

CONCLUSIONS

Legal Challenges in EU Administrative Law by the Move to an Integrated Administration

Herwig Hofmann, Alexander Türk

The contributions to this book have discussed various legal aspects of the phenomenon of integrated administration in the EU and have contributed to developing a better understanding of the legal framework thereof. This has not been a simple task, not least because the founding treaties had not provided for a legal framework for this administrative integration. It was due to the evolutionary and diversified development of forms of integrated administration, that many new and unforeseen legal problems have arisen. They are often the result of forms of non-hierarchical, network-like structures and procedures of administrative cooperation in the EU. Across policy areas a general tendency can be observed of integrating a multitude of administrative actors from different jurisdictions in joint procedures. This often results in a mix of legal systems' rules being applicable to a single administrative procedure.

One of the striking features of this development is that integrated administration has not been subject to any structured legislative approach. There is no standard 'EU administrative procedures act' or similar horizontally applicable legislation. Only few acts of general administrative law exist in the EU.¹ Amongst them, the most prominent are the Comitology decisions of 1987, 1999 and 2006 as well as the EC's Financial Regulation,² and a regulation on so called Community 'executive agencies'.³ Also, the doctrinal treatment of these matters of general EU administrative law is in its infancy. In the past, EU administrative law was generally regarded as the development of general principles of law.⁴ Only recently has there been a developing interest in research with

¹ See the introductory chapter of this book, p. XXX

² Council Regulation 1605/2002 of 25 June 2002 on the Financial Regulation Applicable to the General Budget of the European Communities, OJ 2002 L 248/1 which replaced the 1977 Financial Regulation (OJ 1977 L 356/1).

³ Council Regulation 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, OJ 2003 L 11/1.

⁴ See for example: Jürgen Schwarze *Europäisches Verwaltungsrecht* 2nd edition, Nomos (Baden-Baden 2005); Takis Tridimas *General Principles of EU Law* 2nd edition, Oxford University Press (Oxford 2006); Jan Jans, de Lange, Sasha Prechal, Rob Widdershoven *Europeanisation of Public Law* Europa Law Publishing (Groningen 2007).

respect to a more general approach to EU administrative law, through publications either directly or indirectly concerning the topic.⁵

The final chapter of this book therefore explores the relevant legal problems of administrative integration. It seeks to provide solutions to enhance the effective functioning of administrative tasks as well as their supervision and accountability, it reviews and discusses the findings of the different chapters in this book and proposes further approaches for developing EU administrative law. This chapter thereby reflects the three major parts of the book, starting with the models of understanding integrated administration (a) followed by procedural and structural aspects of integrated administration (b) and leading to questions of supervision and accountability (c). In all of the considerations, the leading question is: Which could be the paths for the case law and legislation as well as the practice of institutions to follow in order to remedy inconsistencies and problems arising from the dramatic and radical phenomenon of a developing integrated administration?

a) Models of Understanding Integrated Administration

Part one of the book presents different models of explaining the phenomenon of integrated administration in the EU as well as the challenges which the authors perceive such integration entails. Eduardo Chiti's contribution attempts to classify the modalities of integrated administration for administrative implementation of EU policies. He identifies four main types of administrative organization in which cooperation procedures for implementation of EU law are established. Two of the forms are the poles of the traditional dichotomy of direct and indirect execution. Between these two, Chiti locates bottom-up and top-down procedures for the integration of EU policies. Administrative

⁵ See e.g. Paul Craig *EU Administrative Law* Oxford University Press (Oxford 2006); Jean-Bernard Auby, Jacqueline Duthéil de la Rochère (eds.) *Droit Administratif Européen* Bruylant (Bruxelles 2007); Herwig C.H. Hofmann, Alexander Türk (eds.), *EU Administrative Governance*, Elgar Publishing (Cheltenham 2006); Matthias Ruffert (ed.) *The Transformation of administrative law in Europe* Sellier (München 2007); Mario P. Chiti, Guido Greco (eds.) *Trattato di diritto amministrativo comunitario* Vol. I, II, Giuffrè (Milano 1998); Eberhard Schmidt-Assmann, Bettina Schöndorf-Haubold (eds.) *Der Europäische Verwaltungsverbund* Mohr (Tübingen 2005).

cooperation between national and European institutions and bodies exists in all of these forms. Chiti's classification shows that in the realm of integrated administration, fragmentation of actors and unity of procedures are 'conflicting but co-existing forces, whose interplay shapes the characters of the emerging European administration.' Composite procedures linking European and national levels – despite the reasonable criticism that can be made concerning the overly complex and dysfunctional choices in one or another policy area – balance three main requirements: that of necessary plural input from various Member State recourses, that of sufficient central coordination without, thirdly, overburdening the central administration with detailed tasks.⁶ The author also sets out the challenges which arise from such a classification: to determine the features of administrative law which apply to the co-operation between national and European administrations as well as between such public powers and private parties; to assess the degree of effectiveness of such structures; and finally, to establish their normative foundations.

Paul Craig's contribution discusses under the notion of 'shared administration' a specific aspect of integrated administration. This notion arises *inter alia* from the EC's financial regulation where it describes joint procedures for implementing Community policies. Craig finds that the diversity of different cooperation structures in shared administration bedevils a coherent approach to developing a European administrative law. He warns that 'the understanding of the substantive law that governs any such [policy] area is crucial in order to comprehend the nature of the difficulties that beset a particular regime.' Even though these difficulties may be dependent on the nature of the particular regime in place, legal research can draw 'more general conclusions that cut across several areas'. The increased regulatory diversity of a Union of 27 Member States will ensure that the 'multi-level governance that is inherent in the very idea of shared administration will nonetheless continue to be central to the delivery of many important Community initiatives'.

⁶ Attempts at systematic reconstruction of administrative structures however, Chiti admits, are quickly made obsolete by ad-hoc solutions created in certain policy fields.

These contributions to the discussion of the models of integrated administration show that there are many approaches and ways to describe the phenomenon of integrated administration. The terminology used in the nascent field of EU administrative law is not yet established. Nevertheless, these different descriptions show that integration of administrations in Europe through joint procedures and by a certain harmonisation of standards and substantive law has become far reaching and can be found in virtually all policy areas touched by EU integration. The consequence is that the traditional way of understanding EU law in the form of a quasi-constitutional two-level legal system has an increasingly limited explanatory value for the realities of implementing EU law. The legal consequences of these findings are subject of the second and third parts of the book.

b) The Future of Procedures and Structures of Integrated Administration in the EU

The contributions contained in the second part of the book provide an analysis of various procedural and structural arrangements within EU administrative law and the challenges the pose for supervision and accountability, in particular due to the various forms of administrative co-operation which is so prevalent for EU administrative action. These contributions help to advance the search for elements of a general EU administrative law. The second part of the book thereby looks at the latest developments in comitology (i), agencies (ii), composite administrative decision-making procedures (iii) and finally, international regulatory cooperation (iv).

