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<cn>1. <ct>**European administration: nature and developments of a legal and political space**

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This chapter presents in broad strokes an overview of the genesis, the reasons for development and the forms as well as the functions of the European administration as we know it today with specific focus on administration of and in the EU. European administration is often described in the context of the metaphor of ‘space’, as a ‘European administrative space’.¹ The reason for this is not only the territorial reach of administrative powers being linked to the territorial jurisdiction of public law. The metaphor is also used in the TFEU, which, maybe a little euphemistically, refers to an ‘area of freedom, security and justice’. Using the image of ‘space’ allows exploring in a more contextual way the gradual evolution of administrative structures, procedures, cultures and approaches within the EU and other jurisdictions affected by European integration.

This chapter approaches the topic in three steps. First, it looks at the genesis of the European administrative space and offers some explanations why things look as they do and what consequences arise therefrom. Second, this chapter focuses on the pluralization of actors composing the ‘European administration’ and their modes of cooperation. I therein highlight the growing procedural integration through composite

¹ HCH Hofmann, ‘Mapping the European Administrative Space’ (2008) 13 WEP 662; also published as HCH Hofmann, ‘Mapping the European Administrative Space’ in M Egeberg and D Curtin (eds), *Towards a New Executive Order in Europe* (Routledge 2009) 24–38; HCH Hofmann, GC Rowe and A Türk *Administrative Law and Policy of the European Union* (OUP 2011) pp. 5–11; H Siedentopf and B Speer, ‘La Notion d’Espace Administratif Européen’ in J-B Auby and J Dutheil de la Rochère (eds), *Droit Administratif Européen* (Bruylant 2007) 299–317; J Trondal and G Peters, ‘A Conceptual Account of the European Administrative Space’ in M Bauer and J Trondal (eds), *The Palgrave Handbook of the European Administrative System* (Palgrave Macmillan 2015) 79–92.

procedures and the increasing relevance of information. Finally, this chapter addresses the possible future developments of an integrated European administrative space and discusses adapted solutions to structural challenges.

<a>1. RECONSTRUCTING THE EMERGENCE OF THE EUROPEAN SPACE OF INTEGRATED ADMINISTRATION

The rise and development of European administration in a ‘European administrative space’ or ‘area’ is viewed and described in a variety of ways. Trondal and Peters identify basically two separate approaches.² One emphasizes the convergence of administrative systems and policies drawing on studies of comparative government and comparative public administration. The main concern of this scholarship is how, in the context of European integration, administrative traditions, concepts and practices spread horizontally between administrations in Europe, and vertically through mutual learning and influencing of concepts as well as public management practices.³ In this context, the notion of space circumscribes the realm of an increasing convergence of administrations and administrative practices at the EU level and various Member States’ administrations as well as the administrations associated in one way or another to the EU and to a ‘common European model’.⁴

² J Trondal and G Peters, ‘A Conceptual Account of the European Administrative Space’ in M Bauer and J Trondal (eds), *The Palgrave Handbook of the European Administrative System* (Palgrave Macmillan 2015) 79–92, 81.

³ Trondal and Peters classify publications such as the book by C Knill, *The Europeanisation of National Administrations* (CUP 2001) and the articles by J Olsen, ‘Towards a European Administrative Space’ (2003) 10 JEPP 506 and JH Meyer-Sahling and K Yesilkagit, ‘Differential Legacy Effects: Three Propositions on the Impact of Administrative Traditions on Public Management Reform in Europe East and West’ (2011) 18 JEPP 311 as belonging to this first wave of scholarship. I would add the famous SIGMA study of the OECD as well as the abundant legal and political science literature on the ‘Europeanization’ of national administrations of which an early example includes E Page and L Wouters, ‘The Europeanization of the National Bureaucracies?’ in Jon Pierre (ed), *Bureaucracy in the Modern State* (Edward Elgar Publishing 1995) 185–204.

⁴ H Siedentopf and B Speer, ‘La Notion d’Espace Administratif Européen’ in J-B Auby and J Dutheil de la Rochère (eds), *Droit Administratif Européen* (Bruylant 2007) 299–317, 304–17; S Kadelbach,

A second approach to the concept of a 'European administrative space' focuses more on the phenomenon of the coordinated formation of policies and subsequent implementation of EU law which is marked by a high degree of close cooperation between Member States' administrations on various levels, EU institutions and bodies as well as private, semi-private and public standard-setting bodies. This cooperation which spans various policy phases mixes purely administrative and more broadly executive tasks. The diverse forms of cooperation are the real-life backbone to the theoretic notion of 'shared sovereignty' in the EU. The concept of the European administrative space in this view does not only refer to the territorial reach of law and policies of the EU but is a concept which indicates a deep policy shaping and implementing interaction between diverse actors from various backgrounds.

This second approach to the concept of a European administrative space is the basis of discussion in this chapter. It studies the European administration in the context of an integrated legal and political space. The objective of studying the evolution and growth of European administration as functional, organizational and procedural phenomenon is to improve both our understanding of the real life structure, designed to achieve the objectives assigned to administration, as well as to improve the possibilities of assuring accountability and legitimacy of the underlying structures.

Phases of Development – Where Did it All Come From and Why Did it Develop?

The European administration as we know it today in the EU has developed in several phases, each adding a characteristic layer to the reality we can currently observe.⁵ Using a phase model to comprehend the degree and type of integration existing in the European administrative space leads to a differentiated understanding of discussions on its nature and consequences. Key to the idea of an integrated administration in a European administrative space is transformation of what used to be a purely territorially bound exercise of public policies.

Prior to the creation within the European Communities or, as the case may be, prior to beginning the process towards accession to the EU, states were to various degrees more or less sovereign within their territories. National administrations developed largely as state-specific structures which reflected historic traditions of organization, and certain underlying values such as regionalization or centralized approaches. Developments of other legal systems were taken into account on a voluntary, case-by-case approach.

