türk (n 10) 669.

[44] *IBM* (n 39) para 12; see also Koen Lenaerts and Others, *EU Procedural Law* (Oxford University Press 2014) 273–274.

[45] See Rademacher (n 4) 423–424.

[46] See Hofmann, Rowe, and Türk (n 10) 667–668.

[47] See *Akzo and Akcros* (n 39) para 45.

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acts, legal review is reserved in principle only to the legally binding act, on the ground that 'the validity of a decision cannot be affected by acts subsequent to its adoption'.[48] The only apparent exception seems to be in the case of factual conduct entailing or underpinning an implicit or tacit legal act, but even in that case it is questionable whether the Court actually reviews the implementing physical act itself or rather exclusively the underlying implicit/tacit legally binding act. In this regard, the concept of '*instant*' implicit decision could perhaps bring some added explanatory value with respect to the legal review of such 'factual conduct' by conceptually equating the physical act with a reviewable act under Article 263 TFEU (not with the mere implementation thereof).[49]

12.4.3 *Failure to Act*

Failure to act is to some extent the mirror image of the action for annulment,[50] and it could also be of relevance as far as breaches of fundamental rights via EU factual conduct are concerned. Article 265 TFEU, third paragraph enables individuals to go to the CJEU for failure of an EU institution, body, office, or agency to address to them 'any act', except for recommendations and opinions. Yet it becomes apparent that individuals can rely on this judicial remedy only where the relevant EU body failed to adopt a legally binding act concerning them,[51] while being under an obligation to do so.[52] Hence, similarly to the action for annulment, failure to act does not seem a particularly suitable legal remedy against EU factual conduct, except for those instances in which the factual conduct that should have been enacted by the defaulting EU body would amount to an implicit decision impacting on the legal situation of the individual.[53] Additionally, for a potential action under Article 265 TFEU to be admissible, the relevant EU body must have 'been

[48] Case 85/87 *Dow Benelux NV v Commission* [1989] ECLI:EU:C:1989:379, para 49; see also Lenaerts and Others (n 44) 277.

[49] This would bring us back to the scenario discussed earlier under the first question, i.e., free-standing factual conduct that amounts to an act intended to have binding legal effects.

[50] Some call the two actions 'two sides of the same coin', Lenaerts and Others (n 44) 426.

[51] Ibid 425 and 430–431, and the case law cited there.

[52] Ibid 422–424.

[53] Examples of such 'failures' could be, e.g.: the failure to rectify within a reasonable deadline personal data in an EU database at the legitimate request of the data subject; failure by an EU official to remove from the website of the relevant EU body personal data posted there in breach of the relevant EU data protection legislation; failure by a Frontex official to intervene to stop an ongoing infringement of fundamental rights of an individual during a joint operation; failure of an EU Commission official to take specific actions to ensure appropriate protection of the documents and items collected during an investigation taking place at the

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called upon to act' by the individual and, furthermore, not defined its position on the matter after being called to act.[54] As a final point, if successful, the action for failure to act results in a court judgment with a rather limited impact: declaring that the failure to act was illegal but without the possibility to impose on the EU body the type, content, and form of the act that should have been taken.[55]

12.4.4 *Preliminary Reference Procedure*

Arguably, some of the gaps resulting from the limited judicial review of factual conduct under Article 263 TFEU could be covered by the preliminary reference procedure under Article 267 TFEU (see also Chapter 4). As is well known from the CJEU's jurisprudence, the admissibility of a question for preliminary ruling extends to the interpretation and validity of *any acts* of EU institutions, bodies, offices, or agencies.[56] This clearly covers formal acts, be they legally binding or not, but it is less clear if EU factual conduct in the form of a mere physical act also qualifies as an 'act' under Article 267 TFEU.[57] A reading of Article 267 TFEU in light of the fundamental right to an effective legal remedy enshrined in Article 47 CFR offers support for the view that the category of acts of EU bodies 'without any exception'[58] encompasses also physical acts representing factual conduct.[59]

Yet, even if this is the case, there are several difficulties with judicial review of EU factual conduct under Article 267 TFEU. First, for a preliminary question on EU factual conduct to be raised before a national court, there must be a decision or measure adopted by a national authority that the person

premises of an undertaking, potentially leading to the loss or destruction of the respective documents and items.

54 TFEU art 265, second paragraph; for a detailed analysis, see Lenaerts and Others (n 44) 432–435.

55 See Lenaerts and Others (n 44) 439–440.

56 See Case C-322/88 *Salvatore Grimaldi v Fonds des maladies professionnelles* [1989] ECLI:EU:C:1989:646, paras 8–9, and subsequent confirmatory CJEU jurisprudence, most recently, Case C-16/16P *Belgium v Commission* [2018] ECLI:EU:C:2018:79, para 44; *FBF v ACPR* (n 39) paras 56–57; and Case C-501/18 *BT v Balgarska Narodna Banka* [2021] ECLI:EU:C:2021:249, para 82; see also Lenaerts and Others (n 44) 464.

57 Unless, of course, it expresses a tacit/implicit decision.

58 *BT* (n 56) para 82.

59 See, in this vein, Hofmann, Rowe, and Türk (n 10) 668. Further support for such a conclusion is provided by the *Tillack* case, in which the General Court highlighted the possibility for the applicant to ask the competent national court to refer a preliminary question to the CJEU on the validity of an 'act' of forwarding information to national authorities by OLAF, *Tillack* (n 20) para 80.

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who claims their fundamental rights are being breached by that EU conduct could challenge.[60] Second, the national measure/act challenged before the national court should be sufficiently linked to the EU factual conduct in such a way that establishing the validity of the latter would enable the national court to decide on the matter.[61] If the national court does not find the relevant EU factual conduct 'necessary' to judge the case before it, the matter will not in principle reach the CJEU.[62] Third, even if a question for a preliminary ruling regarding the validity of EU factual conduct reaches the CJEU, it has been emphasised that judicial review might often come too late to ensure effective protection of the fundamental rights affected by that conduct.[63]

12.4.5 *Action for Damages*

In view of the shortcomings highlighted earlier, the action for damages enshrined in Articles 268 *juncto* 340 TFEU could in principle offer a more reliable remedy against breaches of fundamental rights caused by EU factual conduct.[64] In any case, prima facie the action for damages has a generous scope as it covers '*any damage* (emphasis added) caused by its institutions or by servants in the performance of their duties'. It thus covers both material and non-material damage[65] caused by any acts (both formal legal binding acts as well as factual conduct) of the EU 'institutions'[66] or EU servants. However, this judicial remedy also displays several shortcomings and difficulties.

First, in spite of the apparently generous, though slightly vague,[67] formulation in the Founding Treaties, the standards for EU liability are in reality quite

[60] If there is no identifiable national conduct, Article 267 TFEU cannot be triggered, TFEU art 267; see also Rademacher (n 4) 410.

[61] According to Article 267 TFEU, second paragraph, the national court considers that a decision on the preliminary question 'is necessary' to judge on the matter before it, TFEU art 267.

[62] See Rademacher (n 4) 410.

[63] See Hofmann, Rowe, and Türk (n 10) 668.

[64] See also Melanie Fink, 'EU Liability for Contributions to Member States' Breaches of EU Law' (2019) 56 (5) Common Market Law Review 1227, 1233.

[65] See Paul Craig and Grainne de Burca, *EU Law. Text, Cases and Materials* (7th edn, Oxford University Press 2020) 633, and the case law cited there.