(i) Comitology

Comitology and its developments since the draft Constitutional Treaty, the 2006 reform and the Treaty of Lisbon are the topics of the contributions by Christine Neuhold and Manuel Szapiro. Neuhold, while focusing on the 2006 comitology reform, looks at

various forms of enlarging supervision and accountability of administrative rule-making in the EU through comitology. The solutions she explores include the potential for the European Parliament to use external experts to create a sort of civil society and parliamentary network of control and transparency. Szapiro is rather critical on this point fearing the strengthening of special interests going hand in hand with undue lobbying powers. His contribution focuses on the open questions after the 2006 comitology reform and the adoption of the Treaty of Lisbon. When the latter will enter into force, it will substantially change the parameters of the use of comitology committees as well as the conditions for supervision and accountability thereof. This is a result of the new distinction between legislative, delegated and implementing measures in the Treaty of Lisbon. Adapting the comitology structures to these new realities will require some creativity on the side of the institutions.

The framework of the debate about delegation of implementing powers will, as the contribution makes clear, develop further. The Treaty of Lisbon contains two specificities with respect to delegation and therewith to comitology. The first is the introduction of the typology of acts applicable to what are now first and the third pillar matters. Legal acts of the EU will be issued as legislative, delegated or implementing acts.⁷ The difference between these different types of acts will be on one hand, the decision-making procedure applicable for their adoption, and on the other hand, the conditions as well as procedures for control and supervision of the actors adopting the acts. The second change in the Treaty of Lisbon is that implementing powers delegated to the Commission in the framework of comitology are controlled by the Member States⁸ while so far under Article 202 third indent EC, this was a prerogative of the Council.

Szapiro shows that the development of the Treaty of Lisbon's typology of acts will have a large influence on the future of comitology. Comitology is a fundamental structure of integrated administration. But supervision of implementing powers delegated to the Commission with the help of Comitology procedures have also to date been one of the

⁷ Articles 289, 290 and 291 TFEU.

⁸ Article 291 (3) TFEU.

major sources of inter-institutional conflict. The differences of the new Articles 290 and 291 of the Treaty on the Functioning of the European Union (TFEU) with respect to political supervision of delegated and implementing acts can thus be interpreted as a reaction to the underlying developments of Europe's increasingly integrating administration.⁹

This is the context of attempts to establish judicial and political supervision of comitology.¹⁰ Despite continuous reform efforts, the EP had in the past gained only very limited rights in the comitology procedure. With the introduction of the regulatory procedure with scrutiny, introduced in 2006,¹¹ the EP gained genuine participation rights with the possibility of opposing the entry into force of an implementation measure of 'general scope designed to amend non-essential elements' of a legislative act adopted under the co-decision procedure.¹² The procedure had been introduced mainly as a result of the impasse of the ratification procedure of the Treaty establishing a Constitution for Europe in order to implement certain elements of the latter's Article I-36. In this context it is interesting to note that Article 291 (3) of the Treaty on the Functioning of the European Union (TFEU), unlike Article 202 third indent EC, explicitly refers for implementing acts to comitology only as 'mechanism for control by Member States.' This raises the question as to the future of political supervision of comitology by the EP. We would suggest that the Treaty of Lisbon does not exclude the EP to have certain

⁹ The question of whether there should be two distinct sub-legislative categories of delegated acts and implementing acts is therefore a result of the history of the institutional dispute about the rights of the EP to participate in recourse decisions. In fact, the history of the debate on the introduction of a new typology of acts has been largely influenced by this problem.

¹⁰ For an in-depth analysis of judicial review of comitology related matters see: Kieran St. C. Bradley, *Comitology and the Courts – tales of the unexpected*, in: Herwig C.H. Hofmann, Alexander Türk (eds.) *EU Administrative Governance* Elgar Publishing (Cheltenham 2006), 417-447.

¹¹ See Article 5a (3) of Council Decision (1999/468/EC) of 28 June 1999 laying down the procedure for the exercise of implementing powers conferred on the Commission (Comitology Decision) as amended by Council Decision (2006/512/EC) of 17 July 2006 amending Decision 1999/468/EC, OJ 2006 L 200/11.

¹² There under, the Commission shall present draft measures to the EP which by majority and the Council which quality majority voting respectively, may oppose the adoption of the said draft by the EP. Reasons for such opposition may be the ultra-vires nature of the measure or that the EP holds that the draft measure presented by the Commission is not compatible with the aim or the content of the delegating legislation. See Articles 5 (a) (3) (b) and 5 (a) (4) (e) of Council Decision (1999/468/EC) of 28 June 1999 laying down the procedure for the exercise of implementing powers conferred on the Commission (Comitology Decision) as amended by Council Decision (2006/512/EC) of 17 July 2006 amending Decision 1999/468/EC, OJ 2006 L 200/11.

supervisory powers. These can be provided for in the new comitology decision which according to Article 291 (3) TFEU would have to be taken in the regular legislative procedure, i.e. by co-decision.¹³ That will allow the EP to influence the future structure of comitology procedures to a much larger extent than was so far possible.

We also submit that a specific problem might arise from the possibility of sub-delegation of implementing powers, which will be an additional result of the distinction between the two categories of delegated and implementing acts in Articles 290 and 291 TFEU. Sub-delegation of implementing powers may arise especially in areas of broad delegation of legislative powers to the Commission under Article 290 TFEU. The Commission may then be obliged (under Article 291 TFEU) to sub-delegate to itself or to an agency, implementing powers.¹⁴ This combination of provisions may thus result in a cascade of delegation of powers, which risks subverting the possibilities of political supervision of the exercise of these delegated powers as the Commission might escape well established review procedures such as the Comitology procedures. Under the current Comitology decision, this would be possible, since the application of one of the Comitology procedures for the delegation of implementation powers is a decision within the discretion of the legislator.¹⁵ When undertaking whether to choose one of the committee procedures under the criteria which are laid down in Article 2 of the Comitology decision the legislator must under the current Comitology decision merely ‘state the reasons for that choice.’¹⁶ It would therefore be possible or even likely that in the subject area of delegated acts the Commission will decide that it will itself have the power to issue implementing acts in the form of implementing regulations or implementing decisions without being bound by a Comitology. Such approach could only be vetoed by the EP or Council in cases where such veto power has been provided for in the basic act.¹⁷ The

¹³ This is unlike Article 202 EC, under which the Comitology decision was taken by a unique quasi-legislative procedure by the Council acting unanimously upon a proposal from the Commission and after obtaining the opinion of the EP.

