The Need to Establish an EU Ombudsman for Migrants as a Consequence of Administrative Decentralisation

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Abstract. In recent years, the humanitarian management of migration has become a challenge for the European Union. Pursuant to the treaty provisions on shared competences within the Area of Freedom, the European Union largely complies with the norms of migration law, which are subsequently implemented into the laws of the Member States. As claimed by the paper, the protection of migrants’ fundamental rights is not ensured effectively due to the decentralisation of competences for protective actions between a plethora of administrative institutions and bodies of the EU and of member states insofar as they implement the EU law. The paper analyses the fundamental rights guarantees operating in the EU system, with a particular focus on guarantees for the protection of the fundamental rights of migrants. The main body of the paper explores the issue of dispersion of competences regarding migrant rights protection measures between different EU bodies, with most of them vested with limited powers to adopt protective measures (the EU Agency for Fundamental Rights, the Consultative Forum under the EU Asylum Agency). The analysis conducted clearly indicates the need to strengthen existing guarantees in primary and secondary law for the protection of migrants’ rights in terms of their implementation and execution by both the EU and national administrations. The establishment of the EU Ombudsman for the Protection of Migrant Rights, with specific powers, functions and duties, would definitely remedy this situation and facilitate harmonisation of protective actions in the European Union and standardisation of administrative procedures in Member States.

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Introduction

The European Union has created an efficient, albeit not very homogeneous system of protection of fundamental rights. Provisions of EU law not only protect the

¹ The scientific goal of the project involves creating a legal model of the ombudsman’s action in cases concerning protection of the fundamental rights of migrants at the national and European levels on the basis of an analysis of existing legal guarantees in selected Member States (Poland, Greece, Sweden) and provisions of the European law. The model will be created based on an analysis of sources of the national and European laws, decisions of national and international courts as well as legal scholarship and commentary. In accordance with the main thesis of the project, the existing procedural standards of migrants’ rights are not effective in practice and require strengthening. Thus, there is a need to create a universal model of the Ombudsman’s activity in migrants’ cases, the implementation of which at the level of Member States will contribute to fuller and more effective protection of this group, while also strengthening the Member States in their implementation of the migration policy and the integration process.
fundamental rights of Union citizens but also those of migrants. Such rights include the right to asylum and the prohibition of returning foreigners to countries where they could face inhuman treatment. The thesis of this article proposes that ensuring the protection of migrants’ fundamental rights is not fully effective because of a specific decentralisation of competences for protective actions between many administrative institutions and bodies of the Union and of member states to the extent in which they implement the Union’s law. Appointment of a special administrative organ in the Union’s legal system, the EU Ombudsman for the protection of rights of migrants, would provide a remedy for harmonising protective actions and standardising administrative procedures in member states. The article analyses the system of protection of fundamental rights with a particular focus on competences of bodies for the protection of rights of migrants that stem from norms of EU law. Methodology typical to legal studies is used in this research, being the analysis of the law in force, which takes into account a teleological interpretation of the EU legislation analysed. Moreover, the author applies hermeneutical analysis, which entails examining the texts of legal provisions at both the psychological and functional levels.

**Description of the system of protection of fundamental rights in the European Union**

The introduction of systemic protection of fundamental rights in the European Union’s law stems from evaluating the very form of the original European Economic Community and a specific, positive ‘sweeping in’ of further competences for the EEC and the later Union.  

The principle of protection of fundamental rights in the EU law is not strongly emphasised in treaties and thus, pursuant to the so-called homogeneity clause of Article 2 of the Treaty on European Union (hereinafter: TEU): ‘The union is founded on the values of respect for human dignity, freedom, democracy, equality, rule of law as well as respect for human rights, including rights of persons who come from minorities’. The principle of protection of fundamental rights is treated in the EU law as the so-called general rule and legal scholars and commentators emphasise that it plays multiple functions – not only as protection of individuals

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2 This applies to expanding the scope of migration policies implemented by the Union and results indirectly from global challenges that today’s international community face. One of the effects of ‘the sweeping in’ of the competences was the inclusion of Schengen accuis in the Union’s law and establishing the Area of Freedom, Security and Justice under the Treaty of Amsterdam. See Protocol integrating the Schengen acquis into the framework of the European Union, OJ C 340, 10/11/1997, p. 93.


