



**Faculty of Law,
Economics
and Finance**

Law Working Paper Series
Paper number 2009-06

Constitutionalising Networks in EU Public Law

Herwig C.H. Hofmann, University of Luxembourg
herwig.hofmann@uni.lu

16/04/2009



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Herwig C. H. Hofmann¹

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This paper has as objective to review some consequences of understanding EU law as the law of an integrated legal order. It does so in order to foster an understanding of EU public law beyond the traditional concepts of the EU as a quasi federal system or merely a refined international organization, a constitutional or an administrative legal order. This paper's objective is to initiate some reflection on what might be a step beyond imagining EU public law from traditional perspectives. It is a piece of work in progress, a contribution to an ongoing debate and reflection.

Introduction to the Problematique

Grossly simplified, one could apply two traditional perspectives to EU public law: A constitutional and an administrative perspective. These two can be used as examples to highlight two different aspects of EU integration through law. Looking at EU law from a perspective of administrative law, one might conclude that it contains procedural approaches for the integration of initially organizationally separate actors in order to achieve the goals of EU policies.² The constitutional

¹ Herwig C.H. Hofmann is Professor of European and Transnational Public Law and Director of the Centre for European Law at the University of Luxembourg, Luxembourg. (herwig.hofmann@uni.lu).

² See H.C.H. Hofmann, A. Türk, The Development of Integrated Administration in the EU and its Consequences, 13 *European Law Journal* [2007], 253-271. Pressing questions arising from that perspective are thus very much oriented towards achieving transparency of procedures, accountability of actors and allocation of responsibilities within non-hierarchical networks. An administrative perspective highlights that procedural cooperation has in many instances intensified so much that new actors were created. Comitology committees evolved out of a set of procedural rules for supervision of the Commission exercising implementing tasks. Informal networks of executive bodies became formalised to formal networks with decision-making powers and cooperate procedures, which then in many policy areas evolve to agencies.

perspective, on the other hand, highlights questions more from a perspective of rules of conflict to define the relations between the EU and Member States as well as between the EU and international organisations. This results from rules on distribution of competences and from principles established to solve competence conflicts. There is of course a lively debate about the appropriate use of conflicts rules such as hierarchies of norms, pluralist models or deliberative-supranationalist models.

The results of the constitutional and the administrative perspectives on EU public law could be discussed separately. A joint approach might on the other hand, allow taking into account that European integration has been based not only of establishing a legal order which was supplanted onto Member State law by means of constitutional conflicts rules such as supremacy and direct effect. It would allow acknowledging that it is equally based on a system that actively integrates Member States in a system of joint exercise of public powers. Integration, one might argue with neo-functional approaches was successful because it combined a system of conflicts rules with an increasing degree of procedural integration.³ These latter theories assume that Member States were capable of accepting such new legal order to which they had delegated sovereignty because they were actively part of the exercise of these powers. This was not completely alien to their domestic legal systems. Instead of constituting a loss of sovereignty as consequence of delegation, the Community constituted a gain for the Member States by being able to participate in the creation of policies which would be applicable throughout the Community. Integrated executives from this point of view have emerged from the fundamental needs of the Member States to link national and European administrations in order to maximise their problem solving capacity. The success of integration has been ascribed to the fact that pure intergovernmental structures would not be capable of addressing the joint regulatory problems of a market as integrated as the EU's. A federal structure, on the other hand, would threaten the very existence of the EU member states by establishing heavy hierarchic structures which the member states may not be prepared to support. The evolutionary development of the integrated executive structure was an alternative to that choice.⁴ The tool to achieve this goal was to achieve a high degree of integration of the executive powers of the Member States into

³ The end of the traditional 'binary' approach (distinguishing for internal matters national public law from international public law as the law of contracts between states), is of course not only a phenomenon of European integration. Networks of governmental executives with private party participation for regulation and information sharing exist in many policy areas beyond European integration from banking and finance regulation, over environmental protection and other fields of Common interest. The result of such networking has been referred to as the 'disaggregation of sovereignty' and the 'disaggregated state'. Anne-Marie Slaughter, *A New World Order*, Princeton University Press (Princeton 2004), pp. 5, 12.