¹⁴ Whereas the power to issue delegated acts requires a legislative delegation, the power to issue implementing acts can explicitly be delegated by any ‘legally binding Union act’ including a delegated regulation, directive or decision under Article 290 FEU.

¹⁵ Case law since Case 30/70 *Scheer* [1970] ECR 1197, para 18.

¹⁶ Case C-378/00 *Commission v Parliament (LIFE)* [2003] ECR I-937, paras 51-55.

¹⁷ The use of the possibility of sub-delegation would fit into the explicitly stated critical approach of the Commission towards Comitology. In the recent past the Commission had suggested Comitology structures

possibility of sub-delegation of implementing powers can therefore be counter-balanced by a strict application of time limits for delegation to the Commission with sunset clauses and strict limitation of delegation of powers to adopt delegated acts under Article 290 TFEU. Sub-delegation therefore should be addressed in a new post-Lisbon Comitology decision. Overall, using comitology in order to maintain political supervision over executive exercise of public powers will only be possible if the EP will manage to contain and control delegation cascades from delegated to implementing acts.

(ii) Agencies

EU agencies constitute the second structure of integrated administration discussed in this book. Michelle Everson's contribution on agencies reflects on some essential aspects of their construction and use in the EU. She finds them to be of a hybrid nature. On the one hand they are independent, have the obligation to act in the public interest and are subject to the concept of executive neutrality based on the scientific method for dealing with risk assessment and regulation. On the other hand, they are responsible to the political body of the Commission and with respect to budgets and nominations of leading personnel, also the Parliament. The role and position of these agencies is developing. In the face of this hybrid nature, Everson argues in favour of the possibility of a larger involvement of pluralist interest groups entering into direct contact with agencies to shape their agendas and perceptions of risk. She suggests to open regulatory structures to pluralistic public interest representation not only by means of review of standing rights in court but also by establishing guidelines of good decision-making which takes ethical and social concerns into account. At the same time she suggests firm oversight over agencies by the Commission, the only guarantee of the overarching supranational interest in the EU.

to be replaced with agency networks. See the European Commission, *European Governance: A White Paper*, COM (2001) 428 of 25 July 2001, in which it suggested to restrict the role of Committees to mere advisory function. For further discussion see Paul Craig, *EU Administrative Law* Oxford University Press (Oxford 2006) 112, 113 and 126, 127; Michelle Everson, 'Agencies: the 'dark hour' of the executive?' in this volume. The very negative stance of the Commission towards comitology has in the past few years however been softened in public. Even in policy areas in which the Commission has proposed legislation to create new agencies, comitology procedures continue to play an important role.

The debate about agencies has only just begun and the expansion of the role of agencies in the future is a difficult task. Under the current EC and EU Treaties, there is a continuously growing gap between the prolific creation of agencies in the EU and conferral of powers on them, on the one hand, and their recognition in EU primary treaty law, on the other hand.¹⁸ It is a fact that EU legislation transfers functions directly to agencies without the intermediary of the European Commission.¹⁹ The gap between the silence of primary law and their recognition in secondary law will remain under the Treaty of Lisbon.²⁰ The Treaty of Lisbon does not recognise the reality of the implementation of European law through administrative networks made up of European and Member States' public bodies as well as private parties. The Treaty of Lisbon ignores the development of using agencies for implementation. In this respect, the typology of acts is not conclusive, even though the list in Article 253 (3) TFEU would allude to indicate comprehensiveness.

As a consequence, agencies, whose acts are expressly declared subject to judicial review in Article 263 (1) last sentence TFEU, are not mentioned as recipients of delegation of powers to issue implementing acts. This is explicitly reserved to the Commission or, exceptionally, to the Council. The limitation to the delegation of implementing powers

¹⁸ Deirdre Curtin, *Delegation to Non-Majoritarian Agencies and Emerging Practices of Public Accountability*, in: Damien Geradin, Rudolphe Munoz and Nicholas Petit (eds.), *Regulation through agencies in the EU* Elgar, (Cheltenham 2005), 88-119; Dorothee Fischer-Appelt, *Agenturen der Europäischen Gemeinschaft*, Duncker und Humblot (Berlin 1999) 87-117.

¹⁹ Examples for agencies which have received legislative delegation for single case and restricted regulatory decision-making powers are the Office for the Harmonisation of the Internal Market (OHIM) which is empowered to take legally binding decisions on the registration of Community trade marks and other Intellectual Property rights (see Article 43 (5) and 45 (6) of the Council Regulation 40/94 of 20 December 1993 (OJ 1994 L 11/1) on the Community trademark (as amended in OJ 1994 L 349/1, OJ 1995 L 303/1). The Community Plant Variety Office (CPVO) has been delegated the power to adopt legally binding decisions in relation on the registration of plant variety rights (Article 62 Council Regulation 2100/94 of 22 July 1994 on Community plant varieties, OJ 1994 L 227/1 amended in OJ 1995 L 258/1). Powers akin to regulatory powers have been granted to the European Air Safety Agency (EASA) to adopt decisions with regard to criteria for type certification and continued airworthiness of products, parts and appliances, and the environmental approval of products (Regulation (EC) 1592/2002 of the European Parliament and of the Council of 15 July 2002 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency, OJ 2002 L 240/1).

²⁰ However, number 6 of the horizontal amendments to the EC Treaty in the Treaty of Lisbon provides for the replacement of the word 'institution' or 'institutions' in the EC Treaty to be replaced in all articles of the FEU by 'institution, body, office or agency' or 'institutions, bodies, offices or agencies.' But these developments touch provisions on control of agency action not provisions on the extent of powers to be delegated.

exclusively to the Commission constitutionalises a strict understanding of what is known as the ‘Meroni-doctrine’ - a limitation to delegation established in the early days of European integration within the framework of the ECSC treaty.²¹ The practical reality of executive structures and the legal situation under EU law is now however far more complex than in the 1950’s when *Meroni* was decided under very specific circumstances under the law of the ECSC Treaty. An increasing number of agencies undertake administrative functions and have been created to effectively carry out complex tasks in the network of administrative structures between the European and the member states’ level. Especially regulatory agencies prepare or issue externally binding decisions. Most types of agencies are involved in contractual relationships with private bodies and Member States’ administrations.