4 Pursuant to Article 6(3) TEU: ‘Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law’, OJ C 202, 7/06/2016, p. 13.
against the activity of the authorities but also the function of legitimising the EU’s legal order and directing the interpretation of secondary legislation.⁵ The sources of fundamental rights in the EU include the Charter of Fundamental Rights, the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)⁶ and the constitutional traditions shared by all member states.⁷

The Charter of Fundamental Rights of the European Union (hereinafter: Charter) is an internal mechanism for the protection of fundamental rights.⁸ Under the Treaty of Lisbon, the Charter was conferred legal force equal to that of treaties and is a source of the EU’s primary legislation. As emphasised by Grzeszczak, the Charter plays a stabilising function and is an element of the process of ‘quasi-constitutionalisation’ of the Union.⁹

Legal commentators believe that, from the perspective of the theory of law, fundamental rights are general clauses and do not have a rigid content established in the process of interpretation and application of law.¹⁰ Thus, the Charter is believed to be a work in progress.¹¹ Pursuant to Article 51,¹² the Charter is binding on the Union,¹³ member states and private entities, who are obliged to apply Union’s law.¹⁴

The Charter has an unusual structure for sources of international human rights law — it does not apply the classical division into first- and second-generation rights. Its further titles refer to dignity, freedoms, equality, solidarity, citizens’ rights and

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⁵ D. Miąsiak, Zasady i prawa podstawowe; ‘System Prawa Unii Europejskiej‘, 2022, Vol. 2, Warszawa, p. 280. The author emphasises that the principle of protection of fundamental rights also played the function of filling the ‘gaps in criteria of assessment of the activity of EEC bodies (Community/Union)’ at the Court of Justice.


⁷ A.M. Kosińska, Prawa kulturalne obywateli państw trzecich w prawie Unii Europejskiej, Lublin, 2018, p. 120.


⁹ R. Grzeszczak, Wpływ Karty Praw Podstawowych na strukturę polityczną i prawną Unii Europejskiej, [in:] Karta Praw Podstawowych w europejskim i krajowym porządku prawnym, Giezek J. (Ed.), Warszawa, 2009, p. 55. Moreover, the author believes, and it is difficult to disagree with him that the Charter has strengthened the TEU’s role and contributed to federalisation of the Union’s structure.


¹² Article 51(1) of the Charter: ‘The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law’.

¹³ Thus, the Union’s institutions are, as a consequence, obliged to respect in their actions fundamental rights guaranteed under the Charter — see: M. Dawson, The Governance of EU Fundamental Rights, Cambridge, 2018, p. 84.

¹⁴ D. Miąsiak, Zasady i prawa podstawowe, p. 291.
justice. However, as emphasised by Tabaszewski, the Charter’s characteristics yield a certain hierarchy, which assumes priority treatment of respect-related rights.15

In turn, the possibility of the Union’s accession to the Charter and its process constitute the so-called external mechanism of protection of fundamental rights.16 Pursuant to Article 6(2) TEU: ‘The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union’s competences as defined in the Treaties’.17

The Court of Justice of the European Union (CJEU, the Court) has historically played18 and is still playing a special role in modelling the protection of fundamental rights in the EU. The Court mostly interprets provisions of the Charter of Fundamental Rights.19 It does so mainly through questions referred for a preliminary ruling submitted by national courts under Article 267 TFEU.20 Opinions of Advocates General hold a special place in modelling the human rights scholarly discourse. In the procedure of referring questions for a preliminary ruling, the parties may only request that the question be lodged with the Court of Justice (CJ), though the national court is not bound by this request. Only entities that act in proceedings have the right to lodge individual complaints with the Court. These include: complaints for declaring invalidity (Article 263 TFEU), complaints for failure to act (Article 265 TFEU) and complaints for compensation (Article 268 in conjunction with Article 340 TFEU).21 Therefore, Marcisz rightly notes that ‘The Court’s ruling carries something more than authority (…). The Court’s rulings are considered a necessary basis of deciding in cases and a sufficient source of rules of the conduct they express’.22