⁴ W. Wessels, 'Verwaltung im EG-Mehrebenensystem: Auf dem Weg in die Megabürokratie?', in: M. Jachtenfuchs, B. Kohler-Koch (eds.), *Europäische Integration*, (Opladen, 1996); W. Wessels, 'An Ever Closer Fusion? A Dynamic Macropolitical View on Integration Processes', 35 *Journal of Common Market Studies* (1997) 267-299; W. Wessels, 'Comitology: fusion in action. Politico-administrative trends in the EU system', 5 *Journal of European Public Policy* (1998) 209-234.

activities on the European level, in all phases of what might be referred to as the 'policy cycle' – the phases of agenda setting, rule making and policy implementation in the Community.

Agenda setting, for example, despite being a prerogative of the Commission, is characterised by a high degree of cooperation and consultation of national executives. These in reality play a central role in shaping the Commission's policy initiatives. The forum in which this cooperation takes place are expert groups which are generally composed of national civil servants as well as independent experts. These groups are used to develop and test ideas, build coalitions of experts and pre-determine policy incentives to be formally presented later by the Commission as initiative. They are arenas for deliberation, brainstorming and intergovernmental conflict solving and coalition building.⁵

Similarly, supranational and national administrative actors exercise influence over the EU's decision-making process. The presence of the national administrations is felt mostly within the Council working parties that support COREPER. Here, the national civil servants have to balance their national mandate against the need to reach a consensus in pursuance of EU tasks.⁶

The most obvious arena for intensive administrative cooperation and interaction, however, is the implementation phase. EU administrative governance in the policy phase of implementation forms an essential part of the exercise of public power in the EU. A wide variety of activities pursued by the institutions qualify as implementation - they range from single case decisions and preparatory acts thereof to acts of administrative rule-making and the amendment of specific provisions in legislation where so authorised. A wealth of structures to take implementation decisions and forms of implementation measures have been developed in different policy areas. Amongst these are forms of governance by committees (through 'Comitology'-type and the newer 'Lamfalussy'-type procedures), governance by agencies, governance by administrative networks as well as implementation by private parties acting as recipients of delegation. These forms of implementation structures are not mutually exclusive. Most policies use several of these structures in combination. The current constitutional framework in the EU and EC treaties only partially reflects the evolutionary development of EU

⁵ See: T. Larsson, *Pre-Cooking - The World of Expert Groups*, ESO Report (Stockholm 2003); J. Trondal, Re-Socialising Civil Servants: The Transformative Powers of EU Institutions, 39 *Acta Politica International Journal of Political Science* [2004] 4-30; T. Larsson, J. Trondal, 'Agenda Setting in the European Commission', in H.C.H. Hofmann and A. Türk (eds.), *EU Administrative Governance* Elgar (Cheltenham 2006), 11-43; Ase Gornitzka, Ulf Sverdrup, Who Consults? The Configuration of Expert Groups in the European Union, 31 *West European Politics* 725-750.

⁶ See: C. Neuhold, E. Radulova 'The involvement of administrative players in the EU Decision Making Process', in H.C.H. Hofmann and A. Türk (eds.), *EU Administrative Governance* Elgar (Cheltenham 2006), 44-73. Such interaction, albeit to a lesser extent, also exists through what is known as the 'Open Method of Co-ordination'(OMC). See e.g. D. Hodson, I. Maher, The Open Method as a New Mode of Governance: The Case of Soft Economic Policy Co-ordination, 39 *Journal of Common Market Studies* [2001], 719-746; I. Linsenmann, C. Meyer, Dritter Weg, Übergang oder Teststrecke?, 25 *Integration* [2002], 285-297; C. de la Porte, Is the Open Method of Coordination Appropriate for Organising Activities at European Level in Sensitive Policy Areas?, 8 *European Law Journal* 2002, 38-58; S. Regent, The Open Method of Coordination: A New Supranational Form of Governance?, 9 *European Law Journal* [2003], 190-240).

