

# The European Picture: Ten Challenges Facing EU Public Law in the Coming Decade

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This chapter's objective is to reflect on existing and impending challenges to European Union (EU) public law from both a constitutional and an administrative angle. The background to such an overview is that the EU law has radically changed in the past decades. Next to several Treaty amendments enlarging the scope of EU policies, the EU has grown substantially in size. European administrative law has evolved over time and has become an important factor shaping the reality of policy implementation in the EU. At the same time, EU public law remains complex due to the EU's 'variable geometry,' according to which in some policy areas, such as for example the monetary Union, not all EU Member States participate, whilst in others, such as for example the common visa and travel area, non-EU Member States are involved. In this chapter I argue that the evolving nature of European integration through law has both a constitutional law and administrative law context. Challenges for the future development of quantity as well as quality of policies in the area of integration arise from both aspects. I will try to outline ten of the, in my view, most pressing challenges.

## I. The EU from a Constitutional Perspective

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Looking at EU law from what we might call a ‘constitutional perspective’ might have become a familiar approach to observers of the EU. Most textbooks of EU law are written from this perspective. Also, the case law of the ECJ in the first two decades of the European integration after the entry into force of the Treaties of Rome analysed in large parts the ‘constitutionalisation’ of what was originally the law of the European Communities (EC) and has now become EU law. The birth of the idea of the ‘constitutionalisation’ of the old Community legal system, now the legal system of the EU, was related to the creation of a legal framework composed of mainly constitutional legal principles. These include EU law’s supremacy *over* Member State law and its direct effect *in* Member States law. They also include the protection of EU fundamental rights, a system of guarantees of access to judicial review and a framework of horizontal and vertical separation of powers.<sup>2</sup> This ‘constitutionalised’ legal order can be understood as indicating the creation of a higher legal order against which the legality of political, legal and administrative action of the EU and the Member States acting within the scope of EU law could be assessed.<sup>3</sup> The constitutional point of view has, therefore, influenced and continues to shape the scholarly analysis of future paths of development for the EU legal system. Big constitutional questions occupying the legal (and largely also the political) debate, include issues such as: How to frame the relation between Member State and European law? How to foster democratic participation and legitimacy therein? How to establish accountability in a legal system with little clear separation of powers between legislative and executive functions? How to understand and control the various levels of delegation of powers between Member States and the European level (in both directions) and between various institutions and bodies on the European level? How to ensure that a system of law which was created not only as law between states but also as law conferring rights and obligations on individuals, could actually allow for participation of the citizenry in deciding the law applicable to it? I will try to crystallize these issues in three major constitutional challenges for EU law and its scholarly reception:

A *first* challenge to today’s EU public law from a constitutional perspective, in my view, centres on the questions of extent and limits of delegation of powers from the Member States to the EU. These issues are deeply enmeshed with the essential idea of ‘constitutionalisation’ of the EU through the principles of supremacy of EU law over Member State law and direct effect of EU law within the Member States – principles which give force to the idea that the EU was created by permanent delegation of sovereign powers. At the same time these principles reinforce the notion of an autonomous legal order which, once created, grants rights and imposes obligations on Member States

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<sup>2</sup> It thereby generally complied with a shared notion of constitution defined rather apodictically by Article 16 of the ‘Déclaration des Droits de l’Homme et du Citoyen’ of 1789: ‘Toute Société dans laquelle la garantie des Droits n’est pas assurée, ni la séparation des Pouvoirs déterminée, n’a point de Constitution.’

<sup>3</sup> M. Poiares Maduro, Contrapunctual Law: Europe’s Constitutional Pluralism in Action, in: N. Walker (ed.) *Sovereignty in Transition*, Hart (Oxford 2003), 512.

and individuals. Delegation of sovereign powers includes the delegation of powers to solve disputes between the EU and Member States as well as individuals on matters of delegation. What the limits of the principles of supremacy and direct effect are and how to ensure review of and limitations on the exercise of such sovereign powers is a question which, during the last fifty years, has not ceased to grasp the imagination of legal experts. It has attracted interest not least because it allows one to imagine law and legal relations outside of a traditional constitutional-hierarchical frame.<sup>4</sup> Much thinking on models for more creative ways of imagining the relation has been inspired by systems-theory and discourse-theory. Models of constitutional pluralism,<sup>5</sup> or, deliberative supranational,<sup>6</sup> are examples for this. Theories of the latter kind point to the fact that it might not always be appropriate to review competence-conflicts in the EU as conflicts between well separated levels. The ECJ would not appear to disagree with such an analysis given that, since its early case law, for example in *Costa v ENEL*, it held that the then new Community legal system was not to be seen as one apart from Member State law but rather that it had instead become 'an integral part' thereof.<sup>7</sup> This has been especially obvious in more recent times with the development of ever more elaborate forms of cooperation in order to implement Community policy. The establishment of the principle of supremacy has, therefore, not led simply to the superimposition of a new level of public power over that of the Member States but their merger within a system of the shared exercise of sovereignty.<sup>8</sup> In such a system, legal-hierarchical relations are only one of many varied structural elements. This view would be an addition to the more traditional quasi-federal 'conflict of laws' arrangement for settling disputes between EU and Member State law.<sup>9</sup>

A *second* group of questions queries the viability of the traditional constitutional point of view for understanding the relation between EU and other states under public international law. This is an issue which has been addressed *inter alia* through interpretations of the Courts and in developing legal

<sup>4</sup> N. MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth*, OUP (Oxford 1999).