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17 Pursuant to Article 52(3) CFR: ‘So far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection’. The accession process may be traced at: Carriages preview | Legislative Train Schedule (europa.eu); EU accession to the ECHR — Human Rights. Intergovernmental Cooperation (coe.int) [accessed: 30/12/2021].
19 See: Judgment of the Court of Justice of 9/10/2010, Volker und Markus Schecke GbR (C-92/09) and Hartmut Eifert (C-93/09) v Land Hessen, ECLI:EU:C:2010:662.
Provisions of the EU’s institutional law stipulate the appointment of specialised organs directly or indirectly responsible for the protection of fundamental rights in the EU. Special mention must go the Ombudsman appointed pursuant to Article 228 TFEU who receives complaints on violations of the right to good administration under Article 41 of the Charter. Moreover, there is the Committee on Petitions that operates at the European Parliament, whereas the office of the EU Special Representative for Human Rights was appointed at the European External Action Service. So-called decentralised agencies have been set up to monitor the observance of fundamental rights guaranteed in the Charter: the European Union Agency for Fundamental Rights (FRA, which will be discussed below in more detail) and the European Institute for Gender Equality (EIGE).

Finally, it is worth mentioning that member states are bound by the obligation to protect fundamental rights at each stage of implementation of the Union’s law in the national system. Thus, as suggested by D. Kostakopoulou, the humanist philosophy that places the individual at the centre of protection and interest of authorities should always dominate at each stage of the implementation of Union policies, be it by the Union’s institutions or in the process of their implementation and execution by authorities of member states.

The problem of guaranteeing effective protection of fundamental rights of migrants in the system of EU law

European Union authority in the realm of managing migrations

Pursuant to the Treaty on the Functioning of the European Union, the Union has shared competences with Member States when it comes to the Area of Freedom, Security and Justice. The Area was established under the Treaty of Amsterdam and it accommodated the framework for the EU migration
policy. Chapter II of Title V TFEU details EU competences for border controls, asylum and migration.

Due to increased migration flows in recent years, managing migration requires the involvement of both the Union and the administrations of the member states. An estimated 617,800 people sought international protection in the 27 European Union countries in 2021. Integrational policies also remain a challenge because, as reported by Eurostat, 23.7 million third-country nationals are currently residing in EU countries.

Managing migrations involves many threats, mainly for the security of migrants but also for the security of host countries (e.g. a terrorist threat). Current terrorist threats mainly include the risk of irregular migrants dying as a result of illegally crossing EU borders (maritime and land borders alike) — an estimated 197,000 people crossed the EU border in this way in 2021, while 2,048 lost their lives when travelling across the Mediterranean Sea.

Guarantees for protection of migrants’ rights under EU law

The fundamental rights of migrants are guaranteed in both the primary law of the European Union and in secondary law. As a preliminary point, it should be noted that migrants are a particularly vulnerable group – on the one hand, they are in the migration process, having left their country of origin not necessarily...
of their own free will, and on the other hand, they do not have sufficient knowledge of the legal order in the host country.\footnote{See also: M. Baumgartel, Demanding Rights. Europe’s Supranational Courts and the Dilemma of Migrant Vulnerability, Cambridge, 2019, p. 3; M.B. Dembour, T. Kelly, Introduction, [in:] Are Human Rights for Migrants? Critical Reflections on the Status of Irregular Migrants in Europe and the United States, Dembour M.B., Kelly T. (Eds), Routledge, 2011, p. 6. Legal scholarship emphasises inequality in treating migrants in individual areas, such as irregular migration or family migration — see: C. Grey, Justice and Authority in Immigration Control, Oxford and Portland, Oregon, 2017, p. 51.}

Since the Charter of Fundamental Rights applies to EU institutions and Member States, most of the rights guaranteed therein apply to migrants remaining on the territory of the European Union – such as religious freedom (Article 10), the right to protection of family life and the right to marry (Article 9), but also non-derogable rights such as the prohibition of torture and inhuman treatment (Article 4) and the prohibition of slavery and forced labour (Article 5).\footnote{See: D. Miąśik, Zasady i prawa podstawowe, pp. 323–326.} Clearly, migrants do not enjoy the rights that belong exclusively to Union citizens.