policy implementation,⁷ which has been driven by practical necessity and political arrangements rather than designed around any preconceived constitutional model. In reality, we have not come across examples for pure forms of either direct or indirect administration without existing forms of cooperation between the national and the EU levels. Instead, in many policy areas, the development of the integration of EU and national administrative proceedings has led to ‘composite proceedings’ to which both national and EU administrations contribute.⁸ Administrative cooperation between the national and the European levels is well documented in the relatively formalized process of comitology.⁹ The Commission occupies a central role in the implementation phase in the framework of an institutional arrangement, which was developed in the 1960s with subsequently codified, with modifications in the first and second comitology decisions of 1987 and 1999 with the 2006 amendments.¹⁰ The Commission’s legal position in Article 202 third indent EC as presumed implementation authority is the expression of its functional role as Community executive.¹¹ This capacity allows the Commission to exercise a degree of political judgment as to how to execute the Community interest in cases where implementing competences have been delegated to the Commission. The Commission’s margin of manoeuvre is of course limited by the involvement of comitology committees in the implementation process.¹² The Commission’s margin of discretion in

⁷ References can be found in Articles 10, 202 and 211 EC.

⁸ See the detailed analysis of this term in E. Schmidt-Aßmann, ‘Der Europäische Verwaltungsverbund und die Rolle des Verwaltungsrechts’ in: Eberhard Schmidt-Assmann, Bettina Schöndorf-Haubold (eds.) *Der Europäische Verwaltungsverbund* Mohr Siebeck (Tübingen 2005) 1-23 and the contributions in E. Schmidt-Assmann, W. Hoffmann-Riem (eds.), *Strukturen des Europäischen Verwaltungsrechts* Nomos (Baden-Baden 1999) with further references. The integrated nature of composite procedures is also evident when regarding the process from the perspective of the EC’s obligations under international law. In the area of the denomination of geographical indications of foodstuffs and other products, for example, a WTO Panel reviewing a complaint against the EC took note “that there are various executive authorities involved in the implementation of the Regulation, including representatives of EC member States” and that the Commission represents all of the levels involved since (...) Community laws are generally not executed through authorities at Community level but rather through recourse to the authorities of its member States which, in such a situation, ‘act de facto as organs of the Community, for which the Community would be responsible under WTO law and international law in general’ WT/DS290/21/R, EC – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs, of 25/04/2005, para 7.147 and 7.148. See also: WT/DS301/R EC - Measures Affecting Trade in Commercial Vessels, of 22/04/2005 at paras 7.32 and 7.33.

⁹ Even though the Commission, or on referral the Council, will adopt the final decision, the deliberation and bargaining between the Commission and the national administrations creates a framework within which multilevel actors can find mutually agreeable solutions.

¹⁰ 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).

¹¹ See K. Lenaerts and A. Verhoeven, ‘Institutional Balance and Democracy’, in C. Joerges and R. Dehousse, *Good Governance in Europe’s Integrated Market* (OUP, 2002), p. 76. See also K. Lenaerts and A. Verhoeven, ‘Towards a Legal Framework For Executive Rule-making in the EU? The Contribution of the New Comitology Decision’, *C.M.L.Rev.* (2000) 645, at p. 653.

¹² The interaction between the Commission and national representatives is mainly characterised by a consensual approach, in which the Commission attempts to accommodate Member States’ interests as far as possible. The cooperation is therefore conducted mainly in the form of deliberation (C. Joerges and J. Neyer, ‘From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalization of Comitology’, *ELJ* (1997) 273-299),