<sup>5</sup> See with further references e.g.: F. Ost, M. Van De Kerckhove, *De la pyramide au réseau ? Pour une théorie dialectique du droit*, Publication des Facultés universitaires Saint-Louis (Bruxelles, 2002); N. Walker, The Idea of Constitutional Pluralism, 65 *The Modern Law Review* [2002], 317-359; M. Poires Maduro, Contrapunctual Law: Europe's Constitutional Pluralism in Action, in: N. Walker (ed.) *Sovereignty in Transition*, Hart (Oxford 2003), 512.

<sup>6</sup> See with further references e.g.: C. Joerges, Deliberativer Supranationalismus, 6 *Zeitschrift für Internationale Beziehungen* [1999] 185-242; C. Joerges, Deliberative Supranationalism – Two Defences, 8 *European Law Journal* [2002] 133-151; K.-H. Ladeur, Towards a Legal Theory of Supranationality – the Viability of the Network Concept, 3 *European Law Journal* [1997], 33-54.

<sup>7</sup> Case 6/64 *Costa v. ENEL* [1964] ECR 585, para 8.

<sup>8</sup> Member States are active in all phases of planning, establishment and implementation of EC policies. They do so through representation in Council and its working groups as much as in Commission experts groups involved in agenda setting and in Comitology committees overseeing implementation. For further detail on these networks in general and in various policy areas see, H.C.H. Hofmann, A. Türk (eds.), *EU Administrative Governance*, Elgar Publishing (Cheltenham 2006).

<sup>9</sup> A simplified version of such an approach could have been read as follows: Member States delegate certain rule-making powers to the EU which the latter exercises according to pre-defined procedures. These regulatory actions emanating from the European level are in turn implemented by the Member States.

doctrine, most recently in the anti-terrorism *Kadi and Al Barakaat* cases.<sup>10</sup> The questions there were whether there is a hierarchy of norms running from the international via the supranational to the national legal order, with other words, whether EU courts may question the validity of legal acts under public international law. These questions are similar to the issues raised by international economic law and the relation between EU and WTO law. They will become especially relevant when the EU will join the European public international law system of the protection of human rights – the ECHR. The questions arising then will include what, for example, will be the relation of the ECJ to the European Court of Human Rights? These examples show that the legal understanding of the external relations of the EU is, therefore, far from simple. But the reality is yet more complex resulting from the fact that European integration is not linear. We often see the evolution of ‘concentric circles’ or ‘a European legal space’.<sup>11</sup> Not only are there multiple legal regimes to which the EU legal system is member such as the European Economic Area (EEA) and bilateral agreements with Switzerland. There are as well multiple legal regimes regulating neighbourhood relations both in relation to policy-sectors (for example, the European Energy Community) and cross-sectionally (for example, accession agreements). Policy areas sometimes involve participation by non-EU states (such as the European research support policy) or take place and without the participation of all EU Member States (such as regarding the Monetary Union with the Euro as currency, in certain defence and border-control fields as well as regarding Asylum and Immigration). Other policies include non-EU Member States but exclude some Members (for example the ‘Schengen’ system regarding border controls and visas). These constellations of complex network structures pose difficult questions for constructing the constitutional realities in the EU and defining the nature of the applicable law.

A *third* challenge arises with respect to the system of legal acts established in the Treaty of Lisbon for the EU. The new typology of legislative, delegated and implementing acts introduced by the Treaty of Lisbon may cause more confusion than solve problems.<sup>12</sup> For nearly as long as the EU (and its predecessors) has existed, the necessity of a re-classification of the typology of legal acts and the delegation of powers has been the subject of debate.<sup>13</sup> The result under the Treaty of Lisbon has led

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<sup>10</sup> See e.g. the ECJ and the AG Maduro in Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat v Council* [2008] ECR I-nyr. From the great amount of literature on this seminal case, see: Gráinne De Búrca, The European Court of Justice and the International Legal Order after Kadi, Jean Monnet Working Paper 01/09.

<sup>11</sup> A. Lazowski, Enhanced Multilateralism and Enhanced Bilateralism: Integration Without Membership in the EU, 45 *CMLR* [2008] 1433-1458.

<sup>12</sup> OJ 2008 C 115/1 and OJ 2008 C 115/47.