[66] To be read broadly, in light of Article 47 CFR, as encompassing also EU bodies, offices, and agencies; such a broad reading is also confirmed in the CJEU's jurisprudence – see, for instance, *Tillack* (n 20) para 97 restating that 'an action to establish liability seeks compensation for damage resulting from a measure or from unlawful conduct, attributable to a *Community institution or body* (emphasis added)'.

[67] I.e., the generic reference to 'the general principles common to the laws of the Member States' entails a lot of leeway for the CJEU in identifying and shaping the conditions and criteria for establishing the existence and extent of the Union's liability for damages.

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high,[68] as they are interpreted and applied quite strictly by EU courts.[69] While a breach of fundamental rights via EU factual conduct could relatively easily meet the condition that 'the rule of law infringed must be intended to confer rights on the individual', things become more difficult with the requirement that 'the breach must be sufficiently serious', as well as with the 'damage' and the 'causal link'. Proving a sufficiently serious breach is in principle easier in the case of an EU measure that does not entail discretionary choices,[70] and it proves particularly difficult where the EU measure entails the exercise of some degree of discretionary power; in this respect, even an illegal EU measure annulled under Article 263 TFEU is not per se sufficient to meet the threshold for a sufficiently serious breach under Article 340 TFEU.[71] In our view, Article 47 CFR requires a more lenient reading of the CJEU's 'sufficiently serious breach' condition under Article 340 TFEU, so that EU legally binding acts, including here factual conduct amounting to an instant implicit decision, as well as genuine factual conduct in the form of self-standing physical acts that directly breach fundamental rights, meet the threshold as a matter of principle.[72] As to the damage suffered as a result of EU factual

[68] See Landmark Case C-352/98 P *Bergaderm and Goupil v Commission* [2000] ECLI:EU:C:2000:361, and subsequent relevant jurisprudence in the footprints of '*Bergaderm*'.

[69] See Melanie Fink, 'The Action for Damages as a Fundamental Rights Remedy: Holding Frontex Liable' (2020) 21 German Law Journal 532, 547; one obvious consequence of the CJEU's restrictive approach to EU liability is that, in practice, the likelihood that actions for damages by individuals claiming fundamental rights breaches are successful is fairly small.

[70] 'Where … the institution in question has only considerably reduced, or even no, discretion, the mere infringement of Community law *may* (emphasis added) be sufficient to establish the existence of a sufficiently serious breach' *Bergaderm* (n 68) para 44.

[71] See Case T-212/03 *My Travel Group v Commission* [2008] ELCI:EU:T:2008:315, paras 41–43; specifically with regard to the situation in which the illegal EU measure annulled by the CJEU does not amount to a sufficiently serious breach, though it also entails a breach of the fundamental rights of the individual, see Case T-341/07 *Sison v Council* [2011] ECLI:EU:T:2011:687, paras 73–80; and Fink, 'The Action for Damages' (n 69) 542. Whereas the annulment action and the action for damages follow a different rationale and, therefore, feature different criteria and conditions, a reading of Article 340 TFEU in light of Article 47 CFR should entail closer equivalence between an infringement of EU law under Article 263 TFEU and a sufficiently serious breach under Article 340 TFEU, in particular when breaches of fundamental rights are at stake; as a result, the main concern in an action for damages for fundamental rights breaches should be on establishing the damage and the causal link between the breach and the damage.

[72] See also Rademacher (n 4) 434; this author calls for the 'modernisation' of Article 340 TFEU, basically in the form of a more lenient reading of the conditions for damages, in particular the sufficiently serious breach (to be understood as any breach of EU law conferring rights on the individual) and the damage (when an injunction or mere symbolic compensation is requested); for a similar view supporting more generally the lowering of the EU liability threshold in case of fundamental rights breaches, see Fink, 'The Action for Damages' (n 69) 543.

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conduct breaching fundamental rights, this might be difficult to establish and quantify,[73] especially in view of the non-pecuniary consequences that the breach of some fundamental rights entails.[74] Last but not least, the causal link between the EU factual conduct and the damage might be difficult to establish, especially when it is embedded into a broader complex framework entailing concomitant or subsequent actions by EU and Member State actors that might interfere with the causation chain.[75]

Second, the monetary compensation that is usually provided within the framework of the action for damages might not fully remedy the situation where redressing a breach of fundamental rights by EU factual conduct would require positive administrative action to end the breach and re-establish the situation before the breach occurred.[76] Yet this point of critique seems to be at least partly addressed by the fact that EU courts acknowledge that Article 340 TFEU does not in principle exclude compensation in kind 'if necessary in the form of an injunction to do or not to do something' if this is in line with the general principles of non-contractual liability common to the laws of the Member States.[77] However, one may wonder how far EU courts are willing to have recourse to such types of compensation more extensively and especially

[73] According to CJEU jurisprudence, 'actual damage' must have been suffered entailing that the applicant must prove before the court a 'real and certain' loss, see, for instance, Case T-88/09 *Idromacchine Srl, Alessandro Capuzzo and Roberto Capuzzo v European Commission* [2011] ECLI:EU:T:2011:641, para 25.

[74] For instance, breaches of human dignity or the right to liberty and security by factual conduct of Frontex staff during joint operations, breaches of privacy and data protection rights by personal data processing operations, etc. While Article 340 TFEU enshrines the obligation for the EU to 'make good any damage', in practice it appears that the CJEU awards damages for non-material damage only exceptionally; and see Craig and de Burca (n 65) 633; for an instance in which compensation for non-material damage has been awarded, see *Idromacchine* (n 73) paras 29–80.

[75] Hybrid, composite, or shared administrative procedures/frameworks entailing complex interactions between EU and Member State actors are a case in point; for an example illustrating this point as far as liability for fundamental rights breaches through processing/dissemination of personal data by an EU body is concerned, see *Tillack* (n 20) and Rademacher (n 4) 411; for examples raising the same issue in the context of EU external border management, see Melanie Fink, *Frontex and Human Rights: Responsibility in 'Multi-actor Situations' under the ECHR and EU Public Liability Law* (Oxford University Press 2019) 180–316.

[76] Some examples illustrating this are the need to compel the relevant EU body to withdraw, rectify, or delete inaccurate personal data made public and harming the privacy, reputation, or other fundamental rights of the individual; the need to put an end to a 'pushback' operation and allow the people subject to such physical actions to cross the EU border and submit an asylum application; and the need to compel the relevant EU body not to use for any purpose and to return documents and information seized illegally during an investigation.

[77] See *Idromacchine* (n 73) para 81; see also Case T-279/03 *Galileo International Technology and Others v Commission* [2006] ECLI:EU:T:2006:121, para 63, in which the Court exceptionally

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in cases of fundamental rights breaches by EU factual conduct.[78] A reading of Article 340 TFEU in light of the right to an effective judicial remedy in Article 47 CFR would, in our view, justify such an approach.