The EU’s constitutional reality, reflected in the case law of the ECJ, is therefore out of step with the actual development which has largely overcome the *Meroni* doctrine. With the exclusion of delegation of powers to agencies, under the Treaty of Lisbon (as well as already provided for in the Treaty establishing a Constitution for Europe) the *Meroni* doctrine has been re-iterated in primary law. The divide between the constitutional provisions and the requirements of the architecture of the emerging European network administration, which includes European agencies, will increase. This gap between the institutional reality and the legal framework may be narrowed by secondary legislation on what the Commission refers to as EU regulatory agencies.²² If in addition the case law of the Community Courts could come to clarify the competences of agencies, a big step ahead towards more legal certainty and possibilities of effective judicial control of

²¹ Cases 9 and 10/56 *Meroni v High Authority* [1957/58] ECR 133. In *Meroni*, the ECJ had considered as unlawful the delegation of discretionary powers to a private body powers containing the authorisation to take discretionary decisions and which went beyond the delegation to clearly defined powers. Such limitation of recipients of delegation might be intended to safeguard the coordinating role of the Commission for executive measures on the EU level. It however disregards the existing gap between the institutional reality in EU law and the constitutional situation. See for a discussion of these agency related problems Edoardo Chiti, Decentralisation and Integration in the Community Administration: A New Perspective on European Agencies, 10 *European Law Journal* (2004) 402-438; Paul Craig, *EU Administrative Law* Oxford University Press (Oxford 2006) 160-164 and 184; Michael Koch, *Die Externalisierungspolitik der Kommission*, Nomos (Baden-Baden 2004); Dorothee Fischer-Appelt, *Agenturen der Europäischen Gemeinschaft*, Duncker & Humblot (Berlin 1999); Michelle Everson, Independent Agencies: Hierarchy Beaters?, 2 *European Law Journal* (1995) 180-204.

²² See: European Commission, *Communication from the Commission to the European Parliament and Council – European agencies – The way forward* COM(2008) 135 final [SEC(2008) 323].

agency activity could be made. Unfortunately, so far the ECJ's case law on agencies restricts itself to review the legality of agency activity with respect to the basic legislative acts establishing the agency and their competences. The ECJ and CFI interpret their *ex officio* review obligations in a very limited sense.²³ Thus the review of the constitutional basis of agency activity is almost missing in the case law. The Courts would be well advised, especially when first confronted with a case relating to an agency where there has been no prior case law clarifying its constitutional status, to review also the range of delegation to an agency in the secondary act.

Further challenges with respect to agencies have been outlined by a report on what the Commission refers to as 'regulatory agencies.' Their role within EU administrative procedures, their structure and accountability provisions could be clarified and therewith supervision of agency activity be made more practically viable if a common regulatory framework for agencies were created. Such a framework exists for what is often referred to as 'executive agencies'.²⁴ The establishment of such a legal framework categorising the tasks of agencies and clarifying accountability structures has been proposed by the Commission.²⁵ This will not only make the existing landscape of agencies more transparent it will also allow for more thorough judicial review of agency activity.

(iii) Composite Procedures

Problems of integrated administration for the implementation of EU policies have traditionally been discussed in the context of comitology structures and European agencies and administrative networks. A well-rounded understanding of the legal problems, which administrative integration poses, however requires an understanding of what we refer to in this book as composite procedures, addressed in the contribution by

²³ See for example from the more recent case-law Case C-66/04 *UK v Parliament and Council (smoke flavorings)* [2005] ECR I-10553 and Case C-217/04 *UK v Parliament and Council (ENISA)* [2006] ECR I-3771.

²⁴ Council Regulation 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, OJ 2003 L 11/1.

²⁵ See European Commission, *Communication from the Commission to the European Parliament and Council – European agencies – The way forward* COM(2008) 135 final [SEC(2008) 323].

Herwig Hofmann. Composite procedures are multi-stage procedures with input from administrative actors from different jurisdictions. They co-operate in a vertical relation between EU institutions and bodies and Member States' institutions and bodies, as well as horizontally between various Member States' institutions and bodies. Procedural co-operation also takes place in triangular settings with different Member States' and EU institutions and bodies involved. The final acts or decisions will then be issued either by a Member State,²⁶ or an EU institution or body, but are based on procedures with more or less formalised input from different levels. Member State law defines most of the elements of the Member State authorities' contribution to a composite procedure. This generally includes the consequences of errors during the Member State element of the procedure, the applicable language regime of the administrative procedure,²⁷ and last but not least, the criteria and conditions for judicial review of an act adopted by a Member State authority.

Stated in the broadest terms, the purpose of co-operation in composite procedures is the joint creation and sharing of information.²⁸ Insofar there is a dichotomy of separation and co-operation. The organisational separation of administrations on the European and on the Member State level does not hinder intensive procedural co-operation between the administrations on all levels. These constellations of decision-making raise specific problems for supervision of administrative activity, especially for maintaining the rule of law through judicial review. The composite nature of many procedures and the often informal nature of information exchange make supervision and the enforcement of appropriate standards difficult. This holds all the more true in a system, in which

²⁶ Member State decisions, under EU law, will often be given effect beyond the territory of the issuing state (referred to in the following as trans-territorial acts). Trans-territorial acts are also often referred to as trans-national acts. The latter term is slightly misleading since it is not the nation which is the relevant point of reference but the fact that generally under public law, due to the principle of territoriality, the legal effect of a decision under public law is limited to the territory of the state which issues the decision and the reach of its law. EU law allows for certain acts to have an effect beyond this territorial reach within the entire territory of the EU, and in the case of extra-territorial effect of an act also beyond the EU.

²⁷ With further discussion see e.g. Kerstin Reinacher, *Die Vergemeinschaftung von Verwaltungsverfahren am Beispiel der Freisetzungsrichtlinie*, Tenea Verlag (Berlin 2005), 96-98.

²⁸ See also Eberhard Schmidt-Assmann, 'Der Europäische Verwaltungsverbund und die Rolle des Verwaltungsrechts' in: Eberhard Schmidt-Assmann, Bettina Schöndorf-Haubold (eds.) *Der Europäische Verwaltungsverbund* Mohr Siebeck (Tübingen 2005) 1-23, at page 2.

harmonisation of procedural law is undertaken not systematically but remains sector-specific.