the adoption of implementation acts is further reduced by its obligation, in certain cases, to secure the participation of affected third parties and must take account of their opinions.¹³ Further, the Commission must increasingly ensure that scientific expertise is integrated in the adoption of implementing measures.¹⁴ In reality, the Commission does not only have to act as decision-maker, but also as manager of formal and informal networks existing of Member State representations experts and private parties.¹⁵ The financial services sector has recently adapted the comitology process to suit its new approach to law-making and implementation in a cooperative procedure with Member State representation.¹⁶ The Financial Services Action Plan¹⁷ which set out an ambitious reform package to achieve a more integrated European capital market required for its implementation a new law-making structure. The first acts,¹⁸ adopted in accordance with the Lamfalussy approach and the Commission, have led to the adoption of several implementing measures.¹⁹ Even though the system is relatively new, the Lamfalussy approach has been extended beyond the securities market to the banking, insurance and investment funds sectors.²⁰ Similar to the matter of comitology, the recent growth in EU agencies does not so much constitute a move towards a federal executive on the European level, but shows all the characteristics of multilevel

although interest bargaining is not excluded. For a more general overview over the comitology discussion see e.g. ; M. Andenas and A. Türk (eds.), *Delegated Legislation and the Role of Committees in the EC* (Kluwer, 2000); C. Joerges and J. Falke (eds.), *Das Ausschusswesen der Europäischen Union* (Nomos Baden-Baden, 2000); C. Joerges and E. Vos, *EU Committees: social regulation, law and politics*, (OUP 1999); K. Lenaerts and A. Verhoeven, 'Towards a Legal Framework for Executive Rule-Making in the EU? The Contribution of the New Comitology Decision', 37 *CMLRev* (2000) 645-686; R. Pedler and G. Schaefer (eds.), *Shaping European Law and Policy: The Role of Committees and Comitology in the Political Process* (EIPA, Maastricht 1996).

¹³ In competition cases e.g., see Article 7(2) of Council Regulation 1/2003, [2003] OJ L 1/1.

¹⁴ This is a requirement under the case law of the ECJ and CFI, see e.g. C-212/91 *Angelopharm v Hamburg* [1994] ECR I-171 and T-70/99 *Alpharma v Council* [2002] ECR II-3495.

¹⁵ See C. Harlow, *Accountability in the European Union* (OUP, 2002), at p. 182.

¹⁶ See e.g. R. Lastra, The Governance Structure for Financial Regulation and Supervision in Europe, 10 *Columbia Journal of European Law* (2004), 49; N. Moloney, 'The Lamfalussy Legislative Model: A New Era for the EC Securities and Investment Services Regime', 52 *International and Comparative Law Quarterly* (2003) 509-520.

¹⁷ COM(1999) 232.

¹⁸ See Directive 2003/6/EC on insider dealing and market manipulation (market abuse), [2003] OJ L96/16; Directive 2003/71 on the prospectus to be published when securities are offered to the public or admitted to trading, [2003] OJ L 345/64; Directive 2004/39 on markets in financial instruments, [2004] OJ L 145/1.

¹⁹ See Directive 2003/124, [2003] OJ 339/70 and Directive 2003/125, [2003] OJ L 339/73 and Regulation 2273/2003, [2003] OJ L336/37.

²⁰ See Commission Proposal for a Directive to establish a new financial services committee organisational structure, COM(2003)0659 final. The proposal suggests the establishment of two new comitology committees, the European Banking Committee (EBC) for the banking sector and the European Insurance and Occupational Pensions Committee (EIOPC), which would assist the Commission in the implementation of legislative acts. These committees would be supplemented by two new advisory committees, the Committee of European Banking Supervisors (CEBS) and the Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS), which the Commission has already set up. The UCITS functions would be transferred to the ESC and CESR committees. The EP approved the proposal at its first reading on 31 March 2004. The Council agreed at its 2580th meeting (Economic and Financial Affairs) on 11 May 2004.