12.4.6 *Plea of Illegality*

Another judicial remedy provided in the Founding Treaties is the more indirect plea of illegality under Article 277 TFEU. This remedy is limited in three ways: (1) it can be invoked only against an act of general application; (2) only the four grounds for annulment laid down in the second paragraph of Article 263 TFEU may be invoked to establish the illegality of the act; and (3) the illegality of the act only triggers the inapplicability of that act within the direct action before the EU court in which the plea of illegality has been raised.[79] This remedy seems prima facie of limited relevance in the case of EU factual conduct causing breaches of fundamental rights. Only in the rather unlikely scenario in which EU factual conduct would express an (instant) implicit binding legal act of general application, and on the basis of which individual acts or measures are enacted directly affecting the legal situation of the individual, could Article 277 TFEU be invoked within a direct action against such individual acts or measures.[80]

12.4.7 *Incomplete Judicial Protection for Fundamental Rights Breaches by EU Factual Conduct*

One may question whether the paradigm of 'a complete system of legal remedies and procedures designed to ensure judicial review of the legality of European Union acts' announced by the CJEU in *Les Verts*[81] and reaffirmed in *Inuit*[82] withstands a reality check, as far as EU factual conduct breaching

granted such compensation in kind in the form of an injunction against the Commission, by prohibiting it from using a trademark (paras 64–73).

[78] This seems particularly relevant in the case of factual conduct, as full restitution and compensation might often be more difficult to obtain because of the material consequences deriving from physical acts, as compared to formal legal acts; lacking such compensatory intervention, the victim will be left with financial or symbolic compensation as the sole remedy for the violation of their fundamental rights through EU factual conduct.

[79] Lenaerts and Others (n 44) 453.

[80] See, for an instance in which notices for an invitation to tender were qualified as 'general acts' reviewable under Article 277 TFEU, Case C-92/78 *Simmenthal v Commission* [1979] ECLI:EU:C:1979:53.

[81] *Les Verts* (n 28) para 23.

[82] *Inuit* (n 30) para 92.

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fundamental rights is concerned. Especially if this paradigm is read in light of Article 47 CFR asserting a judicially effective remedy for 'everyone whose rights and freedoms guaranteed by the law of the Union are violated'. Based on the previous analysis, one may argue that the judicial remedies available in the Founding Treaties reveal shortcomings as to the completeness and effectiveness of judicial protection in such instances.[83] Solutions to address this could be: (1) an extensive understanding of the concept of 'reviewable act' in line with *AKZO* jurisprudence whereby factual conduct directly affecting the legal situation and fundamental rights of the individual would amount to implicit reviewable legal acts[84] and (2) a far-reaching interpretation of the action for damages encompassing extensive ways of compensation and a more flexible reading of the conditions for damages that could cover, at least in part, the blind spots of current judicial review of EU factual conduct.[85] It remains to be seen how far EU Courts will be willing to consider such solutions in their future jurisprudence, but even if they do, gaps will arguably remain in the EU system of judicial remedies (especially as regards the lack of preventive judicial protection against potentially harmful EU factual conduct).[86]

[83] See also Jens-Peter Schneider, 'Information Exchange and Its Problems' in Carol Harlow, Päivi Leino, and Giacinto della Cananea (eds), *Research Handbook on EU Administrative Law* (Edward Elgar 2017) 104–105. The fact that, pending a direct action before the CJEU, the Court may suspend the act contested (Article 278 TFEU) and prescribe any interim measures (Article 279 TFEU) does not alter this observation: first, suspension and other interim measures are ancillary to a direct action before the CJEU and normally are granted only after a direct action was brought before the CJEU – see Lenaerts and Others (n 44) 569 – but bringing such an action against EU factual conduct remains quite difficult to begin with (especially under Article 263 TFEU), TFEU arts 263 and 278–279; second, the principle remains that actions before EU courts do not have suspensory effect, meaning that EU judges will only exceptionally order the suspension of the contested measure or prescribe interim relief measures, Lenaerts and Others (n 44) 563; third, while Article 279 TFEU refers to 'any necessary interim measures', which may also include appropriate injunctions against EU institutions, bodies, offices, and agencies, EU courts seem to be particularly cautious with granting such measures, guided by the concern to avoid exercising powers vested with other EU institutions and thereby disturbing the principle of institutional balance, see Lenaerts and Others (n 44) 565–566 and 569.

[84] See Herwig, C H Hofmann, and Morgane Tidghi 'Rights and Remedies in Implementation of EU Policies by Multi-Jurisdictional Networks' (2014) 20(1) European Public Law 147, 155.

[85] See Rademacher (n 4) 430–435 and Fink 'The Action for Damages' (n 69) 543. Rademacher in particular maintains that EU courts should consider granting more extensively non-monetary compensation (including in the form of declaratory and injunctive measures) for breaches of fundamental rights by EU factual conduct, see Rademacher (n 4) 432.

[86] This gap has been acknowledged more broadly also by EU courts as far as potentially harmful EU actions that do not amount to legally binding acts are concerned: 'although it may seem desirable that individuals should have, in addition to the possibility of an action for damages, a remedy under which actions of the Community institutions liable to prejudice their interests but which do not amount to decisions may be prevented or brought to an end, it is clear that a

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Therefore, it may be opportune to look further afield and also consider other (non-judicial) remedies available in EU law to assess whether they may or could, alone or in combination with available EU judicial remedies, address some of the gaps and shortcomings highlighted earlier

12.5 NON-JUDICIAL REMEDIES

12.5.1 *Non-judicial Remedies and the Right/Principle of Good Administration*

While discussions on legal review and legal protection usually focus on the availability and sufficiency of judicial remedies, one should not forget that, in a broad sense, the system of legal remedies is not limited to that. While judicial remedies, in view of their importance, could be placed at the forefront of the Union's system of legal protection, non-judicial remedies also play a role in ensuring review of and redress against EU administrative action. In fact, under certain conditions, non-judicial remedies (i.e., actions and procedures against administrative actions that do not directly involve courts) could arguably be more accessible and effective in addressing fundamental rights breaches of individuals, be they natural or legal persons. Thus, compared to costly, time-consuming, and restrictive judicial remedies, non-judicial internal and external remedies and review mechanisms in the form of complaints,[87] referrals,[88] and appeals procedures[89] could provide easier access, comprehensive scrutiny, and relatively timely redress against potentially harmful EU administrative measures, including factual conduct.[90] After all, in light of the commandment of an 'open, efficient and independent

remedy of that nature, which would necessarily involve the Community judicature issuing directions to the institutions, is not provided for by the Treaty', Joined Cases T-377/00, 379/00, 380/00, T-260/01 and 272/01 *Philip Morris and Others v Commission* [2003] ECLI:EU:T:2003:6, para 124; see also Rademacher (n 4) 434.

[87] E.g., complaints to the European Ombudsman, Frontex complaint procedure against fundamental rights breaches.

[88] E.g., the referral of 'any act of an executive agency which injures a third party' to the Commission for a legality review, Council Regulation (EC) No 58/2003 of 19 December 2002 laying down the statute for executive agencies to be entrusted with certain tasks in the management of Community programmes [2003] OJ L11/1, art 22.

[89] E.g., the procedure before the boards of appeal of EU agencies, see for a comprehensive work on this topic, Merijn Chamon, Annalisa Volpato, and Mariolina Eliantonio (eds), *Boards of Appeal of EU Agencies: Towards Judicialization of Administrative Review?* (Oxford University Press 2022).

[90] Especially if such administrative remedies/procedures also provide for possibilities to quickly suspend the application of the measure challenged and/or to impose interim measures.

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European administration' in Article 298 (1) TFEU, giving the public administration a chance first to repair its own mistakes and to offer redress via easily accessible non-judicial remedies could largely alleviate the need to have recourse to judicial review.