The CFR guarantees two specific rights related solely to third country nationals. The first is the right to asylum provided for in Article 18 of the CFR which implies the Union’s obligation to respect the Geneva Convention.\footnote{Convention Relating to the Status of Refugees, Geneva, 28 July 1951, Journal of Laws of 1991, No. 119, item 515. The Union is not a party to the Convention. See: D. Miąśik, Zasady i prawa podstawowe, p. 388. As a side note, it is worth noting that there is an interesting discussion in the doctrine on the existence of the right of migrants to enter the EU — ‘the right to enter’. See: H. Oosterom-Staples, Effective Rights for Third–Country Nationals?, [in:] A Right to Inclusion or Exclusion? Normative Fault Lines of the EU’s Area of Freedom, Security and Justice, Lindahl L. (Ed.), Hart Publishing, 2009, p. 67. On universally guaranteed rights for migrants, see: D. Weissbrodt, M. Divine, International Human Rights of Migrants, [in:] Foundations of International Migration Law, Opeskin B., Perruchoud R., Redpath-Cross J. (Eds), Cambridge, 2012, p. 152 ff.} The right to asylum is linked to the right to a fair trial, guaranteed by Article 47 of the Charter, as any person seeking international protection has the right to challenge a decision that is unfavourable to him or her with the competent superior authority. The second right guaranteed to third country nationals in the primary law is the prohibition of collective expulsion in Article 19 of the Charter and the prohibition of expulsion to a country where the person could be subjected to inhuman treatment (principle of non-refoulement).\footnote{A.M. Potyrala, Commentary on Article 19 of the Charter of Fundamental Rights, [in:] Charter of Fundamental Rights of the European Union. Commentary, Wróbel A., Warszawa, 2013, p. 675 ff; D. Miąśik, Zasady i prawa podstawowe, p. 390. See also: R. Mungianu, Frontex and Non-Refoulement. The International Responsibility of the EU, Cambridge, 2016, pp. 120–122.}

These rights are detailed in the European Union’s secondary legislation on the regulation of regular, irregular and refugee migration. Directives adopted as part of the Common European Asylum System — notably the Qualification Directive\footnote{Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), OJ UE L 337, 20/12/2011, pp. 9–26.}
and the Procedures Directive\textsuperscript{46} — play a special role here. It is also worth mentioning that, since the entry into force of the Lisbon Treaty, all secondary legislation, consequently including migration law, includes a clause to respect fundamental rights in the application of the legislation concerned.\textsuperscript{47} Thus, to a large extent, recognition of migrants’ rights is the responsibility of Member States at the stage of implementation of migration law standards.\textsuperscript{48}

\textbf{Dispersion of competences for the protection of migrants’ rights in the EU as an argument for the establishment of a Special Ombudsman for Migrants}

Analysing the pragmatic aspect of the protection of fundamental rights, one may easily conclude that it is the Court of Justice of the European Union that plays a particularly important role here. However, as previously mentioned, the system is not perfect, as individuals are only entitled to three individual complaints — a complaint of nullity, a complaint of inaction and a complaint for damages.\textsuperscript{49} In contrast, questions referred for a preliminary ruling under Article 267 of the TFEU are crucial for shaping the Court’s line of case law. In these proceedings, the Court has jurisdiction to interpret the Treaties and to examine the validity and interpret secondary legislation. On the other hand, foreign nationals participating as parties in the main proceedings cannot pressure the court to refer a question to the Court, as such a decision is in each case a discretionary decision of the national court.