The impact of the ever increasing amount of composite procedures in various policy fields has in legal doctrine so far not been sufficiently recognised and discussed. There are however significant consequences to be drawn from their expansion throughout the legal system. Composite procedures are often typical examples of what in political science literature is referred to as network structures, i.e. mostly non-hierarchical structures, with constellations of participating actors changing according to the contexts. Problems thus arise because of the gap between forms of organisation: Administrative procedures are increasingly organised according to concepts of network structures. On the other hand, accountability and supervision mechanisms, especially possibilities of judicial review and parliamentary control mostly follow a traditional pattern of a two-level system with distinct national and European levels. Such traditionally organised supervisory structures have difficulties in allocating responsibility for errors during the procedures and finding adequate remedies for maladministration within a network. They also have difficulties coping with the fact that the substance of administrative co-operation in composite procedures is the joint gathering and subsequent sharing of information.

Attempts to develop EU administrative law allowing not only for effective network related solutions to problems but also effective control of legality of action and more generally accountability of actors, thus requires us to think about developing new solutions. These would be able to overcome the dilemma of network-style procedural integration of administrations escaping the supervision of accountability mechanisms which are organised in increasingly less pertinent two-level structures based on a clear distinction between the European and the national levels. Far from solving the problems of network administrations, the Lisbon treaty maintains the fiction of a two-level system. Thereby it actually perpetuates the gap between constitutional, primary law solutions and the reality of the implementation of EU law in the various policy fields. Approaches to

overcome this gap could come from both further developing judicial review as well as administrative supervision capabilities.

With respect to judicial supervision of composite procedures, we would therefore make two modest proposals, which we believe would have a considerable impact in maintaining the capacity for supervision of integrated administration.

One of the central problems of judicial review of administrative networks acting in composite procedures is the nature of the co-operation. The purpose of composite procedures is frequently the joint gathering and exchange of information. The nature of this activity, is in many cases not regarded as a reviewable final administrative decision but a preparatory act for a final decision taken by another authority. In composite procedures in which administrations from several jurisdictions are involved, there is generally no real possibility by courts in one jurisdiction to review the legality of input from other jurisdictions. On the European level, input by EU institutions and bodies into a composite procedure with the final decision taken by a Member State is only possible if the input by a Community body has been in the form of a final act in the sense of Article 230 EC. This will rarely be the case in composite procedures based on information exchange.

Considering the shortfalls of this situation, the most convincing remedy would be to create a form of ‘declaratory relief’ as distinct form of action before the ECJ and CFI. Short of this rather far reaching step involving treaty amendments or at least legislative enabling provisions, however, there might be a possibility to imagine a creative interpretation by the ECJ and CFI of the damages remedy under Article 288 (2) EC. An innovative interpretation of the conditions of Article 288 (2) EC might and could result in an adapted solution to the problem. First, it is hard to see why under the wording of Article 288 (2) EC the Courts should not be able to acknowledge that even in absence of a financially calculable damage resulting from a violation of rights, a legitimate interest in a declaration of illegality can exist. Secondly, a declaration of illegality should be possible, even where in cases of discretionary action of a Community body a ‘sufficiently

serious' breach of Community law leading to the right of financial compensation can neither be established nor is it sought by the claimant.²⁹ In these cases the restitution for a violation of a right could consist of a moral restitution in the form of a declaration of illegality of the Community body's action. The criteria established by the ECJ and CFI for a 'sufficiently serious' breach of duties was explicitly developed to limit the financial liability of the Community to cases which sufficiently merit the sanction. Moral restitutions through declaratory judgments, it could be argued, would not require such restrictive interpretation of Article 288 (2) EC. In view of the increasing prevalence of composite procedures, the review of legality and more generally judicial supervision of administrative activity would thus profit from the development of a declaratory action either as specific remedy or in form of a re-interpretation of the conditions of Article 288 (2) EC for non-financial compensation of a claimant through a declaratory statement.³⁰ These suggestions to the interpretation of Article 288 (2) EC no doubt would change the existing case-law but they would be within the limits of the wording of Article 288 (2) EC.

Next to furthering the possibilities of judicial review before the ECJ and CFI problems of composite procedures can also be addressed by broadening the possibilities of co-operation between courts. The idea presented in the paper by Hofmann is to build on the exceptional success of the preliminary reference procedure for establishing integration in

²⁹ Often a publication of damaging information can constitute a serious breach of an individual's rights independently of the serious nature of the breach of a duty by the simple fact that the information is wrong. It is thus not inconceivable that such a situation will leave an individual without legal protection. This situation may easily amount to a violation of the principle of effective legal protection. Also the exchange of information which is wrong to an administrative network can be an illegal activity by an administration for which a declaratory judgment might be the necessary precondition for correction. A declaratory judgement not granting damages on the basis of plain illegality of the administrative activity, could become a sufficiently serious breach if the Community body were to in future violate the terms of the initial Court declaration. The CFI has become aware of these problems and begun to address them in Case T-48/05 *Yves Franchet and Daniel Byk v Commission* of 8 July 2009, [2008] ECR II-nyr.

³⁰ This proposal adopted here for the problems of composite procedures was developed in detail by Nicholas Forwood, prior to becoming Judge at the European Court of First Instance for cases of legislative failure (Nicholas Forwood, Judicial protection of the individual – 10 years of the Court of First Instance, in: Cour de Justice des Communautés européennes (ed.) *Le Tribunal de Première Instance des Communautés Européennes 1989-1999*, (Luxembourg 2000) 56-66). Judge Forwood points out that his comments were made in his function as practising lawyer many years ago and can not be regarded as the comments of a judge speaking extra-judicially.

the EU. The approach would consist of developing the possibilities of preliminary review in two dimensions:

The first would be the vertical dimension between the European Courts (ECJ and CFI) and the national courts. So far this vertical dimension is a one-way relation with national courts referring questions to the ECJ on the interpretation of EU/EC law in the context of a procedure before a national Court (Article 234 EC). This is a very powerful procedure for review of certain types of composite procedures. It allows for example for national Courts to request the ECJ to review the legality of the input from a European institution or body into a final administrative decision taken by a national administration. It can be applied for both for cases in which the national administration takes a final decision under national substantive and procedural law or under European law.