Over time, the creation of the European Communities, with their supranational legal order, has led to some radical changes in this familiar concept of territorially distinct administrations. European integration has, in particular, given rise to the notion of shared sovereignty as alternative to the traditional differentiation between internal functions of a state. Although first steps towards European integration in the 1950s were characterized by the pooling of certain sector-specific regulatory powers through the European Coal and Steel Community (ECSC), an organization with a distinctively administrative character empowered to make delegated (administrative)

⁵ This part of the chapter is based on previous publications such as: HCH Hofmann, 'Mapping the European Administrative Space' (2008) 13 WEP 662; also published as HCH Hofmann, 'Mapping the European Administrative Space' in M Egeberg and D Curtin (eds), *Towards a New Executive Order in Europe* (Routledge 2009) 24–38; HCH Hofmann, GC Rowe and A Türk *Administrative Law and Policy of the European Union* (OUP 2011) 5–11.

rules and take single-case decisions,⁶ the establishment of the European Economic Community (EEC) as *traité cadre* changed this logic fundamentally. Its creation initially had the effect of the pursuit and perception of European integration from a quasi ‘constitutional’ point of view. This resulted from the paradigmatic shift of delegating legislative tasks to the European level. Through the creation of the ECSC and the EEC, Member States had delegated sovereign powers to the Communities and thereby opened up their political and legal systems *vertically* by not only allowing Community law to override national law in cases of conflict, but also accepting its direct effect within their territory.⁷ This type of ‘vertical’ opening of the Member States towards EU law however, neither yet *per se* called into question the traditional model of territoriality nor the national model of administration. After all, the exercise of public power on the European level remained limited to each individual Member State and the territorial reach of its sovereignty. This is the origin of the model, commonly cited still today between the exceptional case of *direct administration* of EU law by Union institutions and bodies throughout the Union where so explicitly provided for (such as e.g. in the field of State aid control), on one hand, and, on the other hand, the regular case of *indirect administration* of Union law by Member State administrations within their territory.

This approach was disrupted by the second major development towards a genuinely European administrative space becoming apparent beginning from the mid-

⁶ See e.g. Case 4/54 *ISA v High Authority* EU:C:1955:3; Case 8/55 *Federation Charbonniere de Belgique v High Authority* EU:C:1956:7; Joined Cases 7/56 and 3-7/57 *Algera and Others v Common Assembly* EU:C:1957:7; Case 9/56 *Meroni v High Authority* EU:C:1958:7; Case 10/56 *Meroni v High Authority* EU:C:1958:8; Joined Cases 43/59, 45/59, & 48/59 *Von Lachmüller v Commission* EU:C:1960:37; Case 105/75 *Giuffrida v Council* EU:C:1976:128.

⁷ Case 26/62 *Van Gend en Loos v Administratie der Belastingen* [1963] ECR 3, paras 10, 12, 13; Case 6/64 *Costa v ENEL* [1964] ECR 585, para. 3. This was so established irrespective of the nature of the law, whether primary (treaty) law, derived secondary law, or individual decisions of administrative nature.

1970s case law of the European Court of Justice (now the CJEU) and increasingly focussed on the mutual obligation of the Member States to recognize the administrative and legislative decisions of other Member States in order to ensure the obligations arising from the single market provisions of the Treaties. This implied a 'horizontal' opening of Member States' legal and political systems in what has become known as negative integration,⁸ granting individuals the right to rely on the fundamental freedoms of the EC Treaty *vis-à-vis* other Member State administrations.⁹ Horizontal opening is most closely associated with the *Cassis de Dijon* jurisprudence, which required Member States to recognize each others' regulatory decisions in structurally equivalent situations.¹⁰ Practically this allowed for a trans-territorial reach of decisions by national administrations, through the EU imposed obligation of mutual recognition. In principle, trans-territorial reach of national decisions on the basis of EU law comes with the obligation to take into account interests in the decision-making process from all potentially affected parties, even those in other jurisdictions within the EU. The de-linking of the territoriality of a state and the exercise of public power in the EU has however also had an additional effect which Advocate General Maduro has referred to as the 'Community principle of territoriality' which describes the inherent conflict between EU powers, areas of remaining Member State competencies, and the rights and obligations of individuals

⁸ See especially JHH Weiler, 'The Transformation of Europe' (1991) 100 Yale LJ 2403.

⁹ In Case 104/75 *de Peijper* EU:C:1976:67, for example, the ECJ limited the possibility of a Member State to carry out an administrative procedure already undertaken in another Member State. That would be a disproportionate limitation of the fundamental freedom. Where there were similar requirements for administrative procedures in two Member States but no harmonization, the ECJ went a step further and requested national administrations to make contact to establish the necessary information, Case 251/78 *Denkavit Futtermittel* EU:C:1979:252. Case 35/76 *Simmenthal v Ministero delle Finanze italiano* EU:C:1976:180 provided for the obligation of a Member State to accept the veterinary certificates of another Member State in the case of an investigation procedure harmonized by a directive.

¹⁰ Case 120/78 *Rewe Central Ag v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* EU:C:1979:42, paras 8 and 14.

arising from the two levels of the EU legal system.¹¹ With increasing European integration, the distinction between the ‘inner sphere’ of a state and its ‘outer sphere’ became less pronounced. EU Member States opened their systems towards public powers being exercised from outside of the state, with maybe initially unforeseen consequences on the way in which administrative functions came to be exercised.

The third major phase of development then marks an important shift in the legal and political environment by the move towards what can be described as an ‘integrated administration’ in Europe.¹² This phase is a reaction to the requirements of horizontal cooperation and the creation of obligations such as that of providing mutual administrative assistance in order to ensure effective horizontal cooperation.¹³ Initially, these needs were served by only sporadic, ad hoc, mutual assistance obligations. But with the deepening of the internal market, many policy-specific sectoral regulatory frames required ever more sophisticated tools starting with regular reporting duties, joint planning structures, and coordination of implementation through committees on the European level – within the framework of comitology or otherwise through expert committees. The result was a significant transformation of the functions performed by administrators, not just towards the implementation of the single market, but taking on a more active role in planning procedures and through delegated legislation.