Despite that, the Court has made groundbreaking interpretations in a number of cases concerning the protection of foreigners’ rights, which have made it possible to provide effective protection to third-country nationals. A prime example of such a ruling is the case of N. S. (C-411/10) v Secretary of State for the Home Department and M. E. and Others (C-493/10) v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform,\textsuperscript{50} in which the Court, following the


\textsuperscript{47} In the Schengen Borders Code, for example, this clause is found in Article 4, according to which: ‘In applying this Regulation, Member States shall fully respect the relevant provisions of Union law, including the Charter of Fundamental Rights of the European Union (‘the Charter’), international law, including the Convention Relating to the Status of Refugees drawn in Geneva on 28 July 1951 (‘the Geneva Convention’), obligations related to access to international protection, in particular the principle of non-refoulement, and fundamental rights (…)’. Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (consolidated text), OJ EU L 77, 23/3/2016, pp. 1–52.


\textsuperscript{49} The Court’s 2021 report shows that the Court received only 29 direct actions in 2021, of which 22 were for infringement — Judicial activity (europa.eu) [accessed: 30/11/2022].

\textsuperscript{50} Judgement of the Court of 21 December 2011 in N. S. (C-411/10) v Secretary of State for the Home Department and M.E. and Others (C-493/10) v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform, ECLI:EU:C:2011:865. See also: M. Baumgartel, Demanding Rights. Europe’s Supranational Courts and the Dilemma of Migrant Anna Magdalena Kosińska

130

Internal Security, January–June
jurisprudential path developed in the M.S.S case, held that EU law precludes the application of the irrebuttable presumption that a Member State held liable under the Dublin Regulation respects the fundamental rights of the European Union.

In the case under discussion, applicants for international protection in the EU were threatened with transfer to Greece, which was their first country of entry to the Union, although the parties demonstrated that after the transfer, they would not be guaranteed the basic rights guaranteed under the Common European Asylum System as a result of systemic problems experienced by the Greek administration in charge of migration management.

The Court’s statistics also show that there has been a significant increase in the number of preliminary questions referred by the courts of the Member States related to the subject of asylum over the last twenty years.

Advocates General, whose task is to prepare opinions for the Court, also play an important role in shaping the Court’s line of case law. Importantly, however, this opinion is not binding. An analysis of the opinions in migration cases leads one to conclude that the Advocates often present a more legalistic position, which can be a source of inspiration for the adjudicating panel. An example of such a pro-peace opinion by the Advocate is the opinion in the case of X and X, which concerned the refusal of the Belgian embassy in Beirut to issue humanitarian visas to Syrian nationals who had arrived from Aleppo. Although the Court considered that the issuance of humanitarian visas is not covered by the provisions of the Community Code on Visas, the Advocate General in its Opinion considered that ‘a Member State to which a third-country national has applied for a visa with limited territorial validity on humanitarian grounds is obliged to issue such a visa if, in the circumstances of the particular case, there are serious and documented grounds for believing that the immediate consequence of refusing to issue that document would be to subject that national to the treatment prohibited by Article 4 of the Charter by depriving him/her of the legal mechanisms for exercising his/her right to apply for international protection in that Member State’.


53 M. Baumgartel, Demanding Rights. Europe’s Supranational Courts and the Dilemma of Migrant Vulnerability, p. 5. The Court’s own report shows that, as of the end of 2021, there were 136 preliminary ruling proceedings pending on issues in the area of Freedom, Security and Justice — Judicial activity (europa.eu) [accessed: 10/05/2022].

54 Judgement of the Court of 21/04/2017, X, X v État belge, C 638/16 PPU, ECLI:EU:C:2017:173.

The European Union’s system for the protection of fundamental rights generally lacks hard mechanisms for third country nationals to claim protection under EU law. This is primarily due to two facts — the nature of European Union administrative law and the dispersion of soft powers between different types of bodies, both at the EU and national levels.

The administrative law of the European Union has a dualistic character, since, as Jerzy Superat notes, ‘it consists, on the one hand, of an administration on the EU level, i.e., the Union administration, direct administration, and, on the other hand, of an administration on the level of the Member States’ administrations, indirect administration’. As a result of such a concept, there is also no common code of administrative procedure at the EU level, and the effective implementation of administrative action in respect of fundamental rights is guaranteed by respecting the right to the good administration of Article 41 of the CFR in conjunction with its Article 47, which guarantees the right to a fair trial.