<sup>13</sup> See for a summary of the debates leading up to the Constitutional Treaty: Paolo Stancanelli, Le système décisionnel de l’Union, in: G. Amato, H. Bribosa, B. de Witte (eds.) *Genèse et destinée de la Constitution européenne* Bruylants (Bruxelles 2007) 485-453; H.C.H. Hofmann, A Critical Analysis of the new Typology of Acts in the Draft Treaty Establishing a Constitution for Europe, 7 *European Integration Online Papers* (EIoP) [2003], 1-46.

to the compromise of introducing three different levels of Union acts, separating legislative acts from delegated and implementing acts. While the introduction of a formal distinction between legislative and non-legislative acts is laudable, the distinction between the categories of delegated from implementing acts raises more questions than it provides answers. Distinguishing legislative from non-legislative acts will influence the further development of the distribution of powers between the institutions on the European level,<sup>14</sup> strengthen the EP's role in legislative matters and influence the distribution of powers between the Member States and the EU. On the other hand, the new typology of legal acts for the EU under the Treaty of Lisbon is as interesting for what it addresses as for what it leaves out. The major question arising here is that of the continuing gaps between the formal legal order of the EU, as recognized in the Treaties, and developments in legal practice. The latter include the approaches taken to delegation and sub-delegation of rule-making. Sub-legislative rule-making takes place in comitology settings, by various types of European agencies and through co-regulation with private parties. Importantly, the roles of agencies and their decision-making powers need clarification in the context of a new comitology regulation under Article 291 TFEU.

These issues of course raise questions as to whether the constitutional point of view of understanding the EU is sufficient. Does it provide a correct view of the realities of the interaction of legal systems? Are not the real problems those associated with delegation and accountability? This latter approach might be seen as the European public lawyers' version of 'legal realism'.<sup>15</sup> It calls for an approach — whether constitutionalised or not — which accepts that all forms of the exercise of public power must be controlled. Such a perspective might facilitate a better match between the legal framework and the actual exercise of public power in the EU institutional context.

As a result of these initial considerations, the constitutional perspective on EU public law gives rise to many significant queries and to an interesting list of topics of enquiry about the nature and effect of EU law. These topics generally are related to conflicts between norms in relation to the internal system, the relationship between Member States and the EU, and the external relations of the EU. The unease associated with taking a constitutional-hierarchical view to solving such questions arises from acknowledging the specific nature of a complex, integrated legal system such as that of the EU. The reality is simply much more complex than simplified hierarchical models suggest. Thus one must face the question of whether reality should be adapted to an abstract model or rather the model adapted to the reality? One reason for the certain unease which has befallen EU public law

<sup>14</sup> Final Report of Working Group IX on Simplification CONV 424/02 of 29 November 2002, 2; for the general effect of the Institutional Balance, see e.g.: K. Lenaerts, A. Verhoeven, Institutional Balance as a Guarantee for Democracy in EU Governance, in: C. Joerges, R. Dehousse (ed.), *Good Governance in Europe's Integrated Market*, OUP (Oxford 2002), 35 et seq.

<sup>15</sup> D.Curtin, 'European Legal Integration: Paradise Lost?' in: D.Curtin, A. Klip, J. Smits, J. McCahery (eds.) *European Integration and Law*, Intersentia (Antwerpen 2006), 1-54, at p. 43.

scholarship for some time now – to be further explored below – is to be found in the a growing distance between concepts of law developed through hierarchical approaches based on a too neat classification of different areas of law whether national, European, international and the complexity which actually prevails. Alternative models might search for more organic approaches to understanding the exercise of public power in the EU better adapted to the complexity of EU public law arrangements. This makes a look at challenges to EU public law from an alternative point of view, namely from an administrative one, seems to be a rewarding exercise.

## II. The EU from an Administrative Perspective

Another ‘traditional’ angle of public law to which one might look to supplement the legal toolbox available for developing effective notions of EU public law is administrative law. Today’s EU administrative law structure is significantly different from the early days of the initial European Coal and Steel Community (ECSC), the European Economic Community (EEC), and the European Atomic Energy Community (EAEC). Contemporary EU administrative law is a system of genuine rule-making and importantly rule-implementation powers. One difficulty, though, in adopting an administrative perspective on EU public law lies finding a definition of ‘administrative’. Recurring to three broad elements, namely ‘functional’, ‘organisational’ and ‘procedural’ aspects of the system may help.<sup>16</sup> The *functional aspect* of EU administrative law, in this view, would cover the entirety of administrative functions for implementing EU policies.<sup>17</sup> Closely related to the functional dimension of administration, are also *organisational* and *procedural* dimensions. There is a great complexity of actors and actor-constellations *organisationally* involved in exercising the administrative function of implementing EU law. Many administrative tasks arising under EU law are fulfilled by Member States’ institutions and bodies.<sup>18</sup> When exercised on the European level, executive authority is spread

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<sup>16</sup> This has a reason not least in the dearth of political in the sense of a party political policy-debate-centred culture on the level of rule-making procedures in the EU and a pre-dominance of expert driven and consensus models. This however also indicates that administrations need to be held and can be held accountable on their own account beyond classical parliamentary, hierarchic Weberian-style models.

<sup>17</sup> The tasks include *inter alia* planning and other regulatory activities such as administrative rule-making. Administrative tasks also encompass taking of single case decisions (known in the American English mostly as adjudication), making of recommendations, opinions and reports as well as coordination and supervision of private actors involved in administrative activities. Coordination tasks also extend to coordination of networks of administration for implementation of EU policies. Administrations also fulfil supervisory functions, in certain cases redistributive disbursement of funds (generally in cooperation between EU actors as well as public and private actors in the Member States) as well as information management.