¹¹ Opinion of AG Maduro in *C-446/03 Marks & Spencer plc v David Halsey (HM Inspector of Taxes)* EU:C:2005:201, para 6.

¹² HCH Hofmann and A Türk, ‘Conclusions: Europe’s Integrated Administration’ in HCH Hofmann and A Türk (eds), *EU Administrative Governance* (Edward Elgar Publishing 2006) 573–96.

¹³ Mutual assistance obligations are based either on Art 3(4) TEU (Art 10 EC) or are individually provided for in secondary legislation. One early example of rules for mutual assistance and horizontal exchange of information was created for tax authorities in Council Directive 77/799/EEC concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation [1977] OJ L336/15.

This is the phase of development in which actors involved in the European administrative space begin to multiply and diversify. Key administrative functions were now undertaken in an increasing number of policy areas, involving input from several administrative actors both from the Member States and the European level, tied together through procedural provisions emanating from EU law. The development of vertical and horizontal relations can therefore be understood as stepping stones towards in the creation of an integrated network of administrations.

This third phase of development of European administration and with it the European administrative space is characterized not only by a diversification of actors and an intensification of integration by networked structure. It is importantly also the period of an expansion of the range of administrative activities. The central element thereof is the addition of coordinating and structuring roles which the European administration have developed in all phases of a typical 'policy cycle', by becoming involved in agenda setting, rule-making, and single case implementation. Examples are national administrations' involvement in comitology committees, expert committees, the supervision of EU agencies, and in Council working parties that support COREPER.¹⁴ The integrated administration from this point of view has emerged from the fundamental needs of the Member States to forge links both between national and European administrations and between and among Member State administrations *inter se*, in order to maximize their problem-solving capacity, influence and effectiveness.¹⁵ Such factors relating to administration in Europe have profound effects on the nature and scope of EU administrative law and policy. From a

¹⁴ See e.g. C Neuhold and E Radulova, 'The Involvement of Administrative Players in the EU Decision Making Process' in HCH Hofmann and A Türk (eds), *EU Administrative Governance* (Edward Elgar Publishing 2006) 44–73.

¹⁵ This discussion has been going on for at least two decades, see e.g. W Wessels, 'An Ever Closer Fusion? A Dynamic Macropolitical View on Integration Processes' (1997) 35 *JCMS* 267.

functional point of view, they show that administrative activity cannot be equated simply with implementation of otherwise established policy objectives, but encompasses the rules and legal principles which govern the conduct of administrative action necessary for both the creation and the implementation of EU law.

Throughout the developments in these three phases, Member States have opened up and deeply integrated into a European system in which they have gained in-depth access also through their administrative actors into law-making on all levels in the common administrative and political space. The possibilities of this very effect, however, set EU Member States apart from states which are in Europe but are not members of the EU, such as for example EFTA-members that by opting to accept only parts of EU law, predominantly internal market law, pay for this choice by being in many respects excluded from participation in normative activity affecting their constituencies.

<c>Open questions

The above historic, phase-oriented approach to describing today's situation explains a little why the fading notion of territoriality within the EU is well described by an emerging European administrative space. Some of the most striking developments of the 'third phase' are organizational innovations such as the 'agencification' of EU administration. Also, this is a phase of shifting regulatory approaches from traditional hierarchic administrative organizations and unilateral forms of act towards more fluid and less transparent governance structures and back. More generally, much of the administrative integration on the EU level is the creation of regulatory acts with quasi-legislative effect, not the traditional single case decision-making associated with the concept of 'administration' in some Member States. This also explains why

European administration and administration of the European administrative space in some ways appears to be more political than a tightly controlled hierarchical ‘Weberian’ administration. One reason might be that although regulation of the EU’s internal market is sometimes equated with governance by technical expertise only loosely linked to parliamentary majorities, it is anything but an apolitical activity. Regulation is undertaken within the EU’s constitutional framework by administrative institutions and forms of act, accompanied by a host of co-regulatory and incentive-based approaches. Setting regulatory goals and choosing the means to achieve them is highly political – not only in the general sense that any policy endeavour that can go wrong can become political due to the necessity of accountability tools such as parliamentary oversight over administrative action. Regulation is also highly political in that regulatory choices will have an immediate influence on value choices in society. Each of these phenomena of the European administrative space deserve some probing.

The Pluralization of the European Administration

The European administration as described in this contribution has in the past decades become more multidimensional and diverse. Understanding questions of accountability and transparency as well as diversity in procedural cooperation structures must begin here. The phenomenon of ‘pluralization’ of the European administration has several inter-linked dimensions: An institutional dimension points at the increasing agencification and use of technical standards. This is linked both to the deepening of integration and the increase in policies touched by integration as well as an increase in diversity of the now 28 Member States and several EU policies not affecting all but in some cases also non-EU Members.

<c>Institutional pluralisation

The first dimension of pluralization consists of the multiplication of actors in the integrated European administration. Especially in the past two decades, the executive branch of the EU has seen an unprecedented pluralization of bodies and actors. Such pluralization arises not only from the fact that in the EU, executive powers for implementation of EU policies are split between Member States and the EU, it also arises from the institutional distribution of executive powers within the EU. Although thought to be initially concentrated largely within the Commission, executive powers are also exercised in exceptional cases by the Council, as well as by various bodies created by the Treaties including the European Central Bank, the Court of Auditors and others. Additionally, some agencies have been created by Treaty provisions or have a legal basis in the Treaty.¹⁶ Since the 1970s, several waves of agencies were further created as bodies with separate legal personality from the EU either by Treaty provision or by legislative act. They do not follow a single organizational model as public bodies under EU law,¹⁷ and exercise administrative functions in various areas of EU policies. European agencies are decentralized forms of administration that integrate national administrative bodies into their operations by providing structures for cooperation between the supranational and national levels and between the

¹⁶ These include the European Defence Agency (which is established now in Art 42, para 3, and 45 TEU but was originally created by the Council Joint Action 2004/551/CFSP [2004] OJ L245/17) and the European Police Office (Europol, Art 88 TFEU). Legislative acts provide for the structural details of these agencies and their procedural provisions. See, in particular Council Joint Action 2004/551/CFSP on the establishment of the European Defence Agency [2004] OJ L245/17 and Council Act drawing up the Convention based on Article K.3 of the Treaty on European Union, on the establishment of a European Police Office (Europol Convention) [1995] OJ C316/1.