While access to judicial remedies is enshrined both as a common principle of EU law in CJEU jurisprudence and as a fundamental right under Article 47 CFR, there is no similar explicit constitutional recognition for non-judicial remedies against EU action.[91] Arguably, access to non-judicial remedies could be considered as a dimension of the multi-sided good or sound administration laid down as a fundamental right in Article 41 CFR and also established as a general principle of law by EU courts.[92] Following this line of reasoning, the set-up of effective administrative remedies could be seen as an inherent guarantee for the enforcement of the specific rights encompassed within 'good' or 'sound' administration. It could be arguably incorporated within the scope of 'the right to have his or her affairs handled impartially, fairly and within a reasonable time' under Article 41 (1) CFR. To be sure, availability of an administrative remedy against EU measures affecting individuals is not mentioned in the list of specific rights under Article 41 (2) CFR. Yet it has been maintained that Article 41 CFR only provides 'examples of procedural rights to good administration', and that it 'serves to establish a minimum protection of certain elements generally accepted in the existing case law of the European courts as principles of good administration and rights of defence'.[93] As a result, EU courts could in principle go beyond the rights explicitly listed in Article 41 CFR, though they also warn that 'the principle of sound administration, does not, in itself, confer rights upon individuals … except where it constitutes the expression of specific rights' like those enshrined in Article 41 CFR.[94] Alternatively, the availability of effective administrative remedies could be regarded as an element of the general principle of good/sound administration continuously developed by EU courts. As mentioned previously, it could function as a guarantee for the exercise and enforcement of the specific rights included within the scope of good

[91] One should note, however, that the EU Ombudsman, as an administrative remedy against maladministration by EU bodies, is enshrined in Article 228 TFEU and Article 43 CFR, TFEU art 228; Charter of Fundamental Rights of the European Union [2016] OJ C202/389 (CFR), art 43.

[92] On the use of 'principle of sound administration' terminology, see *Tillack* (n 20) para 127; on the interchangeable use between 'sound' and 'good' administration, see Hofmann, Rowe, and Türk (n 10) 194.

[93] Hofmann, Rowe, and Türk (n 10) 203; see also the explanations of Article 41 CFR in the Explanations relating to the Charter of Fundamental Rights (n 34) 28.

[94] *Tillack* (n 20) para 127.

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administration and enshrined in Article 41 CFR; additionally, it would also be an enabling element for the right to claim damages provided in Article 41 (3) CFR, especially if this is seen, separately from Article 340 TFEU, as a right to claim damages directly from the EU administration at fault (without necessarily ending up before the EU courts).[95]

Since there is a lack of clarity in EU primary law and case law regarding the availability and requirements of non-judicial remedies, the landscape of such remedies is quite diverse and eclectic (see also Chapter 5).[96] In what follows, a few selected non-judicial remedies will be discussed as cases in point as to their applicability to fundamental rights breaches by EU factual conduct. A general observation regarding the mechanisms discussed here is that they are not designed solely to serve as remedies for the individual but to also fulfil other functions pertaining to legal review, scrutiny, and overall accountability of EU public administration (see also Chapter 5).

12.5.2 *EU Ombudsman*

One obvious horizontal non-judicial remedy available against EU acts and measures consists of the possibility, as well as the fundamental right according to Article 43 CFR, for individuals (natural and legal persons) to lodge complaints with the European Ombudsman.[97] This remedy is very generous in terms of accessibility and scope. It is open to all EU citizens as well as any natural and legal person residing or having its registered office in a Member State, and it covers any instance of 'maladministration' in the activities of EU bodies (except for the CJEU).[98] Instances or cases (as enshrined in Article 43

[95] In such a case, the availability of an administrative procedure to claim compensation for the damages incurred as a result of an EU administrative measure would be essential. Article 19 of the European Code of Good Administrative Behaviour seems to imply the availability of non-judicial remedies within the scope of Article 41 CFR: 'A decision of the institution which may adversely affect the rights or interests of a private person shall contain *an indication of the appeal possibilities available for challenging the decision* (emphasis added). It shall in particular indicate the *nature of the remedies, the bodies before which they can be exercised, and the time-limits for exercising them* (emphasis added).' Yet, for the time being, a specific right to an effective administrative remedy cannot be easily spelled out from Article 41 CFR; it will be for the EU courts and/or the EU legislator to do so.

[96] For an observation, in the context of legal protection regarding information exchanges, that supervisory mechanisms are organised 'in very sector specific ways', see Schneider (n 83) 111.

[97] For comprehensive studies on the EU Ombudsman, see Herwig C H Hofmann and Jacques Ziller (eds), *Accountability in the EU: the Role of the European Ombudsman* (Edward Elgar 2017); and Michał Krajewski, *Relative Authority of Judicial and Extra-Judicial Review: EU Courts, Boards of Appeal, Ombudsman* (Hart 2021).

[98] TFEU, art 228(1).

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CFR) of maladministration are to be interpreted broadly, including legally binding and non-binding acts, formal acts and measures, as well as factual conduct.[99] This administrative remedy can thus be used by individuals claiming breaches of their fundamental rights by EU factual conduct, such as improper collection or handling of personal data of an individual by an EU body infringing their reputation or privacy and data protection rights, negligent or malevolent physical acts during an investigation resulting in illegal seizure and further disclosure of sensitive documents affecting the legal situation of an individual, or the improper use of physical force by Frontex staff during joint operations at the Union's external borders endangering the life, physical integrity, or liberty of a person.[100]

While the Ombudsman has a broad competence and is easily accessible for individuals alleging breaches of fundamental rights by EU factual conduct, its major limitation consists of the fact that its findings are not binding on the EU administration. The finding of an instance of maladministration in the examples mentioned above is followed by proposed solutions, suggestions, and recommendations for addressing the act of maladministration, but the EU body concerned remains entirely free to accept or reject them.[101] Moreover, the CJEU emphasised in *Tillack* the nature of the Ombudsman as an 'alternative non-judicial remedy' and made clear that the classification as an 'act of maladministration' by the Ombudsman does not, in itself, interfere with the judicial determination of whether the conduct of an EU body is 'a sufficiently serious breach of a rule of law' for the purpose of Article 340 TFEU.[102] However, the prestige of the EU Ombudsman as a moral figure and epistemic authority, supported by sufficient resources and an adequate framework of dialogue and peer pressure in relation to the EU administration, could make it quite an influential and effective actor in successfully addressing instances of

[99] Maladministration by EU bodies may include (but is not limited to) lack of transparency in decision-making, refusal of access to documents and information, violations of fundamental rights, improper use of discretion, etc., see European Ombudsman, Annual Report 2022 (European Ombudsman, 25 April 2023), 5 and 19.

[100] The European Ombudsman may also start an inquiry on its own initiative in such instances, see ibid 11–12.

[101] See TFEU art 228(2) second paragraph and Regulation (EU, Euratom) 2021/1163 of the European Parliament of 24 June 2021 laying down the regulations and general conditions governing the performance of the Ombudsman's duties (Statute of the European Ombudsman) and repealing Decision 94/262/ECSC, EC, Euratom [2021] OJ L 253/1, arts1–3. Since they are non-binding, EU Ombudsman's decisions cannot be challenged in principle before the CJEU under Article 263 TFEU.

[102] *Tillack* (n 20) para 128.