administrative interaction.²¹ Agencies have been created in several phases to deal with an increase in regulatory activity at Community level. European agencies are decentralised forms of administration that integrate national administrative bodies into their operation by providing structures for co-operation between the supranational and national level and between the national authorities.²² Agencies often pursue their tasks within a wider administrative setting²³ that includes other patterns of EU implementation, such as comitology. European agencies are therefore separate, but auxiliary to the Commission's implementing tasks.²⁴ Their auxiliary function, their more limited decision-making power and their linkage with national administrations, distinguish European agencies from their US counterparts.²⁵ Although in some respects they conform to the 'network' concept that has emerged in political science, European agencies differ in other important respects from this concept, as they are not designed to create a non-hierarchical link with private actors, but provide a channel for the input of different public actors.²⁶ The Member States and the Commission can exercise control over the agencies through the management board, in which they are generally represented and which provides annual reports of the agency's work.²⁷ Finally, less formal structures of administrative interaction in the implementation phase are established in the form of administrative networks. Administrative networks, that have been created and adapted to the needs of each policy area, gather information, organize planning or co-ordinate the enforcement of Community law. They integrate the supranational and national administrative bodies within a structure designed to conduct joint or co-ordinated implementing action. Also, where implementation tasks are entrusted to private bodies, such as in the field of European standardization, the relevant national actors are integrated into a supranational framework. In this sense, the administrative networks encompass various forms of cooperation both in the 'vertical' relation between the European Commission and agencies on one hand and the Member States' agencies on the other, as well as the 'horizontal' cooperation directly

²¹ Agencies integrate national and supranational actors into a unitary administrative structure and mostly operate within a wider administrative framework in which they pursue specific functions. See: T. Groß, 'Die Kooperation zwischen europäischen Agenturen und nationalen Behörden', *Europarecht* (2005) 54-68.

²² On the decentralised integration model, see E. Chiti 'Decentralisation and Integration into the Community Administrations: A New Perspective on European Agencies', 10 *ELJ* (2004), pp. 423-431; D. Geradin and N. Petit, 'The Development of Agencies at EU and National Levels: Conceptual Analysis and Proposals for Reform', *Jean Monnet Working Paper* 01/04, 33 (www.jeanmonnetprogram.org/papers/04/040101.pdf).

²³ E. Chiti, 'Decentralisation and Integration into the Community Administrations: A New Perspective on European Agencies', 10 *ELJ* (2004), p. 419.

²⁴ E. Chiti, 'Decentralisation and Integration into the Community Administrations: A New Perspective on European Agencies', 10 *ELJ* (2004), 419-423 at p. 419.

²⁵ E. Chiti, 'Decentralisation and Integration into the Community Administrations: A New Perspective on European Agencies', 10 *ELJ* (2004), 429-430 at p. 419.

²⁶ E. Chiti, 'Decentralisation and Integration into the Community Administrations: A New Perspective on European Agencies', 10 *ELJ* (2004), p. 419, at pp. 425-428

²⁷ Exceptions to this model exist most notably in the structure of the European Monitoring Centre on Racism and Xenophobia (Council Regulation 1035/97, [1997] OJ L 151/1) and the European Food Safety Agency (Regulation 178/2002 of the European Parliament and Council, [2002] OJ L 31/1).

between different national agencies. These vertical and horizontal relations in practice consist of obligations of different intensity. They range from obligations to exchange information either on an ad-hoc or on a permanent basis. A more intense form is the obligation to assist other administrations by providing administrative support or joint planning. Finally, they can reach as far as using Member States administrations as types of EU agencies, where the EU level decides on the type and scope of activities to be undertaken in individual cases on the national level in single cases.²⁸

Such network structures which regulate vertical as well as horizontal relations between actors at national and EU levels have as their task the effective enforcement of Community rules by integrating national regulators into a Community framework.²⁹ Such formalised administrative network structures function with or in addition to the comitology and Lamfalussy system and the establishment of agencies. They supplement the executive position of the Commission in the implementation of Community law.³⁰ Network structures can play a role both when it comes to the preparation for the conditions of implementation of EU policies through individual administrative decisions as well as in the decision-making process itself. An example of the former are networks created to structure information. Another category are the increasingly common joint planning structures in Europe, in which EU law organises the Commission (and sometimes European agencies) together with national agencies into ‘planning networks’.³¹ In other policy areas, the network structures have been developed to include forms of implementation which will include individually binding decisions such as the ‘enforcement networks’ in the area of competition law enforcement.³² Finally, there are forms of implementation which, on the face look like traditional, decentralised implementation by Member State administrations. As a result of the influence of EU law, they have however developed specific forms of administrative activity which are no longer limited to the territory of a Member State. This form of network effect can be referred to as ‘trans-