Composite procedures however can also lead to the inverse situation: A European institution or body will take a final decision with input from a national administration. In these cases, only the European Courts are authorised to review the legality of such final decision. They will incidentally have to also review the legality of the national administration's decision which as element of the final European decision. In these cases, the preliminary reference procedure as formulated in Article 234 EC does not help. A gap in legal protection can arise from the fact that the ECJ and CFI have traditionally refrained from reviewing incidentally the legality of national administration's input into a final decision on the European level. In this context, the solution for allowing for efficient judicial review of composite procedures needs to differentiate. Where Member State administrations give input into an administrative procedure which terminates on the European level under EU law, nothing in the wording of the EC or EU treaties would hinder the European Courts from reviewing also the legality of the national administrations application of EU law. Despite this, the ECJ and CFI have traditionally refrained from doing so. In our view this approach should be modernised and the European Courts should begin to engage in the review of national administrations application of EU/EC law in the context of this application leading to input into a final decision taken by a European institution or body.

The more complicated case arises, where the national input into a final decision on the European level was generated by application of national law. Here the ECJ and CFI cannot review the legality of the national administrations activity under national law. A solution to this problem might be to create a procedure under which the European Courts had the right to refer questions governed by national law to national courts. The ECJ or CFI could stay their proceedings and refer a question to a national court for interpretation of national law. In order to avoid the obvious disadvantage of such a proposal – the increase in the duration of judicial review procedures before the European Courts – national point of contact courts could be named to deal with the requests for review by the European Courts. The legislative basis for such a procedure does not necessarily require a treaty amendment. It can be introduced through legislation for example in the statutes of the ECJ and CFI. This proposal would expand the possibilities of a request for preliminary reference to become a two-way instrument in the relation between the European and the Member State Courts.

The second dimension mentioned above is the horizontal dimension of the of the relation between national courts. Here the problem is similar to that within the first dimension. The review of the legality of input into composite procedures from administrations from foreign jurisdictions by a national Court is in reality virtually impossible. A solution could be to develop the judicial network to review input by administrations from other jurisdictions in the same vein as the solutions discussed from the vertical dimension of judicial cooperation. European legislation could provide for the right of national Courts to stay proceedings and request a preliminary reference from Court of a different Member State on a question of the review of that state's administrative action which was part of a composite procedure leading to a final decision by the referring Court's jurisdiction. The same national contact courts that would handle preliminary reference requests by the European courts, could be designated to handle requests from other national courts. This system would authorise Member States' courts to enter into preliminary reference procedures on the horizontal level. This will enable courts to review other Member

States' administrations input into a procedure, the final act of which was taken by a national administration.

Expanding the judicial network through adding these two dimensions of reference procedures would allow for effective supervision of administrative cooperation in multi-stage procedures and increase considerably the legal certainty in the system. Judicial review could be undertaken by one single court reviewing the legality of the activity of administrations from different jurisdictions.

With respect to administrative supervision of composite procedures, the proposals which might be made to develop the law follow the approach discussed for judicial supervision. Both parliamentary supervision through ombudsmen as well as administrative forms of supervision of administrative activity need to adapt to the reality of the network structure of integrated administration. From this point of view, the key is to develop supervision tools apt for composite activity with multi-jurisdictional input to single administrative procedures. Insofar, the networks of ombudsmen and the network of data protection supervisors are a good step in order to be able to re-construct supervisory instruments analogous to the developments of the policy areas themselves. We would submit that a possibly more effective solution to these problems of parliamentary and administrative supervision, however, could be the creation of an independent agency in charge of handling complaints by individuals even during an on-going procedure. Similar to the powers of the European Data Protection Supervisor (EDPS), this agency could investigate cases of maladministration by national or European agencies in integrated procedures and take decisions before even a final decision is taken in order to prevent the need for judicial review. Importantly, inspiration should be drawn from the powers of the EDPS. Unlike the European Ombudsman, the EDPS can not only issue recommendations but also has the power of issuing binding decisions *vis-à-vis* other administrations. Such an agency, or integrated network of agencies, would be a potential network-solution for a network-problem. If this review procedure would be structured to allow for one single review procedure of the contributions to a composite procedure from administrations of different jurisdictions by the supervisory agencies of these jurisdictions, a real step

towards developing supervisory procedures fit to the reality of integrated administrative procedures would be achieved.

(iv) International Regulatory Cooperation

An important additional aspect of integrated administration in the EU is also the international dimension of administrative co-operation. George Bermann's contribution on the international dimension of administrative cooperation describes the multi-level dimensions of modern administrative structures and the necessary approach for their accountability and supervision mechanisms. The international regulatory co-operation between the US and the EU/EC is described in Bermann's contribution to this book and constitutes a prime example for non-hierarchic administrative networks. This observation is underlined by the fact that the main impulses for international regulatory co-operation according to Bermann come from private actors who have much to profit from a more harmonized regulatory environment in different markets, not excluding however the creation of an overarching framework. Issues which loom large on the agenda for such dialogue are not surprisingly related to substantive and procedural issues of good regulatory practice and of good procedure. Bermann notes here such matters as the role and form of impact assessment and cost-benefit analysis, the role and inclusion of science and scientific evidence into regulatory activity and other aspects reflecting different regulatory philosophies and attitudes to risk. The essential element of Bermann's enquiry into the workings of international regulatory co-operation are thus questions of democratic oversight, transparency of the process and accountability of the actors for the outcome of regulatory decisions. Here the discussions in other chapters of the book on the control of comitology and the role of epistemic communities might provide some answers.

Additionally to the findings in Berman's chapter, we might briefly add that in the EU context, international regulatory co-operation has caused several problems with respect to the internal distribution of competencies. Despite clear case-law by the ECJ as to the

non-existence of international administrative agreements,³¹ many agencies have entered into a very active role on the international sphere. Agencies in all pillars have to date concluded an undisclosed amount of international agreements with third countries. The substance of these agreements reach from soft law obligations to exchange views and to discuss policy approaches on one side of the spectrum, all the way to co-operation agreements containing obligations to mutually assist third non-EU parties with the supply of documents and information. These international activities of agencies are an indicator for the lack of definition of the limits and nature of agency competences as well as for the uncertainty about their role within the EU system of governance. The matter is complex, not least due to the network structure of agencies and the fact that in many EU agencies, there is a membership also of non-EU Member States. Insofar, the boundaries of what is EU internal and what is international can be blurry. Altogether the external competencies of the institutions and bodies of the EU/EC require more attention from EU law and administrative law expert communities than has been granted thus far.

c) Models of Supervision and Accountability

The third part of the book on models of supervision and accountability contains five contributing chapters. They deal with administrative and judicial supervision of administrative activity in the sphere of EU law, but also reflect on the concepts of participation, transparency and general principles of good governance.