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maladministration, including breaches of fundamental rights by EU factual conduct (see also Chapter 5).[103]

12.5.3 *Legal Review of EU Executive Agencies' Acts*

Another interesting non-judicial remedy is provided by Regulation 58/2003 regarding specifically the legal review of the acts of EU executive agencies.[104] Article 22 of Regulation 58/2003 enables any person directly and individually concerned by 'any act of an executive agency which injures a third party' to refer that act to the Commission for a review of its legality. While the requirement that the person is directly and individually concerned by the act mirrors the strict standing conditions for non-privileged applicants under Article 263 TFEU, the reference to 'any act' of the agency arguably encompasses not only formal legally binding acts but also factual conduct in the form of physical acts liable to directly affect the legal situation of the individual.[105] Examples of such 'acts' in the form of factual conduct could be the provision by the European Research Council Executive Agency (ERCEA) or the European Research Executive Agency (REA) of incorrect information and guidelines regarding calls for proposals under EU research grant programmes that misleads some potential applicants and ultimately precludes them from submitting a grant proposal or the compiling and subsequent dissemination by an EU executive agency of a list of potential applicants for EU grant programmes that are considered 'undesirable' because of their perceived 'problematic' political views. Pending the review of the act, the Commission 'may suspend the implementation of the act at issue or prescribe interim measures'.[106] Finally, the Commission may either 'uphold the executive agency's act or decide that the agency must modify it in whole or in part',[107] the respective executive agency being under a duty to comply with the Commission's decision.[108] Quite importantly in this context, according to Article 22 (5), the explicit or implicit decision of the Commission to reject the administrative appeal filed by the individual against the act of the

[103] This would be the case where EU administration largely accepts and follows the solutions and recommendations of the EU Ombudsman in practice; positive signs that this is indeed the case transpire from the Ombudsman's annual reports, see, for instance, European Ombudsman, Annual Report 2022 (n 99) 21.

[104] Regulation 58/2003.

[105] See, for this argument, Hofmann, Rowe, and Türk (n 10) 668.

[106] Regulation 58/2003, art 22 (3).

[107] Ibid. In our view the modification 'in whole' of the act also covers the possibility to revoke or withdraw the act.

[108] Ibid art 22(4).

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executive agency[109] is subject to judicial review by the CJEU under Article 263 TFEU. In this way, the agency's act in the form of factual conduct directly breaching the fundamental rights of the applicant could be reviewed indirectly (in the context of the review of the Commission's decision to reject the appeal against the act) by the CJEU.

12.5.4 *Boards of Appeal*

Another rather overarching non-judicial remedy available in EU law is the so-called board of appeal (BoA) featured quite prominently within various EU offices and agencies.[110] Characterised by some as a 'quasi-judicial' remedy,[111] the BoAs are in fact administrative remedies within the structure of the respective EU office or agency that bear certain similarities to courts and court proceedings.[112] In this respect, they enjoy in principle a high degree of independence within the respective office or agency and the procedures before them are generally of an adversarial nature.[113] What is more, it appears that overall the EU legal acts establishing BoAs within various offices and agencies followed the model of EU Courts regarding standing and challengeable acts.[114] Accordingly, in general only decisions of the office or agency that are of direct and individual concern to the individual may be appealed before a BoA.[115] As administrative review bodies, BoAs in principle can exercise

[109] This would normally be coupled with a decision to uphold the agency's act or to modify it differently from what is requested in the applicant's administrative appeal.

[110] E.g., Community Plant Variety Office (CPVO), European Union Intellectual Property Office (EUIPO), European Union Aviation Safety Agency (EASA), European Chemicals Agency (ECHA).

[111] See Case T-133/08 *Schräder v CPVO* [2012] ECLI:EU:T:2012:430, para 137, and Case C-546/12 P *Schräder v CPVO* [2015] ECLI:EU:C:2015:332, paras 73–76; see also Marco Lamandini, 'The ESAs' Board of Appeal as a Blueprint for the Quasi-Judicial Review of European Financial Supervision' (2014) 6 European Company Law 290; and Dominique Ritleng, 'Boards of Appeal of EU Agencies and Article 47 of the Charter: Uneasy Bedfellows?' in Merijn Chamon, Annalisa Volpato, and Mariolina Eliantonio (eds), *Boards of Appeal of EU Agencies: Towards Judicialization of Administrative Review?* (Oxford University Press 2022) 305.

[112] See Ritleng (n 111) 301–306.

[113] Ibid 305.

[114] Merijn Chamon, Annalisa Volpato, and Mariolina Eliantonio, 'Conclusion' in Merijn Chamon, Annalisa Volpato, and Mariolina Eliantonio (eds), *Boards of Appeal of EU Agencies: Towards Judicialization of Administrative Review?* (Oxford University Press 2022) 328–329.

[115] See, for an example, Regulation (EU) 2018/1139 of the European Parliament and of the Council of 4 July 2018 on common rules in the field of civil aviation and establishing a European Union Aviation Safety Agency, and amending Regulations (EC) No 2111/2005, (EC) No 1008/2008, (EU) No 996/2010, (EU) No 376/2014 and Directives 2014/30/EU and 2014/53/EU of the European Parliament and of the Council, and repealing Regulations (EC)

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more intensive scrutiny and have more extensive review powers over the contested decision as compared to judicial review, and their binding decisions may be ultimately challenged before EU courts under Article 263 TFEU.[116] However, in view of its admissibility standards, this quite far-reaching administrative remedy seems to be of little relevance as regards factual conduct breaching fundamental rights, except, just like in the case of judicial review under Article 263 TFEU, for those instances in which such factual conduct could qualify as an (instant) tacit or implicit administrative act directly affecting the fundamental rights and legitimate interests of the individual. However, in view of its apparent advantages both as a legal review mechanism and as a potential legal remedy, one may consider further extending the scope of BoAs review in the future, similarly to the legal review model of EU executive agencies' acts, to any acts (including factual conduct) of the EU body affecting the legal situation of the individual and making such a BoA model an entrenched feature of the overall EU institutional framework.

12.5.5 *Frontex Fundamental Rights Complaint Mechanism*

Staying within the sphere of EU agencies, the European Border and Coast Guard Agency (EBCG Agency, Frontex, or 'the Agency') features a specific administrative review mechanism, particularly tailored for breaches of fundamental rights by EU factual conduct. This is the (in)famous complaints mechanism[117] set up on the basis of Article 111 of the EBCG Regulation[118] for addressing alleged breaches of fundamental rights caused by staff involved in the Agency's (operational) activities.[119] Being available free of charge for

No 552/2004 and (EC) No 216/2008 of the European Parliament and of the Council and Council Regulation (EEC) No 3922/91[2018] OJ L212/1 (EASA Regulation) art 109.

[116] See Ritleng (n 111) 301–304.

[117] See, for a harsh critique of the Frontex complaint mechanism, Sergio Carrera and Marco Stefan, 'Complaint Mechanisms in Border Management and Expulsion Operations in Europe. Effective Remedies for Victims of Human Rights Violations?' (2018) Centre for European Policy Studies (CEPS) Brussels, 22–27 <www.ceps.eu/ceps-publications/complaint-mechanisms-border-management-and-expulsion-operations-europe-effective/>.

[118] EBCG Regulation.