¹⁷ Some agencies are also created as public-private partnerships. Examples are the European Institute of Innovation and Technology (EIT) [2008] OJ L97/1, the various joint undertakings in the area of research such as the fusion energy model ITER [2007] OJ L90/58, and the Fusion for Energy agency of the EU to support it; SESAR for air traffic management [2007] OJ L64/1 as amended and Galileo for satellite navigation [2008] OJ L196/1. These bodies are created as joint undertakings under Art 187 TFEU.

national authorities. Next to agencies as EU bodies, EU law widely applies an approach to implement standards into EU legislation which are created by public, semi-public or private bodies organized on the European or international level.¹⁸

The result is a plurality of legal persons acting alongside and in cooperation with the institutions of the EU. Today, agencies and their administrative networks including a diverse assembly of bodies contributing to the setting of standards play an ever-increasing role in policy formulation and implementation.

Therefore, one problem with understanding the ‘agencification’ of EU public law is the continuously growing gap between, on one hand, the prolific creation of agencies in the EU and conferral of powers on them, and, on the other hand, the lack of recognition in EU primary constitutional Treaty law.¹⁹ The phenomenon of agency growth can at least in part be explained by the fact that the spread of networks of national authorities can be regarded as an embodiment of the notion of subsidiarity: The use of agencies and networks allows national and sub-national actors to remain nominally in charge of final decision-making whilst in the background EU agencies structure the procedural cooperation in the implementation of EU policies.²⁰ Accordingly, the distribution of executive powers in the EU can be regarded as representing the needs of a highly dynamic legal order in which legally separated levels – the EU and the Member States – undertake procedurally well-integrated

¹⁸ See for explanations of and problems caused by this approach C-399/12 *Germany v Council and Commission* EU:C:2014:2258; C-251/14 *Balázs* EU:C:2015:687; Opinion of AG Sanchez-Bordona in C-613/14 *James Elliot Construction Ltd* EU:C:2016:63.

¹⁹ 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* (Edward Elgar Publishing 2005) pp. 88–119; D Fischer-Appelt, *Agenturen der Europäischen Gemeinschaft* (Duncker und Humblot 1999) 87–117.

²⁰ S Griller and A Orator, ‘Everything under Control? The Way Forward for European Agencies in the Footsteps of the Meroni Doctrine’ (2010) 35 *EL Rev* 3.

implementation of EU policies. And while this undoubtedly complicates the organizational chart of the EU executive, it represents a realistic approach to explaining implementation of EU policies in the EU's system of integrated executives.

<c>Diversity due to deepening and widening integration

Another way in which the European Union polity has evolved in recent years is in the nature and breadth of the tasks it performs which influences the growth of and diversity of actors who perform them. This dimension of a pluralization of actors and policies is linked to the broadening of policy objectives touched by Union law. Broadening of policy objectives goes hand in hand not only with an expansion of existing powers and the further development of innovative agencies and networks of regulators but also with innovations in the administration of policies. To note just one more recent but particularly relevant example to the setup of the European administration is in the area of European economic governance, where the Council has received an added institutional structure, the 'Eurogroup'. These have established a 'deep administrative infrastructure for the civil servants of the Eurozone members in parallel with the traditional ECOFIN machinery.'²¹

Obviously, the growing membership of the Union to 28 Member States, mostly of small size, with increasingly diverse systems of administration and historic constitutional paths and developments has also contributed to a pluralization of actors. But importantly, some of these Member States also have obtained official or

²¹ W Wessels, P Valant and T Kunstein, 'The EU Council(s) System and Administrative Fusion' in M Bauer and J Trondal (eds), *The Palgrave Handbook of the European Administrative System* (Palgrave Macmillan 2015) 265–80, 271–72. See further, Council of the European Union, The guiding principles for the conduct of proceedings of Euro Summit meetings of 14 March 2013 available at: www.consilium.europa.eu/en/european-council/euro-summit/.

unofficial opt-outs and partial participation in some policies. In other policies such as Schengen, non-EU Member States participate, including in the fields of information sharing and composite procedures. Only a few 'core' policies of the EU cover a territory identical to that of the Union as defined in Articles 52 TEU and 355 TFEU. This policy diversification is a hallmark of today's Union.

Consequences

The result of these different aspects of pluralization of conditions is that organizationally, the actors involved in European administrations remained separate, being organized either on the national or the European level. Other than through the public/private partnerships organized in the area of research and development there are, legally speaking, no mixed types of institutions both under EU law and national (public) law. All legal acts of the European administration are formally either qualified as national or European. From an outsider's perspective, therefore, despite all the moves towards an integrated European administration, not too much has changed from the *status quo ante* in the 1950s. When administrative functions are undertaken on the European level, their exercise is organizationally fragmented insofar as executive authority on the EU level is spread across several institutions, most notably the Commission and the Council, which are increasingly supported by EU agencies.

From the 'inside' however, the system is held together by procedural law. In this, an administrative space is created in which joint creation of law and its implementation is a reality. Limitations on autonomy of Member States arise from the fact that, in the fields of Union policy, Member States' substantive and procedural administrative law is to be applied within the framework of EU law. This is set by reference to three basic factors. First, Member States' substantive and procedural law

is applicable as such only in the absence of any explicit requirements in Union law for the adoption of either specific procedures or of organizational arrangements within Member States' administrations. Secondly, the application of national procedural rules in the implementation of Union law, where this has not been pre-empted by explicit EU provisions, must be exercised in strict compliance with the principles of *equivalence* and *effectiveness*.²² Thirdly, in all areas of the 'scope' of EU law, Member States are subject to general principles of EU law and fundamental rights.²³ Therefore, insofar as Union law itself makes provision as regards procedures, criteria, or organizational requirements, national administrations are obliged to act in conformity with these.