The functioning of the EU administration, including migration management-related, is linked to the concept of multi-level governance and the creation of decentralised agencies, whose task is to relieve the European Commission of management tasks within the framework of Union policies that require a high level of expertise. Decentralised agencies also operate in the area of Freedom, Security and Justice, as is discussed below.

The administrative fragmentation in the area of managing migration policy and, consequently, guaranteeing fundamental rights at the level of its implementation, concerns the functioning of many administrative bodies at the EU and national levels responsible for the implementation of EU law. However, there is no single specialised body responsible for the overall control of the implementation of migration policy in the spirit of fundamental rights.

Currently, hard and soft competences in the area of the protection of fundamental rights of migrants at the level of the European Union administration are mainly in place:

— **Ombudsman of the European Union** (European Ombudsman); the Ombudsman has limited cognisance of complaints — namely, they can only relate to violations of the right to good administration provided for in Article 41 of the CFR. Although the right to turn to the Ombudsman is primarily a right of citizens of the Union, citizens of third countries also have this right. Pursuant to Article 2(1) of Regulation 2021/1163: ‘Any citizen of the Union or any natural or legal person residing or having its registered office in a Member State of the Union may, either directly or through a Member of the European Parliament, refer a complaint to the Ombudsman in respect of an instance of maladministration’,

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58 Regulation (EU, Euratom) 2021/1163 of the European Parliament of 24 June 2021 defining the regulations and general conditions governing the performance of the Ombudsman’s...
European Parliament’s Committee on Petitions; the right to present a petition is granted under Article 20(2)(d) TFEU. This gives the European Parliament the opportunity to check how specific EU policies are actually implemented. The right to petition is available to any person residing within the European Union, and thus also to third-country nationals, who may in this way signal problems in the implementation of Member States’ migration policies.  

European Union Agency on Fundamental Rights (FRA) is a decentralised agency tasked with monitoring respect for fundamental rights in the European Union. The Agency therefore acts as a kind of watchdog organisation for the EU. As part of its activities, the Agency regularly monitors the implementation of migration policy, particularly asylum policy, in the light of the Charter of Fundamental Rights. These activities result in published general reports (annual reports) and thematic reports.  

European Union Agency for Asylum (EUAA) is a decentralised agency established under Regulation 2021/2303 and replaced the existing European Asylum Support Office (EASO). The purpose of the Agency’s activities is to support Member States in implementing the provisions of the Common European Asylum System. In addition, a Consultative Forum has been set up within the Agency. The forum is attended ex officio by the FRA, the European Border and Coast Guard Agency and the UNHCR. Civil society organisations also participate in the forum meetings.  

European Border and Coast Guard Agency (Frontex) is the result of a recast of the mandate of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States (Statute of the European Ombudsman) and repealing Decision 94/262/ECSC, OJEU. L 253, 16/7/2021, pp. 1–10.

59 Petitions available at: Show petitions | PETI | Committees | European Parliament (europa.eu) [accessed: 10/05/2022].


61 Asylum, migration and borders | European Union Agency for Fundamental Rights (europa.eu) [accessed: 30/12/2021].


63 Article 50 of Regulation 2021/2303. Pursuant to this article: ‘The Agency shall maintain a close dialogue with relevant civil society organisations and relevant competent authorities active in the field of asylum policy at local, regional, national, EU or international levels. For this purpose, the Agency shall establish an Advisory Forum’.

64 A full list of the organisations currently involved is available on the website: Civil Society and the Consultative Forum | European Union Agency for Asylum (europa.eu) [accessed: 10/05/2021].
of the European Union. In order to fully implement fundamental rights in the tasks performed by the Agency, there is a pool of forced return observers, as well as a Fundamental Rights Officer whose task, according to the Regulation is ‘(...) to participate in the work on the Agency’s fundamental rights strategy, and to monitor and promote the Agency’s respect for fundamental rights’. In addition, a Consultative Forum, consisting of representatives of NGOs and European agencies (including the FRA), the UNHCR and the International Organization for Migration, has been operating at the Agency since 2012. The Forum’s task is to consult on the strategy for the protection of fundamental rights within the framework of the Agency’s activities and the functioning of the complaints mechanism for violations related to the Agency’s activities.