²⁸ For further analysis see E. Schmidt-Assmann, ‘Der Europäische Verwaltungsverbund und die Rolle des Verwaltungsrechts’ in: Eberhard Schmidt-Assmann, Bettina Schöndorf-Haubold (eds.) *Der Europäische Verwaltungsverbund* Mohr Siebeck (Tübingen 2005) 1-23 and the contributions in E. Schmidt-Assmann, W. Hoffmann-Riem (eds.), *Strukturen des Europäischen Verwaltungsrechts* Nomos (Baden-Baden 1999).

²⁹ See the ‘European Regulators Group’ in the telecommunications sector (Decision 2002/627), the ‘Committee of European Securities Regulators’ in the financial services sector (Decision 2001/527 [2001] OJ L191/43) and the ‘European Competition Network’ (Council Regulation 1/2003 [2003] OJ L1/1).

³⁰ Further types of measures have been established for example with respect to the ‘open method of cooperation’. Here the Council decides on guidelines and establishes, where appropriate, quantitative and qualitative indicators and benchmarks - see No 37 of the Presidency Conclusions of the Lisbon European Council on 23 and 24 March 2000, http://www.europarl.eu.int/summits/lis1_en.htm#e.

³¹ A prominent example of such a network is the ‘European Information Observation Network’, ‘Eionet’ (Council Regulation 1210/90 of 7 May 1990, OJ 1990 L 120/1 and Council Regulation 933/99 of 29 April 1999, OJ 1999 L 117/1, amending Regulation 1210/90 on the establishment of the European Environment Agency and the European environment information and observation network). See for further reference: G. Sydow, ‘Strukturen europäischer Planungsverfahren’, 56 *Die Öffentliche Verwaltung* (2003), pp. 605-613.

³² See: Council Regulation 1/2003, [2003] OJ L 1/1; Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), [2004] OJ L 24/1.

territorial' effect of administrative activity. It results from administrative acts by national administrations which have effect outside of their own jurisdiction born from obligations of mutual recognition of administrative acts. This is necessary, for instance, to coordinate the administration of the single market by different national authorities.

European integration has therefore developed over time very much driven through the establishment of a network of integrated executives for the creation and implementation of matters within the sphere of EU law. This system of procedural integration of executives covers both the areas traditionally reviewed from the constitutional as well as from the administrative perspective. It however, is not always visible from the outside because they are generally procedural preparation for final administrative or legislative decisions either on the Member State or the EU level. Rules and principles governing the cooperation have often not only been provided for in the Treaties, more often they have evolved out of institutional practice.³³ This difference between the formal order of the EU and the reality amounts to an organisational 'gap.' The gap exists between the reality of actors involved in creating and implementing EU policies in comparison to the procedures and institutions to be found when reading the (already complex forms of act and procedures provided by the) founding Treaties.³⁴ A challenge to EU public law theory exists in developing approaches that take into account both the open and the hidden realities. Such 'realist' understanding might be referred to as the material constitution of the EU.

This organisational gap leads also to an 'accountability gap.' The latter gap arises due to different degrees of integration between what in a traditional separation of powers system would be referred to as the legislative, executive and judicial powers. On the European level, the high degree of integration of executive powers is often not matched by an equal level of integration of legislative and judicial powers. This leads to imbalances and problems with supervision and control of the executive. It is a consequence which has been deplored with respect to Member States executives becoming more powerful vis-à-vis their national parliaments due to the possibility of escaping political accountability at home by engaging in EU level rule-making.³⁵ This problem has been addressed by strengthening of the EP and effective judicial control of EU law in the ECJ. However,

³³ Cite 11/70 Köster und aus ELJ Topology article discussion of using institutional practice for arguing in favour of amending Treaty provisions.