Additionally, case studies show that it has become difficult to draw clear dividing lines between different types of legal regimes on the international, supranational and national spheres.²⁴ Therefore, European administration is based not on the law of the European Union alone but encompasses also public international law sources, such as for example the Aarhus Convention to name just one example, as well as the law and general principles of law applicable on the national and sub-national level in the Member States.²⁵

²² National law may not provide for conditions of implementation of Union law that are 'less favourable than those governing similar domestic actions'. The principle of effectiveness requires that the Member States' arrangements 'do not render practically impossible or excessively difficult the exercise of rights conferred by Community law'. See Case C-261/95 *Palmisani v INPS* EU:C:1997:351, para 27. See also C-453/99 *Courage and Crehan* EU:C:2001:465, para 25.

²³ C-617/10 *Åkerberg Fransson* EU:C:2013:105 with reference to C-260/89 *ERT* EU:C:1991:254, para 42; C-299/95 *Kremzow* EU:C:1997:254, para 15; C-309/96 *Annibaldi* EU:C:1997:631, para 13; C-94/00 *Roquette Frères* EU:C:2002:603, para 25; C-349/07 *Sopropé* EU:C:2008:746, para 34; C-256/11 *Dereci and Others* EU:C:2011:734, para 72; C-27/11 *Vinkov* EU:C:2012:326, para 58.

²⁴ See for example: A Follesdal, RA Wessel and J Wouters (eds), *Multilevel Regulation and the EU* (Martinus Nijhoff Publishers 2008) 9–47; HCH Hofmann and A Türk (eds), *EU Administrative Governance* (Edward Elgar Publishing 2006).

²⁵ See with further discussion the contribution by E Chiti in this volume. See also: J-B Auby and J Dutheil de la Rochère, 'Introduction Générale' in J-B. Auby and J Dutheil de la Rochère (eds), *Droit Administratif Européen* (2nd edn, Bruylant 2013) 4.

<a>2. EUROPEAN ADMINISTRATION: A COOPERATIVE SYSTEM OF A PLURALITY OF ACTORS

The development of an integrated European administration thus takes place through Member State participation in European bodies, and administrative procedures and EU law being the ‘law of the land’ within Member States. This is what one can describe as the hard core of the European administrative space. Values therein are described by Harlow and Rawlings as being shaped by the absence of a strong Union-based bureaucracy as basic principles of ‘cooperation, coordination and communication’.²⁶ These remain as the basic characteristics of procedural design holding together the European administration, despite the ever more prevalent approaches of control and conditionality in the post-2008 crises response mechanisms. However, it would appear that the pluralization of actors, tasks and forms of act would put stress on the values of coordination and communication since their realization requires a certain familiarity and closeness of actors. An ever growing pluralization of actors and diversity of forms of act and procedures are factors which are not conducive to the development of closeness and familiarity. In times of stress, fragility of a system shows.

Tackling the challenges to realize the values is undertaken, firstly, by increasing procedural cooperation within the European administrative space. Actors from various jurisdictions, both national and European and in some cases also international, are thereby linked through procedure prescribed by EU law, mostly by joint generation and management of information.

²⁶ C Harlow and R Rawlings, *Process and Procedure in EU Administration* (Hart Publishing 2014) 323.

Procedural Cooperation

The integration of EU law and of the administrative systems implementing it has largely taken place in a fragmented fashion leading to the above described pluralization of actors, forms of act and procedures. The diversity of the 'tasks with which executive authorities are entrusted; of the institutions, bodies, and actors responsible for carrying out such tasks; and of the processes through which administrative measures are adopted' complicates the task of analysis.²⁷ Also the EU to date lacks the normal reflex to simplification in the face of diversity: no overarching approach exists which can be applied to interlocking legal and political systems and sub-systems when implementing EU law. The EU has not so far undertaken the important structural step of adopting, other than for comitology committees through the Comitology regulation, an administrative procedure act applicable throughout policy areas.

Cooperation between diverse actors and across the different levels is an essential component of European administration. Administrative cooperation takes place in policy areas in which responsibility for implementation rests on the European level, and also in fields where, in the absence of EU administrative capabilities and competences, Member State authorities are responsible.²⁸ Cooperation is maintained by procedures linking the various actors and levels.

²⁷ K Lenaerts, foreword to HCH Hofmann, G Rowe and A Türk, *Administrative Law and Policy of the European Union* (OUP 2011).

²⁸ It should be noted that there is in fact a mismatch between the allocation of functions and administrative resources to the Commission when compared with those available to national bureaucracies, with the Commission equalling in size the administration of a major European city: H Kassim, 'The European Administration: Between Europeanization and Domestication' in J Hayward and A Menon (eds), *Governing Europe* (OUP 2003) 139–61, 151.

These procedural linkages can be highly developed, for example through composite procedures in which actors from various jurisdictions, both national and European, contribute to the final decision taken by one single actor. The procedural links can also be looser forms of cooperation, for example in the case of some agencies which often pursue their tasks within a wider administrative setting including private parties acting as recipients of limited delegation.²⁹

Administrative networks can go so far as to use Member State administrations as types of EU agencies, in which the EU level decides on the type and scope of activities to be undertaken in individual cases at the national level.³⁰ A more legally structured debate however requires terminology, which can be based on procedural forms of interaction. In legal discourse the concept of networks has been more recently further developed to analyse categories of accountability as well as new forms of regulatory cooperation.³¹ The diversity of forms of procedural cooperation for the implementation of EU law through national and European bodies is often referred to as ‘shared administration’. The terminology was made widely accepted by the Committee of Independent Experts set up by the European Parliament and the Commission to investigate alleged misconduct of the Santer Commission in 1999. It

²⁹ E.g. in the case of normatization by actors such as CEN (Comité Européen de Normalisation), CENELEC (Comité Européen de Normalisation Electrotechnique) and ETSI (European Telecommunications Standards Institute) which are charged with providing specific standards on the basis of Commission demands. Other standards arise from links to technical expertise such as e.g. references in legislation to norms set by international bodies. An example for this is Art 120f of Council Regulation (EC) 1234/2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products [2007] OJ L299/1, as amended. It provides: ‘When authorising oenological practices in accordance with the procedure referred to in Article 195(4), the Commission shall: (a) base itself on the oenological practices recommended and published by the International Organisation of Vine and Wine’.