<sup>18</sup> Thereby they enjoy limited institutional or procedural autonomy to decide how to exercise their tasks – see initially Case 33/76 *Rewe-Zentralfinanz EG v. Landwirtschafts-Kammer für das Saarland* [1976] ECR 1989, para 5. Limitations of the Member States’ autonomy arise from the fact that Member States’ substantive and procedural administrative law is applicable only within the framework of EU law.

across several institutions, most notably the Commission and the Council, which are now increasingly supported by EU agencies. Generally, however, executive functions are exercised in a mixed, composite structure with EU and national actors who carry out their administrative functions through *procedural* cooperation.<sup>19</sup> Most forms of procedural cooperation are based on information exchange and the joint gathering and/or generation of information. Such procedures vary considerably from one policy area to another in some areas leading to enforcement networks<sup>20</sup> and in other policy areas in joint planning networks.<sup>21</sup> The *functional* unity of administrative tasks undertaken by actors separated *organisationally* but engaged in often intense *procedural* cooperation is thus the background to the EU's multi-dimensional executive. It is especially these particularities of EU administrative law that provoke some of the most significant challenges for future development of EU public law.

A *first* challenge facing EU public law from an administrative perspective is understanding the consequences of the Treaty reforms introduced by the Treaty of Lisbon. From an administrative perspective, the reform of delegation of powers and types of act (Articles 288-291 TFEU) was designed originally as an attempt to *simplification* of the existing situation under the old EU and EC Treaties. The Treaty of Lisbon provides that legislative acts can delegate powers to issue either delegated acts<sup>22</sup> or implementing acts.<sup>23</sup> Any one of these three basic categories of act (legislative, delegated and implementing acts) can be issued in the form of regulations, directives or decisions. This makes nine basic types of act (without all the other forms of act possible under the Treaty or which have been established in practice). Nothing proves to be as difficult as simplification. The matter is further complicated by the fact that administrative action also takes place through agreements between various kinds of actors - both public and private - from the European and the national levels – albeit non-unilateral types of acts. Contractual relations are at the core of the

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<sup>19</sup> Structures to coordinate actors include comitology committees for development and coordination of implementation of EU law between Member States and the Commission, as well as agencies fulfilling special tasks of network administration.

<sup>20</sup> Examples of the use of network structures with both vertical and horizontal relations have increased in recent years. The most publicised example is the modernisation of the enforcement regime for EC competition law under Articles 101 and 102 TFEU (Regulation 1/2003). It requires a high degree of co-ordination, which is pursued within the European Competition Network linking the Commission and national competition authorities.

<sup>21</sup> The EC Treaty provides for certain planning competencies in areas such as infrastructure, environment, research support, economic and social cohesion or agriculture and fisheries policies - to name just a few. The result of all of these planning procedures is that no planning takes place purely on a European level. Instead, Member State authorities always participate in the creation and implementation as well as updating of planning activities. The coordination of the Member State and the European level takes place through comitology procedures, often in addition to a structure of formalised contacts between the agencies involved in the different phases of planning procedures.

<sup>22</sup> Article 290 TFEU defines these as 'non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act.'

<sup>23</sup> These are defined in Article 291 TFEU as acts for cases 'where uniform conditions for implementing legally binding Union acts are needed.'

emerging administrative network used for implementing EU policies.<sup>24</sup> Agreements are, for example, used widely in non-hierarchical network relations. Agreements as being in themselves forms of administrative act are acknowledged (as now under the current Treaties) only indirectly, being referred to in provisions on Court responsibilities.<sup>25</sup>

Also touched by the new typology of acts are the future of comitology and the role of agencies. For example, one of the central differences between the separate categories of delegated acts and implementing acts under the Treaty of Lisbon will be the mode of supervising the Commission with respect to delegated matters.<sup>26</sup> In the case of delegated acts, the EP and Council can reserve the right either to revoke the delegation or to object to a proposed measure. Implementing acts would, on the other hand, be subject to newly defined comitology rules.<sup>27</sup> The world of EU agencies, however, remains largely untouched by the new forms of act – essentially ignored by the framers of the Lisbon Treaty. There is thus a continuously growing gap between the prolific creation of agencies in the EU and the conferral of powers on them on one hand, and their recognition in EU primary treaty law on the other hand.<sup>28</sup> As a consequence, acts by agencies, despite being mentioned as potential sources of judicial review in an annulment procedure (under Article 263 (1) last sentence TFEU) are not expressly mentioned as recipients of delegated powers for the issue of implementing acts. Such a delegation is explicitly reserved to the Commission or, exceptionally, to the Council, despite the existence of legislation which already increasingly transfers functions directly to agencies without the intermediary of the European Commission.<sup>29</sup> With the absence of express reference to the delegation

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<sup>24</sup> See H.C.H. Hofmann, Agreements in EU Law, 31 *European Law Review* [2006], 800-820.

<sup>25</sup> See Articles 272 and 340 TFEU.

<sup>26</sup> There are however hidden delegation issues. One is the possibility of sub-delegation is an additional result of the distinction between the two categories of delegated and implementing acts in Articles 290 and 291 FEU. This possibility will arise especially in areas of broad delegation of legislative powers to the Commission under Article 290 FEU. The Commission may then be obliged (under Article 291 FEU) to sub-delegate to itself implementing powers. This combination of provisions may thus result in a cascade of delegation of powers.