[119] EBCG Regulation art 111 (2) seems to indicate that the complaints mechanism concerns the operational activities of the Agency (joint operations, pilot projects, rapid border interventions, migration management support team deployment, return operations, return interventions, or an operational activity of the Agency in a third country); yet the recent Management Board Decision 19/2022 revising the Agency's rules on the complaints mechanism appears to extend the availability of the mechanism more generally to 'the actions or a failure to act on the part of staff involved in *an Agency activity*' (emphasis added), see Frontex – European Border and Coast Guard Agency Management Board Decision 19/2022 of 16 March 2022 adopting the Agency's rules on the complaints mechanism art 3 (1). However, the fact that the Frontex

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any person (no matter the age)[120] directly affected by any actions or failure to act on the part of staff involved in Frontex's activities,[121] the complaints mechanism looks prima facie like a remedy genuinely intended to bridge the gap concerning review of as well as redress for potentially harmful factual conduct of the Agency and its staff during external border management operations.[122]

However, the complaints mechanism also features some alleged shortcomings and limitations that have triggered criticism regarding its legal design and practical operation.[123]

First, while the extensive involvement of the Frontex Fundamental Rights Officer (FRO) in handling individual complaints is to be welcomed, questions pertaining to the genuine independence of the FRO vis-à-vis the management of the Agency as well as to the limited powers of the FRO regarding the outcome of the procedure leave a mixed impression as to its effectiveness in addressing fundamental right breaches.[124] Thus, in the instances in which the FRO finds the existence of concrete fundamental rights violations, for instance in the form of excessive use of force by Frontex staff against individuals attempting to cross the EU external border by land, it draws up a report that includes recommendations for appropriate follow-up by the Frontex Executive Director (ED).[125] Next, although the EBCG Regulation and the Agency's rules on the complaints mechanism provide that the ED 'shall ensure the appropriate follow-up'[126] … 'to FRO's recommendation through

Management Board decision merely implements Article 111 EBCG Regulation and considering that the Frontex Fundamental Rights Officer (FRO) assesses the admissibility of complaints based on Article 111 (2)–(3) EBCG Regulation, one may conclude that the recently updated complaints mechanism is still aimed at addressing fundamental rights breaches within the framework of the Agency's operational activities.

[120] Frontex Management Board Decision 19/2022 art 3 (1).

[121] EBCG Regulation art 111 (2); Frontex Management Board Decision 19/2022 art 3 (1).

[122] E.g., 'pushbacks' and physical expulsions in the area of the Union's sea and land borders, body searches, use of force to contain inflows of migrants, apprehension of personal belongings of individuals crossing EU external borders, etc.

[123] See, for instance, Marco Stefan and Leonhard den Hertog, 'Frontex: Great Powers But No Appeals' in Merijn Chamon, Annalisa Volpato, and Mariolina Eliantonio (eds), *Boards of Appeal of EU Agencies: Towards Judicialization of Administrative Review?* (Oxford University Press 2022) 151–165; and European Ombudsman Case OI/5/2020/MHZ on the functioning of the European Border and Coast Guard Agency's (Frontex) complaints mechanism for alleged breaches of fundamental rights and the role of the Fundamental Rights Officer (15 June 2021); this led to the recent revision of the Agency's complaints mechanism by Frontex Management Board Decision 19/2022.

[124] See Stefan and Hertog (n 123) 162.

[125] Frontex Management Board Decision 19/2022 art 7 (4).

[126] EBCG Regulation art 111 (6).

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measures provided for by the applicable rules',[127] the fact remains that the ED has broad discretion in establishing the 'appropriate follow-up' and is not formally bound by the FRO's findings and recommendations.[128] The obligation stipulated for the ED to report back to the FRO as to 'the findings, the implementation of disciplinary measures, and follow-up by the Agency in response to a complaint' does not change this;[129] in fact, the Agency's rules on the complaints mechanism provide clearly that a complaint may be declared unfounded by the ED.[130]

Second, it remains unclear what the 'follow-up' by the ED may consist of. Both the EBCG Regulation[131] and the Agency's rules on the complaints mechanism[132] merely refer more explicitly to disciplinary measures and referral for initiation of civil and criminal proceedings; for the rest, formulations remain rather vague, such as 'any follow-up measure'[133] or 'undertaking immediate action' in case of an imminent risk of irreparable harm to the complainant or to the Agency.[134] One may thus wonder whether the follow-up measures decided by the ED should also include redress for the individual whose rights have been breached by the Agency's factual conduct, such as putting an end to the infringement, where applicable, and/or various compensatory measures for the harm suffered. If this mechanism and its follow-up are not aimed at properly addressing the breaches of the complainant's fundamental rights caused by the Agency's operational activities, one may seriously question whether this procedure represents a genuine remedy for the individual.[135]

Third, one may wonder whether the affected individual can legally challenge the outcome of the complaint procedure; one may consider in particular a decision by the ED to declare a complaint unfounded or an ED decision

[127] Frontex Management Board Decision 19/2022 art 10 (1).
[128] As such, the FRO's powers within the complaints procedure resemble those of the EU Ombudsman: making non-binding recommendations and suggestions for improvement.
[129] EBCG Regulation art 111 (6).
[130] Frontex Management Board Decision 19/2022 art 10 (5).
[131] EBCG Regulation art 111 (6).
[132] Frontex Management Board Decision 19/2022 art 10 (1).
[133] Ibid art 10 (3).
[134] Ibid art 11 (1).
[135] Some take the view that since the complaint mechanism 'focuses primarily on internal measures' pertaining 'to actions in relation to the staff or national authorities involved, and not to the complainant', it 'offers no administrative remedy to the affected individual', Stefan and Hertog (n 123) 163 and 171. Against this background, the only option left to the individual whose rights have been infringed by factual conduct of the Agency or its staff seems to be the judicial remedy of action for damages, explicitly encompassing, according to Article 97 (3) EBCG Regulation, damages caused by the use of the Agency's executive powers.

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by which inappropriate follow-up by the Agency is taken on the complaint. Somewhat paradoxically, the legal review of such ED decisions is not clearly stipulated in the EBCG Regulation, prompting the remark that 'the complaint mechanism is by design not fit to contest decisions of the agency'.[136] In our view, to the extent that such decisions represent acts of the Agency that directly affect the legal situation of the complainant (and in our view this is the case where they do not properly address complainants' breaches of fundamental rights), they are covered by Article 98 EBCG Regulation and, as a result, should be challengeable before the CJEU under Article 263 TFEU.[137] In this respect, the revised Agency rules on the complaints mechanism arguably bring more clarity on this matter as they now stipulate that the 'decisions adopted by the Executive Director … in relation to an admissible complaint shall contain an indication of the appeal possibilities provided under EU … law available for challenging the decision'.[138]

Last but not least, the effectiveness in practice of the complaints mechanism has been called into question. With a low number of complaints being registered over the years, and no complaints recorded until June 2021 regarding the activities of Agency staff members,[139] concerns (followed by recommendations for improvement) have been raised inter alia regarding the accessibility, transparency, and proper functioning of this procedure.[140]

12.5.6 *The European Data Protection Supervisor (EDPS)*

Finally, a horizontal but rather specific non-judicial remedy available in the area of personal data processing by EU institutions, bodies, offices, and agencies deserves closer attention. Regulation 2018/1725 (the so-called General Data Protection Regulation for EU institutions and bodies) entrusts the European Data Protection Supervisor (EDPS) both with an overarching

[136] Stefan and Hertog (n 123) 163–164.

[137] According to Article 98 (1) EBCG, 'Proceedings may be brought before the Court of Justice for the annulment of acts of the Agency that are intended to produce legal effects vis-à-vis third parties, in accordance with Article 263 TFEU.'