³⁴ At the origin of this word-play seems to be Deirdre Curtin with various publications e.g. D. Curtin, *Mind the Gap: the Evolving EU Executive and the Constitution*, Walter van Gerven Lectures, Europa Law Publishing (Groningen 2004).

³⁵ This is generally explained by the fact that conferral of powers from the national to the supranational sphere often affect or even undermine the separation of powers typically established within a state. Since it is generally the executive branch of government representing the state towards the outside, this branch of government gains powers through participation in the exercise of this power on the supranational level which nationally would have remained with the legislature. See with further considerations for the consequences of delegation e.g. D. Sarooshi, *International Organisations and their Exercise of Sovereign Powers*, Oxford University Press (Oxford 2005) 15.

the important difference between an integrated executive and the accountability systems are that on one hand, there is an integrated executive cooperating closely in agenda setting, policy making and policy implementation. Integration has become so intense that it is often not possible to discern the locus of responsibility for the final outcome. On the other hand, there is a two-level reality of political (parliamentary) and judicial supervision and control of executive actors. This results in structural imbalances for effective accountability. The accountability gap therefore arises between the extent and intensity of executive integration in reality and the capabilities of control and supervision of executive actors.

This has consequences not only for our understanding of the role of the EU/EC and the Member States in Europe but also for the analysis of key aspects such as accountability of exercising public powers in Europe. The latter aspect is the key challenge arising from this integration. The question therefore is whether, in view of the evolution of integrated executives, forms of accountability have equally been created. It is not a given that the accountability structures would automatically appear in comparable time and speed. Not least because the highly integrated network system has been developed in a non-coordinated approach through experimentalist approaches pioneered in individual policy areas.

The challenges EU public law faces is to align various options of *ex ante* and *ex post* modes of control and supervision from executive, parliamentary and judicial forms to allow for both transparent and effective exercise of public powers.³⁶

Integrated Executives

A more in-depth look at accountability structures for integrated executives action in formal and informal both legislative and administrative-type activities confirms this gap. The actors belonging to the European or Member State executives acting in the networks are *inter alia* subject to a system of checks and balances from within the integrated executive. Such forms include, hierarchical and non-hierarchical arrangements. 'Internal' supervision of executive activities from within the executive networks can be divided into a number of areas of focus.³⁷ They take into account various multi-level, network and composite elements and their associated complexities and include:

³⁶ Above, in the chapter re-thinking the challenges arising from administrative law, it was found that accountability can be considered from three different perspectives aligned to the classical separation of powers as executive supervision, political (parliamentary) supervision and judicial supervision.

³⁷ The complexity of these mechanisms is best illustrated by the in-depth discussion by G. C. Rowe, Administrative Accountability of Executives, 15 *Administrative Law Review* [2009 forthcoming].

- internal supervision within the Commission (e.g. through institutions so diverse as the need for collegiate decisions in the Commission, the role of the Hearing Officer in certain administrative procedures or the role of OLAF as internal control organ);
- hierarchical supervision of European executive and regulatory agencies by the Commission for Community agencies and by the Council for Union agencies;
- supervision exercised by specialised and independent authorities within the EU and vis-à-vis Member State actors. These include actors such as OLAF, the European Data Protection Supervisor, the Ombudsman (although this actor is linked to the EP, one might regard him as part of parliamentary supervision);
- supervision by the Commission of Member State executives for example in the area of implementation of EU policies or in the area of state aids;
- scrutiny by Member State executives of Commission action especially in Comitology committee settings (with possibilities of recourse to the Council) and expert groups. Also supervision by Member State executives of agencies through membership in supervisory bodies;
- involvement of Member State executives in Council working groups;
- 'inter-state' supervision between Member States, that is, supervision of measures of one Member State by the administration of another Member State (for example, in the fields of bank, insurance and securities regulation) as well as with respect to maintaining the correctness of information in information networks (e.g. SIS II data correction possibilities) and by means of the very rare Article 227 EC procedure;
- supervision internal to the administrations of the Member States within fields of EU action; supervision of *sub-national* and *municipal* authorities within the Member States e.g. in the area of public procurement and state aids but also the use of structural funds;
- supervision within composite procedures of input from other members of an administrative network.
- supervision of executive action by private parties involved in procedures, e.g. by lobbyists in legislative and rule-making procedures and e.g. complainants in single-case administrative procedures.
- supervision of executive action by the wider public through access to information possibilities.