<sup>27</sup> Supervision of implementing powers delegated to the Commission with the help of Comitology procedures has also to date been one of the major sources of inter-institutional conflict. The differences of Articles 290 and 291 TFEU with respect to political supervision of delegated and implementing acts can be interpreted as a between-the-lines commentary on the underlying developments of Europe's increasingly integrating administration.

<sup>28</sup> D.Curtin, Delegation to Non-Majoritarian Agencies and Emerging Practices of Public Accountability, in: D. Geradin, R. Munoz and N. Petit (eds.), *Regulation through agencies in the EU* Elgar, (Cheltenham 2005), 88-119; D. Fischer-Appelt, *Agenturen der Europäischen Gemeinschaft*, Duncker und Humblot (Berlin 1999) 87-117. The gap between silence in primary law and recognition in secondary law will remain under the Treaty of Lisbon.

<sup>29</sup> 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 powers to agencies, the Treaty of Lisbon (as well as already provided for in the Constitutional Treaty) in effect reiterates the *Meroni* doctrine has in written primary law,<sup>30</sup> despite the fact that the ECJ in the past has incrementally moved away from the doctrine in its more recent case law. As a consequence, the division between the constitutional provisions and the requirements of the architecture of the emerging European networked administration, including European agencies, will increase.

A *second* challenge, linked to the network structure, is the development of 'EU international administrative law'. The openness of the EU administrative system gives rise to questions about essentially the understanding of what the EU itself is and where it and its legal system strictly ends. EU administrative law develops in the context of internationalisation of administrative activities: European administrative activity is often the necessary result of obligations arising from international organisations of which the EU and/or the Member States are members. These can be, for example, the UN,<sup>31</sup> the WTO,<sup>32</sup> or other organisations such as the Council of Europe the ILO, NATO or the OECD. This international dimension adds to the complexity and difficulty of allocating responsibility since impulses for action may emanate from outside of the EU legal system. Internationalisation of EU administrative activities also results from the fact that EU administrative networks often include non-EU participants such as third states and international NGOs. Finally, not all EU Member States participate in a given policy and thus that cooperation between certain EU members begins or may persist through cooperation initiated through agreements under public international law.<sup>33</sup> These three dimensions are an indicator of the non-hierarchical, disaggregated state of administrative networks in the EU. They raise questions parallel to the external policy considerations from the constitutional perspective. The network character of administrative cooperation thus surpasses the territorial limits of the EU and its Member States. Such networks often in fact include non-EU actors. In this respect, EU international administrative law is quite underdeveloped. Developing it is a

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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).

<sup>30</sup> In *Meroni* (Cases 9 and 10/56 *Meroni v High Authority* [1957/58] ECR 133), 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. 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; P. Craig, *EU Administrative Law* Oxford University Press (Oxford 2006) 160-164 and 184; M. Everson, Independent Agencies: Hierarchy Beaters?, 2 *European Law Journal* (1995) 180-204; M. Koch, *Die Externalisierungspolitik der Kommission*, Nomos (Baden-Baden 2004).

<sup>31</sup> See e.g. the increasing police and secret service coordination activity at the UN level resulting in Case T-306/01 *Ahmed Ali Yusuf* [2005] ECR II-3533; C-415/05 P and C-415/05 P *Kadi and Al Barakaat* [2008] ECR I-nyr of 3 Sept. 2008, in which the ECJ followed AG Maduro in providing for judicial review of EU measures implementing UN sanctions against individuals.

<sup>32</sup> Especially with respect to enforcing obligations under agreements such as the GATT, GATS, TRIPS, SPS, TBT and SCM as well as panel and appellate body decisions establishing the details of these obligations.

<sup>33</sup> See for example the origines of the Shengen, Dublin and Prüm agreements.

task complicated by diffuse ‘borders’ of the EU and the many grey-zones between EU law, public international law and international administrative law. This situation has not changed with the entry into force of the Treaty of Lisbon. A legal ‘black hole’ continues to exist in many policy areas for agencies’ international activity and agreements.<sup>34</sup> Giving this activity, the achievement of an overarching legal framework is not made simpler by the diversity of conditions within the EU policy areas. Especially matters which pre-entry into force of the Treaty of Lisbon were organised in the former second and third pillar matters, delegation of powers can be, for example, not only vertical from the Council to an agency but also horizontal involving delegations of powers from Member States directly to agencies. Europol is perhaps the best known example for this type of approach, having been initially set up by the Member States to coordinate certain national police activities.<sup>35</sup>

These first two challenges lead to a more general *third* challenge relating to gaining a workable understanding of the realities of organisational separation and procedural cooperation within the networks of actors undertaking administrative functions in the EU. Network architectures in the EU are generally policy-specific. The various types of information, enforcement and planning networks in different policy areas link the administrations of the Member States directly with agencies, the Commission and Council. Therefore, any allocation of responsibilities needs to acknowledge that it takes place in the context of a highly integrated system. Specifically, this means that Member States and the Union as such do not interact through hierarchical chains, links or contacts, for example channelled through governments. Instead, interactions take place and responsibilities are allocated and satisfied in the context of direct links between EU actors and their Member State counterparts together with semi-private and private actors. Thus, as actors within the Union context, the Member States are ‘disaggregated’.<sup>36</sup> This is neither negative nor astonishing in a system of shared sovereignty. It requires however, careful analysis of exactly where decisions are taken and thus where responsibility ultimately lies.<sup>37</sup> The challenge is therefore as fundamental as ‘mapping the *locus*’, or the *loci* as it were, of executive (and by contrast also legislative) powers not only with respect to the production of formal EU legal acts but also within the (often informal) forms of network

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<sup>34</sup> Under the Treaty of Lisbon, the external dimensions of individual policy areas remain largely implicit. See with further detail: M. Cremona, *A Constitutional Basis for Effective External Action?*, *EUI Working Papers Law* 2006/30.