³⁰ See e.g. the role of national data protection authorities under Art 28 of Directive 95/46 [1995] OJ L281/31.

³¹ See e.g. C Harlow and R Rawlings, ‘Promoting Accountability in Multi-Level Governance: A Network Approach’ (2007) 13 ELJ 542.

referred to as ‘shared administration’, administrative procedures consisting of forms of administrative cooperation for the management of Union programmes where the Commission and the Member States have distinct administrative tasks which are interdependent and set down in legislation and where both the Commission and the national administrations need to discharge their respective tasks for the Community policy to be implemented successfully. Shared administration – i.e. networks maintained by procedure – pose specific problems for oversight and accountability. The notion of shared administration, although helpful, lacks comprehensive explanatory value in itself since an understanding of the substantive law governing a certain specialized policy area is necessary to understand the nature of the specific legal and administrative difficulties within that particular field.³²

An alternative basis for categorizing forms of procedural cooperation is to look at who takes the final administrative decision.³³ This approach distinguishes ‘top-down’ proceedings, which may begin with measures taken on the European level and conclude with measures taken by national authorities, from ‘bottom-up’ proceedings, which begin at the national level and conclude with measures taken by EU institutions and bodies. This distinction should not be understood, however, too literally, because there are also mixed or hybrid models that present features typical of both types of process. Indeed, the very notion of hybrid procedures acknowledges that there is hardly any EU policy area which, taking both administrative rule-making and single

³² P Craig, ‘Shared Administration, Disbursement of Community Funds and the Regulatory State’ in HCH Hofmann and A Türk (eds), *The Move to an Integrated Administration – Legal Challenges in EU Administrative Law* (Edward Elgar Publishing 2009) 34–64.

³³ See, G della Cananea, ‘The European Union’s Mixed Administrative Proceedings’ (2004) 68 *Law and Contemporary Problems* 197 with further references and examples; E Chiti, ‘The Administrative Implementation of EU Law: a Taxonomy and its Implications’ in HCH Hofmann and A Türk (eds), *The Move to an Integrated Administration – Legal Challenges in EU Administrative Law* (Edward Elgar Publishing 2009) 9–33.

case decision-making into account, will not be subject to at least some form of cooperation from different jurisdictions. The application of hybrid procedures is increasingly frequent because it is attached to all procedures in which various procedural steps are undertaken in joint organizations or networks of authorities.³⁴

Information Management

The procedural obligations underlying administrative networks for implementation of EU law consist of obligations of different intensity. They range from obligations to exchange information either on an ad hoc or a permanent basis with network structures which have been developed to include forms of implementation such as individually binding decisions.³⁵ Therefore, a different and in my view currently promising approach to describing procedural cooperation consists of a focus on information management procedures.³⁶ The starting point for a wider notion of procedural cooperation lies in a conceptualization relating essentially to the flow of information between the participant executive branches. This perspective requires identification of the intensity and level of complexity of information exchange, and the pertinent obligations, as criteria for differentiating between different forms and levels of procedural cooperation. Reliance on these distinguishing characteristics derives from the fundamental idea that most forms of procedural cooperation in implementing EU policies are based on the joint production, gathering and management of information and/or exchange of information.

³⁴ This has been referred to as ‘regulatory concert’, see: S Cassese, ‘European Administrative Proceedings’ (2004) 68 *Law and Contemporary Problems* 15, 21.

³⁵ A prominent example of the latter is enforcement networks in the area of competition law with the ‘European Network of Competition Agencies’. See: Council Regulation (EC) 1/2003 [2003] OJ L1/1 and the Commission Notice on cooperation within the Network of Competition Authorities [2004] OJ C101/43.

³⁶ See D-U Galetta, HCH Hofmann and J-P Schneider, ‘Information Exchange in the European Administrative Union – An Introduction’ (2014) 20 *EPL* 65 with further references.

How to Deal with Procedural Cooperation by Information and Composite Procedures?

Some 20 years ago Schmidt-Aßmann published a seminal article establishing this view and describing the various forms of such administrative cooperation ranging from ad hoc single case information exchange to settled procedures involving ongoing administrative cooperation.³⁷ More recently, the ReNEUAL Model Rules on EU Administrative Procedure have developed a model of EU administrative procedure law on this basis.³⁸ Conceiving of information (including its generation, management and distribution) thus as a legal *topos*, the need for institutional routines in the form of legally defined structures of administrative cooperation — horizontally — between the Member States themselves and — vertically — between the Member States and the Union bodies is the fundamental approach of this concept. Cooperative procedures which have been developed in this context include certain forms of implementation such as individually binding decisions³⁹ and joint planning procedures.⁴⁰ Key to composite procedures however is the information cooperation discussed in

³⁷ E Schmidt-Aßmann, 'Verwaltungskooperation und Verwaltungskooperationsrecht in der Europäischen Gemeinschaft' (1996) *Europarecht* 270.

³⁸ www.reneual.eu. The results of the project have been published in English language online on the ReNEUAL website and in Spanish as *Código ReNUEAL de procedimiento administrativo de la Unión Europea* (INAP 2015), in German as *ReNEUAL – Musterentwurf für ein EU-Verwaltungsverfahren* (Beck 2015), in Polish as *ReNEUAL Model kodeksu postępowania administracyjnego Unii Europejskiej* (Beck 2015) and in Italian as *Codice ReNEUAL del procedimento amministrativo dell'Unione europea* (Editoriale Scientifica 2016) with French and Romanian language versions to follow in 2016.

³⁹ A prominent example of the latter is enforcement networks in the area of competition law with the 'European Network of Competition Agencies'. See, Council Regulation (EC) 1/2003 on the implementation of the rules on competition laid down in Article 81 and 82 of the Treaty [2003] OJ L1/1 and the Commission Notice on Cooperation within the Network of Competition Authorities [2004] OJ C101/43.