[138] Frontex Management Board Decision 19/2022 art 15 (2). In our view, such 'appeal possibilities' should include both follow-up non-judicial review mechanisms (if available) and the possibility to challenge the ED decision before the CJEU under Article 263 TFEU.

[139] 'Between 2016 and January 2021, the FRO had received 69 complaints of which 22 were admissible', European Ombudsman, Decision in OI/5/2020/MHZ (n 123) 4.

[140] See, in this respect, European Ombudsman, Decision in OI/5/2020/MHZ (n 123), and the suggestions for improvement listed there. The Agency's revised rules on the complaints mechanism (2022) can be seen as an attempt to address these shortcomings in light of the increased probability for Frontex's staff actions to breach fundamental rights in the exercise of the significant operational and executive powers entrusted to the Agency since 2019.

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supervisory function regarding the processing of personal data by EU institutions and bodies and with the function of an administrative remedy for data subjects whose rights have allegedly been breached by unlawful data processing.[141] For certain, unlawful data processing by EU institutions and bodies may entail formal legal acts but also (perhaps in particular) factual conduct in the form of various physical operations (e.g., inadvertent collecting, recording, retrieving, consulting, altering, or deleting personal data in a database such as EURODAC or Europol Information System (EIS); combining, structuring, or analysing personal data for profiling purposes; prohibited disclosure by transmission of personal data to a third party,[142] including, for instance, exchanges of personal data with third countries by Frontex within the EUROSUR framework; unauthorised dissemination of personal data to the public,[143] etc.).[144] The right to lodge a complaint with the EDPS is granted broadly to any data subject who considers that the processing of his/her personal data infringes Regulation 2018/1725.[145]

Further, clear obligations are established for the EDPS in dealing with the complaint. First, the EDPS has a duty of information to the complainant as to the progress and outcome of the complaint, as well as to the availability of a judicial remedy.[146] Second, the EDPS is under a duty to handle the complaint or inform the data subject about the progress/outcome of the complaint within three months; failure to do so equates to an implicit negative decision by the EDPS.[147]

Next, unlike the EU Ombudsman and the Frontex FRO, the EDPS has quite extensive formal powers vis-à-vis EU institutions and bodies at fault. Within the realm of its so-called corrective powers, the EDPS may inter alia order the controller or the processor to: 'comply with the data subject's requests to exercise his or her rights',[148] or 'bring processing operations into compliance [with Regulation 2018/1725] ... where appropriate, in a specified manner and within a specified period',[149] or further to ensure 'the rectification

[141] Regulation 2018/1725 arts 52 and 57 (1) (a) and (e).
[142] E.g., sensitive personal data collected during an EPPO coordinated criminal investigation being transmitted by the EPPO to private persons with whom the suspects entertain close relationships, resulting in the damaging of their reputation.
[143] In this respect, the *Tillack* affair provides an excellent example of a press release published by OLAF, containing allegations of criminal acts having been committed by an identifiable individual, *Tillack* (n 20) paras 7–24.
[144] Regulation 2018/1725 art 3 (3).
[145] Regulation 2018/1725 art 63 (1). In our view, the data processing that can be subjected to the complaint procedure can cover both formal legal binding acts and factual conduct.
[146] Ibid art 63 (2).
[147] Ibid art 63 (3).
[148] Ibid art 58 (2) (d).
[149] Ibid art 58 (2) (e).

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or erasure of personal data or restriction of processing' pursuant to the data subject's rights under Regulation 2018/1725.[150] Additionally, and quite notably, the EDPS can effectively enforce the measures mentioned previously by imposing administrative fines for non-compliance by the relevant EU institution or body.[151] The EDPS seems thus to have effective legal means to properly address breaches of fundamental rights by EU personal data processing operations.

Finally, but quite importantly, the decision of the EDPS concerning a data subject's complaint, including the implicit negative decision where the EDPS fails to handle the complaint or inform the data subject about the progress or outcome of the complaint, can be challenged before the CJEU by the data subject.[152] Hence, in the area of personal data processing, the synergy between a strong administrative remedy provided by the EDPS and the judicial review of EDPS ensuing decisions bears the promise, at least on paper, of offering quite effective legal protection as concerns breaches of data subjects' fundamental rights by EU factual conduct in the form of various physical data processing operations.[153]

12.6 OVERALL ASSESSMENT AND THE WAY FORWARD: DEPLOYING EFFECTIVE EU ADMINISTRATIVE REMEDIES WITH JUDICIALLY REVIEWABLE OUTCOMES

A number of observations are put forward based on the previous analysis in this chapter with regard to the current legal protection landscape regarding breaches of fundamental rights through EU factual conduct. First, the system of judicial remedies in the EU Founding Treaties does not seem to fully

[150] Ibid art 58 (2) (h).
[151] Ibid art 58 (2) (i).
[152] Ibid art 64 (2).
[153] Ibid arts 63 (1) and 64 (1) suggest that data subjects can also go directly before the CJEU, without filing a complaint first with the EDPS, for breaches of their rights by EU data processing operations; however, in this scenario, the admissibility requirements pertaining to the actions before the CJEU (action for annulment or actions for damages) must be met; this will likely raise insurmountable obstacles to the action for annulment where the fundamental rights of the individual have been infringed by physical data processing operations, unless the CJEU qualifies them as implicit binding legal acts. Therefore, relying first on the remedy provided by the EDPS with a 'last resort' prospect of a judicial challenge against the EDPS decision has several advantages: (1) it would strengthen, through the involvement of the EDPS, the position of the data subject against the faulty EU body; (2) it may lead to timely and proper redress, without a need to have recourse to judicial review; (3) it ensures extensive, indirect, judicial review over any EU data processing operations, through the possibility to challenge the EDPS decisions before the CJEU.

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ensure the right to an effective judicial remedy for 'everyone whose rights and freedoms guaranteed by the law of the Union are violated' through EU factual conduct. Access to EU courts remains quite challenging as far as the admissibility of an annulment action under Article 263 TFEU against EU factual conduct breaching fundamental rights is concerned. Moreover, the high restrictive thresholds regarding the EU liability conditions under Article 340 TFEU arguably entail low chances of success for the individual affected by EU factual conduct to obtain proper compensation. The long delays between the occurrence of the harmful factual conduct and the possibility for judicial intervention under Article 267 TFEU, as well as the uncertainties surrounding this procedure, do not offer an optimistic picture either. A more extensive and flexible approach regarding the concept of 'reviewable act' under Article 263 TFEU as well as regarding the EU non-contractual liability under Article 340 TFEU could arguably address these shortcomings to some extent.[154] But even if this were the case, judicial review still may not offer full satisfaction because of the limited powers of EU Courts, which, besides the possibility of awarding compensation for damages,[155] are confined to merely annulling or declaring invalid the contested EU measure without being able to by and large issue orders or injunctions against the EU actor at fault.[156]

Second, the brief overview of the diverse non-judicial remedies discussed here also reveals some limitations and shortcomings regarding the capacity to address fundamental rights breaches by EU factual conduct.[157] Some of these (e.g., EU agency BoAs) do not seem well-suited for challenges against EU factual conduct. Others display problematic legal design and practical operation as regards access, transparency, independence, fair and speedy handling,

[154] Some provisions in EU secondary legislation arguably could be seen as an attempt to broaden judicial review with regard to EU factual conduct; such an example is Regulation 2018/1725 art 64 (1) providing that 'the Court of Justice shall have jurisdiction to hear *all disputes relating to the provisions of this Regulation* (emphasis added), including claims for damages'. Yet one may question the validity of such interpretation, entailing that a provision of EU secondary legislation would extend judicial review beyond the scope of the judicial remedies in EU primary law, as interpreted by the CJEU in its jurisprudence (in particular in its *Inuit* case law), see also Rademacher (n 4) 428–430.