<sup>35</sup> Europol has in recent years concluded an extensive range of international agreements with international organisations and third countries (see: <http://www.europol.europa.eu/index.asp?page=agreements>) but has done so on the basis of a rather shaky legal foundation for such activity. The same tendency, it might be argued, is visible in regard to the first pillar, for example in respect to the border agency FRONTEX.

<sup>36</sup> A.-M. Slaughter, *A New World Order*, Princeton University Press (Princeton 2004), pp. 5, 12. Slaughter, uses this phrase for calling for a conceptual shift in understanding states in the international sphere. Her concept is all the more applicable in the context of the supranational EU.

<sup>37</sup> F. Bignami, Foreword, 68 *Law and Contemporary Problems* [2004] 1-20 thus observed that decision-making in these contexts is ‘national, transnational, and supranational, all at the same time.’

cooperation.<sup>38</sup> The challenge is, therefore, to comprehend the numerous and varied structures of governance and to make them transparent. Doing so is an essential condition of establishing subsequent supervision and achieving accountability of administrative action, a condition for adhering to the rule of law in the exercise of public power. The satisfaction of this task further needs to take into account that, unlike many forms of organisation in ‘traditional’ administrative law, hierarchical structures of control and supervision are not generally an organisational feature within the network arrangements referred to here.

Yet a *fourth* challenge for EU public law is the aspect of accountability of the actors involved in the administrative networks mentioned already. Accountability has both a political and a legal dimension.<sup>39</sup> Both dimensions of accountability can be established by both *ex post* and *ex ante* mechanisms. Anticipatory, *ex ante*, mechanisms broadly allow for the defining of tasks and for imposing conditions for carrying them out. They also include matters such as the choice of personnel entrusted with the tasks and the allocation of the budget for the purpose. *Ex post* mechanisms provide *inter alia* for possible demands to justify actions already taken, as well as rewards for compliance or sanctions for non-compliance with the definitions of task and limits set *ex ante*.<sup>40</sup> In EU law, many different approaches to accountability mechanisms for network administration exist. The various structures of European agencies are, in fact, a perfect example of an experimental approach to the design of forms of accountability. Developing a set of accountability mechanisms which can be applied generally as part of a transparent and visible system of control and supervision of network administration is one of the central challenges for EU administrative law in the future. Before turning to the challenge of how to do so, I would like to turn to the fifth and sixth challenges to EU administrative law in the future.

A *fifth* challenge is that EU administrative law is in many important ways distinct from its national counterparts, most notably through the development of multiple forms of ‘composite procedures.’ Composite procedures are multiple-step procedures with input from administrative actors from different jurisdictions, cooperating either vertically between EU institutions and bodies and Member States’ institutions and bodies, horizontally between various Member State institutions and bodies or in triangular procedures with different Member States’ and EU institutions and bodies involved. The

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<sup>38</sup> D. Curtin, ‘European Legal Integration: Paradise Lost?’ in: D. Curtin, A. Klip, J. Smits, J. McCahery (eds.) *European Integration and Law*, Intersentia (Antwerpen 2006), 1-54, at p. 35.

<sup>39</sup> M. Bovens, *Analysing and Assessing Accountability: A conceptual framework*, 13 *European Law Journal* [2007], 447-468.

<sup>40</sup> M. Bovens, *Analysing and Assessing Accountability: A conceptual framework*, 13 *European Law Journal* [2007], 447-468. The ECJ links this notion with the requirement to guarantee an institutional balance stating in case C-70/88 *Parliament v Council* [1990] ECR I-2041, para 22 that ‘[o]bservance of the institutional balance(...) requires that it should be possible to penalize any breach of that rule which may occur.’ The relation between these two actors can be hierachic or can exist within networks. *Ex ante* and *ex post* functions may themselves be delegated and sub-delegated.

final acts or decisions emanating from such procedures are issued by a Member State body or an EU institution or body.<sup>41</sup> Such composite procedures are made increasingly necessary by the complexity of regulatory demands, which often exceed the limits of competence of individual regulatory levels and individual Member States. The emergence of composite procedures involving vertical and horizontal administrative cooperation gives rise to many legal problems, especially for the protection of rights and the supervision of administrative action.<sup>42</sup>