It also follows from the dualistic nature of the EU administration that most decisions concerning the status of foreigners, and thus indirectly the protection of their fundamental rights, are taken at the national level. For example, in Poland, the Head of the Office for Foreigners and the Refugee Board are responsible for granting international protection. Consequently, in the 27 EU Member States, national administrations are tasked with implementing standards for the protection of fundamental rights during migration proceedings.

**Conclusions**

The systemic and legal analysis presented in this paper confirms the thesis that the protection of migrants’ fundamental rights is not ensured effectively due to decentralisation of competences for protective actions between a plethora of administrative institutions and bodies of the EU, and also of member states to the extent in which they implement the EU law. There is no administrative body at the EU level dedicated strictly to migrant advocacy.

It seems that a special ombudsman — such as the Patients’ Rights Ombudsman or the Insurance Ombudsman in Poland — acting in every member state may be a sensible systemic solution. The appointment of a special Ombudsman for Migrants at the EU rather than the national level is justified insofar as migration policies are a shared competence between the Union and the Member States. This also implies the need to harmonise standards of conduct in the administrative bodies of the Member States.

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66 Article 71(2016/1624).
The model for the functioning of the Ombudsman for Migrants in the EU institutional system is the subject of my subsequent research but, at this point, it is worth noting that such a body should be able to receive complaints and consequently intervene whenever there is a risk of violation of fundamental rights by administrative bodies; to draw up reports, as well as to carry out continuous monitoring of the respect of migrants’ fundamental rights and to network between administrative bodies responsible for dealing with foreigners’ cases and protect their fundamental rights. Apart from the obvious adjudicatory activity, the functioning of such an Ombudsman would contribute to the harmonisation of protection standards and the development of common pathways for administrative proceedings at the EU level.

References


Streszczenie. Humanitarne zarządzanie migracjami w ostatnich dekadach staje się wyzwaniem dla Unii Europejskiej. W związku z traktatowymi postanowieniami o kompetencjach dzielonych w ramach Przestrzeni Wolności, Unia Europejska w dużym stopniu stanowi normy prawa migracyjnego, implementowane następnie do prawa państw członkowskich. Zgodnie ze stawianą w artykule tezą, zapewnianie ochrony praw podstawowych migrantom nie jest w pełni skuteczne, poprzez swoiste rozproszenie kompetencji do działań ochronnych na różne instytucje i organy administracyjne Unii, jak również państw członkowskich w zakresie, w jakim implementują one prawo Unii. Artykuł poddaje analizie gwarancje praw podstawowych funkcjonujące w systemie UE, ze szczególnym uwzględnieniem gwarancji ochrony praw podstawowych migrantów. Kluczowa część artykułu wskazuje na problem swoistej rozproszenia kompetencji w zakresie środków ochrony praw migrantów pomiędzy różne organy Unii, w większości niewyposażone w twarde kompetencje ochronne (Agencja Praw Podstawowych UE, Forum Konsultacyjne działające przy Agencji UE ds. Asylu). Przeprowadzona analiza wskazuje jednoznacznie na konieczność wzmocnienia istniejących w prawie pierwotnym i wtórnym gwarancji ochrony praw migrantów na poziomie ich implementacji i realizacji, zarówno przez administrację unijną, jak też krajową. Remedium dla harmonizacji działań ochronnych i standardyzacji procedur administracyjnych w państwach członkowskich byłoby ustanowienie w systemie prawa unijnego specjalnego organu administracji – unijnego Ombudsmana ds. ochrony praw migrantów.