[155] Even if compensation were awarded more generously by EU courts, the fact remains that such compensation might often offer only rather belated and partial redress for the harm incurred by the individual as a result of EU factual conduct that might have produced sometimes irreversible and long-standing consequences, especially if its effects have continued for a long time before being discontinued by proper intervention.

[156] See Lenaerts and Others (n 44) 411–412 and 475.

[157] Such limitations could partly be explained by the multi-purpose design of these mechanisms, serving simultaneously the need for legal review, scrutiny, and accountability of EU administrative action and the need to offer a legal remedy to the individual against harmful measures by EU administration.

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and offering appropriate redress (e.g., Frontex's complaints mechanism). Furthermore, the interplay between non-judicial remedies and judicial remedies is not always fully addressed in EU secondary legislation; this might not always be necessary in view of the specific role and features of the non-judicial remedy, such as the EU Ombudsman, but it is striking with respect to Frontex's complaints mechanism for fundamental rights breaches. On the positive side, it must be noted that non-judicial remedies generally allow for more timely, comprehensive, and insightful review of the relevant EU measures, including redress possibilities, as compared to the limited legal review carried out by EU courts. What is more, EU law features a few non-judicial remedies (e.g., EDPS and the legality review of the acts of EU executive agencies) that seem capable (at least on paper) of offering effective redress for fundamental rights breaches through EU factual conduct and, on top of that, the final outcome of such remedies can be challenged before the EU Courts.

We therefore put forward a number of reflections and recommendations with a view to addressing this apparent blind spot in legal protection concerning fundamental rights breaches through EU factual conduct.

First, in our view, upholding sound administration both as a general principle of EU law and as a right of the individual (Article 41 CFR) requires having in place effective administrative remedies against EU measures. Only in this way may one hope to enforce in a timely manner, if need be, 'the right to have his or her affairs handled impartially, fairly and within a reasonable time' laid down in Article 41 (1) CFR. After all, for the individual, it is most important to have a quick, accessible, and effective remedy or mechanism to put an end to the breach and obtain appropriate redress for the harm incurred as soon as possible. This can best be ensured by the EU administration in the first instance. From this viewpoint, judicial review can be seen rather as the 'last resort' remedy,[158] not being particularly advantageous for the individual in view of the high costs involved, time incurred between the breach and the possibility for the court to address it, and difficulty accessing the EU courts, as well as the rather limited review and redress EU courts may be able or willing to offer. In order to be fully effective, such administrative remedies should abide by certain procedural and substantive benchmarks ensuring that they are sufficiently accessible to the individual, independent, prompt, transparent, comprehensive, and thorough,[159] as well as capable of offering appropriate redress. Therefore, serious consideration should be given in EU administrative

[158] I.e., when the EU administration fails to address and redress properly fundamental rights breaches.
[159] For the listing of these standards in the context of the EU Ombudsman's assessment of Frontex's complaints mechanism, see Decision in OI/5/2020/MHZ (n 123) para 16.

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law to further developing underlying principles and criteria, as well as to designing effective administrative remedies addressing fundamental rights breaches by any form of EU action, including factual conduct.[160] Moreover, a more systemic perspective should be taken, by also looking at and clarifying the synergies and complementarity between various non-judicial remedies with a view to avoiding gaps or overlaps in legal protection and bearing in mind the fact that an optimal combination of administrative remedies could better address the situation.[161]

Second, we suggest that a combined reading of the principle of sound administration (enshrined as a right in Article 41 CFR) and the principle of an effective remedy (enshrined as a right in Article 47 CFR) could support a more complete system of legal protection against EU action, featuring easily accessible, comprehensive, and strong administrative remedies with, in principle, judicially reviewable outcomes. This entails that, as a rule, administrative remedies should result in final legally binding decisions that can then be challenged before EU courts under Article 263 TFEU. In this respect, we suggest, as a default approach, extending and adapting, where appropriate, the model of the EDPS when designing administrative remedies against EU action.[162] In this way, the individual should in principle have the chance to obtain appropriate redress the easier way (via the administrative remedy), with the safeguard that their rights will be ultimately protected by the EU courts if the relevant EU body fails to do so.[163] Ensuring by default judicial review concerning the final outcomes of administrative remedies could also fulfil a preventive function, in that it would increase the pressure on the EU administration to address properly fundamental rights infringements, once the 'sword of Damocles' of judicial review is hanging there. Along the same lines, we also support the idea of the opening up of judicial protection offered by the CJEU,

[160] The Research Network on EU Administrative Law (ReNEUAL) project could be an appropriate forum to achieve this, in particular in view of its previous work on the ReNEUAL Model Rules on EU Administrative Procedure <www.reneual.eu/>.

[161] For instance, one should consider the complementarity relationship between the EU Ombudsman and other administrative remedies with different features, such as suspensory effects and legally binding outcomes.

[162] For a similar suggestion on the establishment of a centralised EU supervisory authority whose decisions could be challenged by individuals before the CJEU, though limited to the specific sector of information management and exchange within highly complex and integrated hybrid networks and information systems involving EU and Member States' actors, see ReNEUAL Model Rules on EU Administrative Procedure (2014), Book VI – Administrative Information Management, 258 and 302–306; see also Schneider (n 83) 109–111; and Hofmann and Tidghi (n 84) 160–163.

[163] In this respect, EU agencies' BoAs could be aligned to the EDPS model, by extending their jurisdiction to EU factual conduct affecting the legal situation of the individual.

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and in particular Rademacher's view that EU Courts should more generously trigger EU non-contractual liability for damages, in instances of fundamental rights breaches through EU factual conduct.[164] In this way, one may hope to close the gap of legal protection against harmful EU factual conduct.

12.7 CONCLUSION

With the focus of inquiry on the legal protection against breaches of fundamental rights through EU factual conduct, this chapter first attempted to provide some clarification on the concept of 'factual conduct' and illustrate concretely how such factual conduct may infringe fundamental rights. Favouring an understanding of factual conduct as 'physical acts and operations' by EU bodies (and their staff), the chapter looked next into the available legal review and legal protection avenues regarding such EU conduct, in particular when it allegedly breaches fundamental rights of individuals. After examining both judicial and selected non-judicial remedies as elements of an overarching EU system of legal protection premised on the constitutional parameters of sound administration and effective judicial remedies, it highlighted the potential as well as the shortcomings of existing legal remedies to address fundamental rights breaches by EU factual conduct. It detected 'blind spots' in legal protection, in particular in the form of insufficient and ineffective judicial review of factual conduct as well as in the form of problematic legal design and practical operation of some of the currently available administrative remedies. To close the gap of legal protection against harmful EU factual conduct, the chapter suggests focusing more on designing a coherent system of strong and effective administrative remedies with final outcomes that can be challenged before the CJEU, along with more opening up of judicial protection by EU courts, in particular under Articles 263 and 340 TFEU.

[164] See Rademacher (n 4) 430–435.

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