The increasing prevalence of composite procedures in EU administrative law leads to a *sixth* issue of information. The establishment and use of information in administrative procedures increasingly needs to be treated as an important *topos* of concern, and thus of legal research, in its own right. The reason is that the sophisticated complexity which EU administrative co-operation within networks has reached is based mainly on the generation, gathering, compilation, handling, computation, management and distribution of information. Increasingly, information is the key input and commodity for decision-making through administrative cooperation in the EU. Composite procedures, in fact, can themselves generally be reduced to steps, measures and decision-making concerning the joint creation, use and sharing of information. Information is used in relation to many functions *inter alia* as a raw material for public decision-making, planning and steering activities. One of the central reasons for the importance of information is that the law concerning the establishing, compiling and using of information is developing at an increasingly rapid pace in numerous policy areas. Next to policy-specific rules such as in areas of risk regulation, obviously general legal provisions can be found on access to data and on data protection. The nature and the extent of the impact of the role of information and the accompanying developing law of information in the EU on the fundamental rights of the citizens is considerable. There is both a substantive and a procedural element relevant to understanding this aspect of the exercise of public powers in Europe. The substantive element concerns the establishment of joint rules and principles for the creation, sharing and use of information. Substantive rights of participation are necessary to ensure both that individuals do not merely become sources of administrative information, but also that they be treated as individuals holding rights under European law. The procedural element concerns the establishment of rules and principles for composite decision-making in the EU so as to ensure that

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<sup>41</sup> The final decision, when issued by a Member State administration will often have ‘trans-territorial’ effect, which is given an effect beyond the territory of the issuing jurisdiction. See: H.C.H. Hofmann, Decision-Making in EU Administrative Law – The Problem of Composite Procedures, 61 *Administrative Law Review* [2009/1 forthcoming].

<sup>42</sup> D. Curtin, Holding (Quasi-)Autonomous EU Administrative Actors to Public Account, 13 *European Law Journal* [2007], 523-541, at 540: ‘One of the main problems regarding the checks and balances under construction in the ‘undergrowth’ of legal and institutional practice is the chronic lack of transparency of the overall system. It is not that there is no public accountability (...) it is rather that it is not visible and often not structured very clearly.’

individuals can actually enforce such participation rights broadly defined.<sup>43</sup> These are essential elements for a modern EU legal system in which accountability of the exercise of public powers is guaranteed.

This leads to the *seventh* challenge of EU administrative law: It can be asked whether a generalisable set of administrative rules and principles applicable throughout the EU system could plausibly be established. Very limited EU legislation exists, applicable throughout the full range of policy areas, most being policy-specific. Amongst the few legal norms of general application are the rules on Comitology,<sup>44</sup> directives on data protection,<sup>45</sup> the EU's financial regulation,<sup>46</sup> the Regulation on so called 'executive agencies'<sup>47</sup> as well as directives on access to information.<sup>48</sup> Additional sources of general EU administrative law arise from general principles of law<sup>49</sup> and fundamental rights,<sup>50</sup> which apply within the sphere of EU law irrespective of the specific law applicable to the procedure, whether national or European. However, such general EU administrative law, except for the rules on Comitology generally do not establish any specific procedural rules on supervision and review. Policy specific law generally leaves it to the Member States to establish the procedure as well as the conditions for supervision and judicial control of administrative action. It has been due to the

<sup>43</sup> See with further detail on conceptual and legal philosophical considerations, see e.g.: J. Mendes, Participation and participation rights in EU law and governance, in: H.C.H. Hofmann, A. Türk (eds.) *Legal Challenges in EU Administrative Law: The Move to an Integrated Administration*, Elgar Publishing (Cheltenham 2009, forthcoming); J. Greenwood, *Interest representation in the European Union*, Palgrave Macmillan (Hounds Mills, 2003); P. Magnette, European governance and civic participation: beyond elitist citizenship?, 51 *Political Studies* [2003], 144-160.

<sup>44</sup> See the Council Decision 87/373/EEC of 13 July 1987 laying down the procedures for the exercise of implementing powers conferred on the Commission, [1987] OJ L 197/33 and Council Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission, [1999] OJ L 184/23. Decision 2006/512/EC, OJ 2006 L 11. For a discussion of this pre-2006 development, see C.F. Bergström, *Comitology: Delegation of Powers in the European Union and the Committee System* (OUP, 2005). In 2011 a new Comitology regulation established on the basis of Article 291 TFEU entered into force on March 1<sup>st</sup>, 2011.

<sup>45</sup> Regulation 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, OJ 2001 L 8/1.

<sup>46</sup> 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).

<sup>47</sup> 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.

<sup>48</sup> See for the EC, Regulation 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ 2001 L 145/43.

<sup>49</sup> General principles of law often include principles requiring standards of procedural justice in administrative procedures, such as the notions of proportionality, rights of defence and others. See for example: J. Schwarze *Europäisches Verwaltungsrecht* 2nd edition, Nomos (Baden-Baden 2005); T. Tridimas *General Principles of EU Law* 2<sup>nd</sup> edition, Oxford University Press (Oxford 2006); J. Jans, de Lange, S. Prechal, R. Widdershoven *Europeanisation of Public Law* Europa Law Publishing (Groningen 2007).