⁴⁰ Increasingly common are joint planning structures, in which EU law provides for the organization of the Commission (and sometimes European agencies) together with national agencies into 'planning networks'. An example of such a network is 'Eionet' (Council Regulation (EEC) 1210/90 [1990] OJ L120/1 and Council Regulation (EC) 933/99 amending Regulation 1210/90 on the establishment of the European Environment Agency and the European environment information and observation network [1999] OJ L117/1).

ReNEUAL's 'Book VI' which provides for innovative approaches as to how to address some of the central information-related shortcomings of composite procedures in the EU – most of which centre around matters of accountability, judicial review and remedies. Accordingly, as Schneider further develops in this volume, since the European administration is characterized – procedurally speaking – by the composite nature of many decision-making procedures, a major component of composite procedures is the inter-administrative exchange of information.⁴¹ Thus, information exchange is an important foundation of an integrated European administration.

Information exchange mechanisms are established in numerous fields of EU law and policies, generally on internal market matters,⁴² as well as in the area of many policy fields such as in food, plant and medicine health and safety regulation.⁴³ Another important area of such common alert systems is the Schengen information system and related instruments for immigration and border control mechanisms.⁴⁴ Most prominently, information exchange and alert systems exist in the area of tax and

⁴¹ D-U Galetta, HCH Hofmann and J-P Schneider, 'Information Exchange in the European Administrative Union – An Introduction' (2014) 20 EPL 65.

⁴² See in that respect e.g. the Internal Market Information System (IMI) with various functionalities for effective information exchange (Regulation (EU) 1024/2012 on administrative cooperation through the Internal Market Information System, etc [2012] OJ L316/1).

⁴³ See e.g. RASFF (Commission Regulation (EU) 16/2011 laying down implementing measures for the Rapid alert system for food and feed [2011] OJ L6/7), RAPEX (Commission Decision 2010/15/EU laying down guidelines for the management of the Community Rapid Information System 'RAPEX' [2010] OJ L22/1), EUROPHYT (Council Directive 2000/29/EC on protective measures against the introduction into the Community of organisms harmful to plants, etc [2000] OJ L169/1, Arts 12(4), 13(8) and 16). See also Commission and European Medicines Agency, 'Compilation of Community Procedures on Inspections and Exchange of Information' (2014) EMA/572454/2014 Rev 17, 14–29.

⁴⁴ Schengen Information System (The Schengen acquis – Declaration of the Executive Committee of 28 April 1999 on the structure of SIS [2000] OJ L239/1, Art 92; Regulation (EC) 1987/2006 on the establishment, operation and use of the second generation Schengen Information System (SIS II) [2006] OJ L381/4), Eurodac (Regulation (EU) 603/2013 on the establishment of 'Eurodac' for the comparison of fingerprints, etc [2013] OJ L180/1) and VIS (Regulation (EC) 767/2008 concerning the Visa Information System (VIS), etc [2008] OJ L218/60).

recovery of public payments but also in the fields of customs.⁴⁵ The transfer of information and evidence within enforcement networks can also lead to (the need for) the allocation of enforcement responsibilities in cases where several Member State bodies might be responsible. Examples are the allocation of responsibilities also undertaken on this basis in fisheries and environmental law.⁴⁶ Enforcement in the fields of competition law and merger control are also prominent examples of such allocative rules.⁴⁷

Although scholars of European administrative law have recognized the increasing importance of information exchange, the discussion still appears to be at an early stage.⁴⁸ Although composite administrative procedures allow for using existing national administrative infrastructure, they can be highly problematic from the point of view of accountability. One problem is transparency, especially since inter-administrative information exchange makes a clear allocation of responsibilities that depends on a clear definition of functions and tasks difficult. Without such clear allocation and definition, any form of anticipatory or subsequent accountability tools,

⁴⁵ See e.g. Council Directive 2011/16/EU on administrative cooperation in the field of taxation, etc [2011] OJ L64/1 establishing the CIS; Council Directive 2003/48/EC on taxation of savings income in the form of interest payments [2003] OJ L157/38, Art 9; Council Directive 2010/24/EU concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures [2010] OJ L84/1; Council Regulation (EU) 904/2010 on administrative cooperation and combating fraud in the field of value added tax [2010] OJ L268/1.

⁴⁶ See for example Art 50(5) and (7) of Regulation (EC) 1013/2006 on shipments of waste [2006] OJ L190/1, which provides that '5. Member States shall cooperate, bilaterally or multilaterally, with one another in order to facilitate the prevention and detection of illegal shipments.' '7. At the request of another Member State, a Member State may take enforcement action against persons suspected of being engaged in the illegal shipment of waste who are present in that Member State'.

⁴⁷ E.g. Art 9 on the referral of merger control cases to the authorities of the Member States in Council Regulation (EC) 139/2004 on the control of concentrations between undertakings (the EC Merger Regulation) [2004] OJ L24/1.

⁴⁸ See e.g. A von Bogdandy, '§ 25 – Die Informationsbeziehungen im europäischen Verwaltungsverbund' in W Hoffmann-Riem, E Schmidt-Aßmann and A Voßkuhle (eds), *Grundlagen des Verwaltungsrechts Bd. 2* (Beck 2012); K Heußner, *Informationssysteme im Europäischen Verwaltungsverbund* (Mohr Siebeck 2007); HCH Hofmann, G Rowe and A Türk, *Administrative Law and Policy of the European Union* (OUP 2011) 411–90.

such as design of procedural safeguards or allowing for effective judicial review, is severely restrained.⁴⁹

3. THE FUTURE OF THE INTEGRATED EUROPEAN ADMINISTRATION

Judging from the developments so far, the two main themes that have dominated the evolution of the European administrative space will probably continue to do so in the future. One is the question of accountability of a system in which actors organized on different levels engage in composite decision-making and procedures with participation from horizontal and vertical levels. Another is the question of values which govern the system of integrated administration.