Resumen. Resumen. En los últimos años, la gestión humanitaria de la migración se ha convertido en un reto para la Unión Europea. De conformidad con las disposiciones de los tratados sobre competencias compartidas en el espacio de libertad, la Unión Europea establece en gran medida las normas del Derecho de migración, que luego se incorporan a las legislaciones de los Estados miembros. Como se argumenta en el artículo, la protección de los derechos fundamentales de los migrantes no está garantizada de manera efectiva debido a la descentralización de las competencias en materia de acción protectora entre una serie de instituciones y órganos administrativos de la UE y de los Estados miembros en la medida en que aplican la normativa de la UE. El artículo analiza las salvaguardias de los derechos fundamentales que operan en el sistema de la UE, con especial atención a las salvaguardias para la protección de los derechos fundamentales de los migrantes. La parte principal del artículo examina la dispersión de competencias en materia de medidas de protección de los derechos de los migrantes entre los distintos organismos de la UE, la mayoría de los cuales tienen competencias limitadas para adoptar medidas de protección (Agencia de Derechos Fundamentales de la UE, Foro Consultivo en el seno de la Agencia de Asilo de la UE). El análisis realizado señala sin lugar a dudas la necesidad de reforzar las salvaguardias existentes en el derecho primario y derivado para la protección de los derechos de los inmigrantes en lo que se refiere a su aplicación y cumplimiento tanto por parte de la UE como de las administraciones nacionales. La creación de una institución de Defensor del Pueblo de la UE para la protección de los derechos de los inmigrantes, dotada de competencias, funciones y obligaciones específicas, pondría definitivamente remedio a esta situación, facilitaría la armonización de las medidas de protección en la Unión Europea y normalizaría los procedimientos administrativos en los Estados miembros.

Zusammenfassung. Die humanitäre Migrationssteuerung hat sich in den letzten Jahrzehnten zu einer Herausforderung für die Europäische Union entwickelt. Aufgrund der vertraglichen Bestimmungen über die geteilten Zuständigkeiten innerhalb des Raums der Freiheit legt die Europäische Union weitgehend die Normen des Migrationsrechts fest, die anschließend in die Gesetze der Mitgliedstaaten umgesetzt werden. Die in dem Artikel aufgestellte These lautet, dass der Schutz der Grundrechte von Migranten nicht in vollem Umfang wirksam ist, da eine Art Streuung der Zuständigkeiten für Schutzmaßnahmen auf die verschiedenen Institutionen und Verwaltungsgremien der Europäischen Union sowie auf die Mitgliedstaaten erfolgt, soweit diese das Unionsrecht umsetzen. Der Artikel analysiert die Grundrechtsgarantien im EU-System, mit besonderem Augenmerk auf die Garantien für den Schutz der Grundrechte von Migranten. Der wichtigste Teil des Artikels verweist auf das Problem einer Art von Zersplitterung der Zuständigkeiten im Bereich der Maßnahmen zum Schutz der Rechte von Migranten zwischen verschiedenen EU-Organen, von denen die meisten nicht mit harten Schutzkompetenzen ausgestattet sind (die EU-Agentur für Grundrechte, das bei der EU-

Резюме. Гуманитарное управление процессом миграции в последние десятилетия становится проблемой для Европейского союза. В силу договорных положений о совместных полномочиях в рамках Зоны свободы, Европейский союз в значительной степени формирует нормы миграционного права, которые впоследствии имплементируются в законодательство государств-членов. Согласно тезису, выдвинутому в статье, обеспечение защиты основных прав мигрантов не является в полной мере эффективным из-за своеобразного распыления сферы компетенции по защите прав между различными институтами и административными органами Союза, а также государствами-членами в той мере, в какой они имплементируют право ЕС. В статье проводится анализ гарантий основных прав, действующих в системе ЕС, и особое внимание уделяется гарантиям защиты основных прав мигрантов. Ключевая часть статьи указывает на проблему своеобразного распыления сферы компетенции в области мер по защите прав мигрантов между различными органами ЕС, большинство из которых не наделены жесткими защитными полномочиями (Агентство ЕС по основным правам, Контсультативный форум, действующий при Агентстве ЕС по вопросам убежища). Проведенный анализ однозначно указывает на необходимость усиления существующих в первичном и вторичном законодательстве гарантий защиты прав мигрантов на уровне их имплементации и соблюдения, как органами ЕС, так и национальной администрацией. Средством согласования мер защиты и стандартизации административных процедур в государствах-членах может стать создание в правовой системе ЕС специального административного органа — Омбудсмена ЕС по защите прав мигрантов.