<sup>50</sup> Fundamental rights can be procedural, as Article 41 of the Charter of Fundamental Rights of the EU shows or substantive. All provisions which regulate activity within the scope of Community law need to be interpreted in the light of fundamental rights guaranteed by the Community legal order. Generally see Case C-159/90 *Society for the Protection of Unborn Children Ireland* [1991] ECR I-4685, para 31; Case C-299/95 *Friedrich Kremzow v Austria* [1997] ECR I-2629, para 15; Case C-276/01 *Steffensen* [2003] ECR I-3735, para 70. The definition of the scope of Community law is widely defined in Case C-260/89, *ERT-AE v DEP* [1991] ECR I-2925, paras 42, 43.

evolutionary and diversified development of the forms of integrated administration that has led to many new and unforeseen legal problems which, as noted above, often result from non-hierarchical, network-like structures and cooperative procedures for administration in the EU. One of the striking features of this development is that there is no standard EU 'administrative procedure act' or similar code or legal framework horizontally applicable throughout the policy areas touched by European integration.<sup>51</sup> Also, the doctrinal treatment of these matters of general EU administrative law is in its infancy. Only recently has there been a developing interest in research with respect to a more general approach to EU administrative law going beyond studying merely the general principles of law.<sup>52</sup> Such a development could prove useful especially in the light of the lack of transparency, the diverse methodologies of accountability and generally the fluidity of EU administrative law techniques and structures.

### III. Some Conclusions

These considerations provide an overview over some important challenges posed for EU public law considered from an administrative perspective built on an understanding of the constitutional level. For a realistic understanding of EU administrative law, one must start by acknowledging the specific contextual factors of functional unity, organizational separation, and procedural cooperation which determine the development of the EU administration. The notion of procedural cooperation has a particular importance in this. In reality such cooperation is often so intensive that the cooperative procedures themselves in effect 'coagulate' so as to become administrative actors. Good examples for this have been comitology committees which have in some policy areas been transferred to EU agencies. An example is the European Medicines Agency (EMEA) which was created by the relevant legislation on the basis of two comitology committees as predecessors. Key to the development of a public law framework for administrative action is, then, an understanding of the network-context of administrative law in which actors from various backgrounds, both public and private, cooperate in joint procedures. This network character is also relevant for understanding the difficult distinctions

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<sup>51</sup> There is of course legitimate debate as to whether there is to date a legal basis for such an approach. No matter what the position, Article 289 TFEU would create such a legal basis for a generalisable EU administrative law with the entry into force of the Treaty of Lisbon.

<sup>52</sup> See e.g. H.C.H. Hofmann, G.C. Rowe, A. Türk, *European Administrative Law and Policy*, OUP (Oxford 2009, forthcoming); J.-B. Auby, J. Dutheil de la Rochere (eds.) *Droit Administratif Européen* Bruylants (Bruxelles 2007); M. Ruffert (ed.) *The Transformation of administrative law in Europe* Sellier (München 2007); M. P. Chiti, G. Greco (eds.) *Trattato di diritto amministrativo comunitario* Vol. I, II, Giuffrè, 2<sup>nd</sup> ed. (Milano 2007); P. Craig *EU Administrative Law* Oxford University Press (Oxford 2006); H.C.H. Hofmann, A. Türk (eds.), *EU Administrative Governance*, Elgar Publishing (Cheltenham 2006); E. Schmidt-Assmann, B. Schöndorf-Haubold (eds.) *Der Europäische Verwaltungsverbund* Mohr (Tübingen 2005).

between the European and the international levels in certain administrative procedures, due to many hybrid forms of cooperation. In the wake of this emerge far-reaching questions about the nature of the EU and its limits. EU public law will highly benefit from the experience of other legal systems in handling these issues while due to its unique character can also be seen as an innovative experimental field for modern problems of public law in general.

Administrative law is also a necessary framework for encapsulating and, where possible, generalising the solutions or methods constantly being developed as experimental forms within individual policy areas. A key issue here is the great potential — and great need — for simplification and a more systematic approach. Attention needs to be given to achieving a more comprehensively applicable law on administrative procedure and organisational form through greater standardization of structures, procedures and methodology throughout the various EU policy fields. Also here, the US tradition has much to offer to a European point of view. Much fruitful interchange is imaginable.

Overall, from a realist's point of view, the integrated nature of the European legal system is the one of its most characteristic defining features. European integration is not so much built on a model of clear vertical or horizontal separation of powers. It is built on the basis of shared sovereignty, coordinated approaches to joint problem-solving and integration of various levels and interests in decision-making. This integrated character and the reduced role of the clear separation of powers requires careful thinking for maintaining transparency, for example, with respect to the allocation of responsibilities for action and the accountability of actors. Since most of the network structures in European law have developed in an evolutionary, trial and error fashion, transparency might require clarification and systematisation of procedures. This was the approach chosen for many years with respect to Comitology procedures which had developed out of institutional practice and necessity. This could be repeated with respect to other problems of European governance.

The review of EU public law both from what generally might be viewed as a constitutional and an administrative point of view has therefore shown that, in many situations, initial appearances within EU law may be deceptive. An attempt to frame a legal system along purely constitutional lines, familiar to a scholar of classical federal constitutional models risks creating legal structures only poorly adapted to addressing the problems which the EU legal system actually poses. The specific nature of the EU is to large degree the product of requirements to exercise shared sovereignty by integrating executives. The profound challenge for lawyers in EU public law in terms of the future of legislative and legal-conceptual constructs is, now, above all the development of crucially necessary accountability structures from both the constitutional and the administrative toolbox.