Regarding the first, it would appear uncontroversial that administrative action, be it within the national or the European context, must be subject to supervision and accountability mechanisms of various kinds, whether exercised within — that is, by elements of — the administration itself, or externally through political and judicial mechanisms, in order to ensure conformity with the law and thus with policies established by the legislature. The question of establishing workable checks while finding an adequate balance between institutions is an old political and legal conundrum. In the European Union, the problem is that most structures of judicial and political accountability are organized on either the national or on the European level. Supervisory and accountability mechanisms are generally not procedurally linked in the same way as integrated administration is. They follow a traditional pattern of a

⁴⁹ For relevant sector-specific analysis see: F Boehm, *Information Sharing and Data protection in the Area of Freedom, Security and Justice* (Springer 2012); O-C Günther and N Tüchler (eds), *Exchange of Information for Tax Purposes* (Linde 2013); Á Gutiérrez Zarza (ed), *Exchange of Information and Cross-border Criminal Proceedings in Europe* (Springer 2015); J Sommer, 'Information Cooperation Procedures – with European Environmental Law Serving as an Illustration' in O Jansen and B Schöndorf-Haubold (eds), *The European Composite Administration* (Intersentia 2011) 55–89.

two-level system with distinct national and European levels. Such traditionally organized supervisory structures have difficulty in allocating responsibility for procedural errors and finding adequate remedies for maladministration within a network. They also have difficulty coping with the fact that the substance of administrative cooperation in composite procedures is in particular the joint gathering and subsequent sharing of information. For example, European agencies have indirectly been largely able to escape from judicial review both on the national and the EU level because their activities often take place in the realm of preparatory measures and collection as well as distribution of information needed for final decision-making only. Therefore, exclusive reliance on *ex post* review of a final act for example by Courts of the level – Member State or EU – which has issued the final act following a composite procedure, is problematic. A strong set of tools of accountability capable of addressing the real-life problems arising from information exchange and composite procedures would be necessary to secure individual rights and freedoms. To date, the integrated European administration is generally by design primarily geared towards ensuring effective decision-making in the context of de-central administration of a single legal space. Therefore, supervision of administrative activity in the EU suffers from some systemic problems, so to speak, the downside of a de-central, subsidiarity-oriented administrative structure. Some solutions to this problem are discussed by the Research Network for EU Administrative Law (ReNEUAL) Model Rules on EU Administrative Procedure.⁵⁰

Holding actors to account, however, requires a set of values and criteria for assessing the action. Here much clarification is necessary. Although the early Court of

⁵⁰ See n 39.

Justice in reaction to the evolving system of shared sovereignty within a European administration had already begun to develop general principles of law as yardsticks for review of activities of the High Authority of the European Coal and Steel Community,⁵¹ this development is ongoing. And today, 60 years later, there is still not a generally applicable set of basic rules of administrative procedure which transparently sets out concrete steps for compliance with basic constitutional principles outlined in the Treaties and the case law of the CJEU. The vast array of actors, forms of acts and applicable procedures within European administration make it difficult to assess to what extent constitutional values infuse the integrated administrative activity, and, more precisely, how general principles are complied with across the legal system.⁵² Requirements for accountability become particularly urgent in cases where administrative networks have been created within the European integrated administration which act on matters particularly sensitive to fundamental rights.⁵³ Holding administrations to account for compliance with procedures realizing constitutional values such as the rule of law, good administration, democratic participation, transparency and effective judicial protection is thus a contribution both

⁵¹ These concepts included *inter alia* the presumption of validity, the consequences for illegality, and the conditions for revocation of administrative acts, as well as the distinction between the non-existence and the nullity of administrative acts and the conditions for and consequences of the revocation of administrative acts, such as liability. See Case 4/54 *ISA v High Authority* EU:C:1955:3; Case 8/55 *Federation Charbonniere de Belgique v High Authority* EU:C:1956:7; Joined Cases 7/56 and 3-7/57 *Algera and Others v Common Assembly* EU:C:1957:7; Case 9/56 *Meroni v High Authority* EU:C:1958:7; Case 10/56 *Meroni v High Authority* EU:C:1958:8; Joined Cases 43/59, 45/59 and 48/59 *Von Lachmüller v Commission* EU:C:1960:37; Case 105/75 *Giuffrida v Council* EU:C:1976:128.

⁵² See for further discussion regarding rule-making: D Curtin, HCH Hofmann and J Mendes, 'Constitutionalising EU Executive Rule-Making Procedures: A Research Agenda' (2013) 19 *ELJ* 1, 3.

⁵³ See e.g. A Benz, 'European Public Administration as a Multilevel Administration: A Conceptual Framework' in M Bauer and J Trondal (eds), *The Palgrave Handbook of the European Administrative System* (Palgrave Macmillan 2015) 31–47 and M Egeberg, 'EU Administration: Center Formation and Multilevelness' in M Bauer and J Trondal (eds), *The Palgrave Handbook of the European Administrative System* (Palgrave Macmillan 2015) 66–78.

to the objective of the protection of individual rights as well as to an effective discharge of public duties by the administration.⁵⁴

In short, the European administrative space is populated by bodies which are organized either on the European or the national level but they cooperate intensely, primarily by procedures involving sharing of responsibilities and information. An integrated European administration has developed over time with the objective of administering the common legal space. It is a space in which both European and national administrative decisions can, because of EU law, have an effect beyond the territorial reach of a single state's jurisdiction. It is important that such de-territorialization through cooperative structures does not result in de-constitutionalization. Constitutional values and rights must also be maintained in cooperative structures. Anything else would result in de-legitimization of the growing degree of integrated administrations in Europe.

⁵⁴ C Harlow and R Rawlings, *Process and Procedure in EU Administration* (Hart Publishing 2014) 326; A-S Lind, 'Realizing fundamental Rights in Practice – a Quest for an Emerging European Administration' in A-S Lind and J Reichel (eds), *Administrative Law Beyond the State, Nordic Perspectives* (Martinus Nijhoff Publishers 2013) 218–29.