(i) Administrative Supervision

Gerard Rowe addresses forms of administrative supervision of administrative activity. Internal forms of supervision and control are manifold, not only on the European but also on the Member State level. Administrative supervision of administrative activity in the sphere of EU law however has to cope with the integrated nature of many administrative procedures both for administrative rule-making as well as for single-case decision-

³¹ C-327/91 *France v Commission* [1994] ECR I-3641.

making. In all of these activities, as has become evident from the various analysis in this book, administrative actors from various jurisdictions often work together either in joint bodies such as comitology committees or in composite administrative procedures. Forms of administrative supervision are however mostly oriented to supervision of the activity on one level – the EU level or the national level – the administrative activity however is integrated transcending levels. Against this background, Rowe develops proposals for improvement of administrative supervision. He suggests to explore the potential and need for greater standardisation of control measures, to give more concern to the cost-effectiveness and efficiency of control, to find solutions for the supervision of cooperative or transnational administrative acts, which in his opinion should lie centrally with the Commission, and to pay more attention to the distinction between the supervision of the legality and the expediency of decisions.

(ii) Judicial Review

As the contribution by Alexander Türk demonstrates, existing approaches to judicial review of administrative activity also show shortcomings when faced with an increasingly integrated EU administration. As with the earlier discussed administrative supervision of administrative activity in the sphere of EU law, the problem remains that organisation of judicial review is based on a two-level model. It is still operating along the traditional dichotomy of the EU-level and the Member State level. The administrative reality however has through the development of integrated administration largely overcome this dichotomy. Without a further development of judicial review reflecting this administrative reality, meaningful judicial supervision will become increasingly difficult.

Various solutions are however conceivable to address the current shortcomings of judicial review of integrated administrative activity. While EU administrative procedures tend to involve European and national administrations, the final act which results from these procedures is either adopted at European or at national level. Two distinct models of review are therefore possible. The first approach would allow challenges to all

intermediate steps, even where they constitute non-binding acts, in the proceedings allocating jurisdiction according to the author of the contested act. This has the advantage that contested measures can be reviewed in close temporary proximity to their adoption by the judicial body best suited for their review. The disadvantage consists in a considerable loss of efficiency due to the possibility of considerable delays in the procedure, which ultimately make this option unattractive even from the view of the individuals concerned. The second approach, which is currently adopted by the Community Courts, focuses on the review of the final act.³² The judicial forum for a challenge to such acts is under current system of judicial review unproblematic; actions against Community acts are brought in the Community Courts and those against national acts in the national courts. The problem in this scenario is, however, whether the respective courts are entitled to review intermediate measures adopted at a different level. The current position for national courts is that, while they are allowed to review intermediate measures adopted by Community institutions, they are precluded from setting unlawful measures aside and in case of doubt as to its validity need to refer the contested measure to the ECJ under Article 234. While therefore a mechanism exists for national courts to have intermediate measures reviewed by the ECJ, no provision is made where national authorities in other Member States have contributed to the procedure. In this case a horizontal referral to the competent court of another Member State could be a solution.³³ Where the Community Courts review a final act of a Community institution, they have shown a willingness to probe the lawfulness of intermediate measures³⁴, albeit only where they emanate from Community bodies. As the *Borelli* case shows, contributions by national administrations in the proceedings are beyond the jurisdiction of the Community Courts. In this case two solutions are possible. The Community Courts can abandon their position to refuse the review of national measures. In a procedure determined by Community law in which national administrations participate, national authorities operate under the rules and principles of Community law and therefore within the scope of Community law. While the Community Courts would still be precluded from

³² Intermediary acts in the procedure can be reviewed, but only where they affect the applicant's legal position.

³³ See also the discussion on composite procedures in this volume.

³⁴ See Joined Cases T-74, 76, 83-85, 132, 137, and 141/00 *Artegoda v Commission* [2002] ECR II-4945. See also the discussion in P. Craig, *EU Administrative Law* (OUP, 2006), p. 729.

assessing the legality of national administrative measures against national law, it is difficult to see why they should not be allowed to review such measures against Community law. A second option would be to provide a reverse preliminary procedure allowing the Community Courts to refer to the question as to the validity of a national measure to a national court.

Where a Community institution adopts a measure which forms the basis of a procedure determined by national law, as in the case of *Tillack* the notion of reviewable act at present constitutes an obstacle to access to the Community Courts under Article 230. Applicants are currently limited to an action for compensation under Article 288(2). In this case two solutions can be envisaged. The first solution would operate within the existing framework of Article 230(4). Where a factual acts, such as information sharing, affects fundamental rights of individuals the Community Courts should consider the applicant's legal position affected. The second solution would be the provision of a remedy of declaratory relief, which would be available to those whose legitimate interests are affected by a Community measure falling short of a reviewable act, interpreted in the traditional sense.³⁵

(iii) Participation, Transparency and Good Administration

After these general considerations on administrative and judicial supervision of administrative action, the chapter by Joana Mendes touches upon the very difficult and always contested matter of participation. Much has been written in the legal and political science literature since the Single European Act about whether in different phases of development EC legislative procedures suffered from a democratic deficit. Much less thought has been contributed to considerations as to participation in administrative procedures beyond the development of the general principle of the right to a fair hearing. Mendes's contribution confronts this lack of understanding by analyzing the probably most well-understood field of integrated administration – that of state aid procedures, and carefully expands the picture obtained therein to a more generalized view. She argues that

³⁵ See also the discussion on composite procedures in this volume.

the substantive relation of interested parties to the procedure is the basis for claim for participation rights. Much needs to be done in the way of developing impact assessment and notice and comment procedures in order to develop the possibilities of participation not only in single-case acts but also in more generally applicable types of act. Mendes shows ways to achieve this for both the decision-making phase and through means of expanding judicial review of an act. However this needs to be undertaken carefully in order to avoid regulatory capturing and other developments readily observable in other legal systems with strong participatory traditions. Key to the approach of increasing participatory elements in European administrative law is therefore the creation of participation rights for individuals. These must be transparent and judicially enforceable, through effective legal procedures.

The contribution by Christopher Bovis's is a further study in this vein. He focuses on the principles of transparency and accountability as the basis of public procurement regulation. His is a fascinating case-study on an area of EU administrative law which has become highly developed, whose procedures have become largely unified throughout the EU and which has established a regime at an important interface between public and private sectors. Transparency and accountability structures which are designed to give individual rights which can be judicially enforceable are at the heart of procedural harmonisation for public procurement. It was the only tool available in a complex matter with multiple jurisdictions containing very diverse rules and many cross-border implications of their specific activity. Public procurement is thus an area which despite not often being the focus of attention in the framework of EU administrative law, has developed an impressive body of case-law and harmonization for the link between the public and private spheres. Insofar, it is an important area of study to obtain an understanding of this link from a different perspective than the debate on participation in single-case decision making and administrative rule-making. This policy area thus has developed a sector specific structure of administrative law applicable throughout the EU and an adapted system of judicial review including the involvement of private parties for the enforcement of its provisions. Transparency provisions are the key to effective supervision of the compliance of public actors with public procurement provisions since

these allow for interested private parties to engage in contributing to enforcement of the provisions.

Hanns-Peter Nehl's contribution then turns to an attempt to generalise approaches of good administrative law and practice as general principles of law. His contribution addresses one of the central notions for the developing European administrative law – the right and principle of good administration. This concept has increasingly been employed in the case law of the ECJ and the CFI in the past years as an umbrella notion of a general principle addressing a host of sub-elements ranging from the right to a fair hearing to access to documents and other important procedural rights. Their common element is that they are basic rationales of procedural justice and legality of administrative behaviour of any institution or body acting within the sphere of EU law. Nehl shows that good administration, despite it having been defined to a certain degree in the EU Charter of Fundamental Rights, continues to be shaped in the case law of the CFI and ECJ. But he is highly critical of the lack of precise definition which the necessarily vague generic umbrella term of good administration has received. He suggests, in order to further develop European administrative law, the courts should focus on their obligation to control legality in order to uphold the rule of law. This protects individual rights in the procedure as a protective function which needs to be weighed against the more utilitarian function of assuring effective and legitimate decision-making. He submits that procedural principles summarized under the title of good administration understood in this way 'are particularly well suited to fill gaps of individual protection and to solve problems of legitimacy in multilevel or composite EC administration which involves executive activity shared by both EC institutions and the national authorities.'

These remarks need in our view to be reviewed in the context of an integrated administrative system. The procedural rights enshrined under the umbrella of Good Administration need to take account of the integrated nature of European administrative action. The involvement of administrative actors from the European as well as the national level makes it necessary that procedural rights be provided at both levels. This is most important to for the rights of defence, which have to be granted not only at the

European level, but also at the national level, where national administrations operate under the rules of a Community procedure. Similarly, where the procedure is initiated at national level, but is concluded at European level, hearing rights granted at national level are only sufficient where the Community institution which adopts the final act does not substantially deviate from the national measure. While rights of defence are available as general principles of law, legal certainty would best be served if they were to be enshrined in Community rules as enforceable rights. The violation of such rights, whether at national or European level, would then constitute a breach of an essential procedural requirement which can be sanctioned by the courts.

The decision-making process which involves the European and national administrations would, however, also benefit from the provision of more general participation rights, in particular for interest associations. While the dignitary rationale which guides the rights of defence gives way to a more instrumental rationale in case of general interests, participation rights enhance the transparency of composite procedures and ultimately strengthen the democratic legitimacy of a political administration. The organisation of such rights of participation has, however, to be balanced against the efficiency of administrative action, which makes a notice and comment system only attractive for general rule-making and more doubtful for individual decision-making.

d) The Future of Integrated Administration – Towards a Legal Framework ?

This book has highlighted the legal challenges arising from the move towards an ever more integrated administration in the area of implementation of EU policies. Integrated administration in essence means the joining of administrative actors from different jurisdictions – i.e. the Member States and the EU as well as in some cases outside the EU – in joint procedures for both administrative rule-making and single case decision-making. These structures arise across policy areas in the EU. In summary many of the problems a modern EU administrative law faces, are problems arising from outdated conceptions of the nature of European integration. We find that European integration is

not leading to a multi-level legal system with distinct procedures on different levels. Instead the procedural cooperation in administrative rule-making and single-case decision-making has led to a high degree of integration through joint structures such as comitology and agency networks as well as procedurally through the creation of various types of composite procedures in various policy fields.

However, the diversity of rules and principles in the application of Community rules across the various policy fields in EU law raises the question as whether the time has come to create a harmonised administrative procedural law for Member State and EU institutions and bodies when acting in the sphere of EU law. An EU administrative procedure act for all administrative procedures in the sphere of EU law would allow for increased legal certainty in the face of network administrations in Europe. Moreover, it would contribute to more effective judicial review. Thereby, it would be possible to take the step from a fairly complex system of conflicts of law approach to a more streamlined joint standard of procedure.³⁶ Certain exceptions to this principle may be provided in European legislation.³⁷

In view of the problems discussed in this book, it might therefore be time to re-examine the considerations to establish an administrative code for administrative procedures in the sphere of EU law. Harmonized legislations could contain rules and principles for issuing an act, participation rights and consequences of errors in the procedure. Thereby, an individual could gauge far more precisely the chances and possibilities of protesting an act

³⁶ Take for example the example of information generation and sharing discussed above. Frequently, within the system of integrated administration in the European Union, one administration will use information collected by another administration (either national or European). Therefore, limits to the use of information may arise from different sources. Conflicts rules exist in order to assign the applicable law, either the transmitting authorities' law, the receiving authorities' law or EU law.

³⁷ Article 12 of regulation 1/2003, for example, clarifies that the 'transmitting authority' defines the purpose for which information may generally be used. This results from the transferring authority's power to define the subject matter of the data collection. Also, the transmitting authorities' law is applicable to determine whether the information may be used as evidence in a procedure to inflict sanctions onto natural persons. The receiving authorities' laws on the other hand will govern the question whether information may be used (see Article 12 (2), (3) of 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, OJ 2003 L 1/1). In tax matters, similarly the applicable law for the collection and transfer of data generally is the law applicable to the transferring authority (Article 40, 41 (3), (4) of Council Regulation (EC) No 1798/2003 of 7 October 2003 on administrative cooperation in the field of value added tax, OJ 2003 L 264/1).

or decision with EU-wide trans-territorial effect. Additionally, review of administrative procedures by review of a final decision can be made possible by any Court in Europe. Harmonising procedural methods and approaches as well as the judicial interpretation of a common procedural provision is an essential element of increasing legal certainty in a complex networked administration using composite procedures to achieve decision-making.