Looking at this long yet necessarily only indicative list of options, it becomes apparent that executive supervision and control takes place in an integrated manner when it comes to executive functions

generally undertaken in network structures. Challenges exist in respect to transparency and allocation of responsibility in networks.

This picture is quite different from parliamentary and judicial forms of supervision, which may illustrate the accountability gap. That gap arises from the difference between these intricate network control and supervision structures of integrated executives in comparison to the possibilities of a two-level set-up of parliamentary and judicial control and supervision structures.

Two-Level Parliaments

Parliamentary supervision can but does not have to rely on formal remedial elements or competences to generate binding results. Supervision by parliaments can also rely more on forcing the publication of information, and voting strength. This will lead to the passing of motions and questioning of individuals. More formal powers include the appointment of individuals to positions of responsibility, allocation of budgets and delegation of powers through legislation. The forms of parliamentary supervision in the EU exist either on the European or the Member State level. The parliaments are integrated only to a very limited degree, generally maintaining a strict two-level structure: The EP supervises and controls activities on the European level undertaken by EU actors; The Member States' national (and where relevant sub-national parliaments) control national governments in their exercise of powers within the executive networks and in Council. The difficulties for a two-level parliamentary supervision in view of a highly integrated executive are the very difficulty of allocating responsibilities in executive network structures. Networks are generally designed to produce effective results but render the allocation of responsibilities problematic, often due to a lack of transparency of the roles of individual actors. One possible remedy to this problem might be to also integrate parliamentary supervision and control procedures. However, in reality the existing forms of parliamentary cooperation are much less developed than those of executive cooperation. Cooperate approaches,

- National parliaments' possibility to cooperate amongst each others and with the EP. A forum for such cooperation has been created by members of the European affairs committees of the national parliaments and MEPs who regularly hold meetings in the framework of 'The Conference of European Affairs Committees' (COSAC). COSAC meetings not only serve to exchange information, they also serve to coordinate efforts of

political supervision by concerted action between the parliaments.³⁸ COSAC will continue to be an important forum for parliamentary exchange about methodology and substance of parliamentary supervision of executive activities.³⁹

- The Treaty of Lisbon also occasionally provides for direct involvement of national parliaments in supervision of European agencies and their administrative activities. Articles 85 (1)(b) and 88 (2)(b) TFEU, for example, require legislative acts to lay down the procedures for ‘the evaluation of Eurojust’s activities’ and ‘for scrutiny of Europol’s activities’ by the EP and national Parliaments.
- Also provided for in the Treaty of Lisbon is the possibility of Article 12 TEU, MS parliaments by review of compliance of legislative proposals with the principle of subsidiarity
- European political parties, so far only marginally organised, could help to reinforce political networks also within parliaments.
- Informally the work of the EP’s Ombudsman is supported by the activities of the national and regional ombudsmen in the Member States, organized in a ‘European Network of Ombudsmen.’ This serves to provide mutual support and exchange of views. The network was established in order to address potential lacunae in the Ombudsman’s supervision of administrative activity.⁴⁰ The idea is to be able to transfer complaints between the European and the relevant national and regional ombudsmen. Thereby complaints should be automatically handled by the ombudsman in charge of the administration being the source of alleged maladministration. However, the strict organic distinction of competences also within the network of ombudsmen can lead to difficult situations in composite administrative procedures. To address these problems a special procedure was developed through which national or regional ombudsmen may ask for written answers to queries about EU law, its interpretation and its application to special cases from the EO. The EO either provides the answer directly or, if appropriate, channels the query to another EU

³⁸ For further reference to history and functioning of the COSAC see www.cosac.eu and from the literature e.g.: H. Matthieu, La COSAC, une instance européenne à la croisée des chemins, [2005] *Revue du Droit de l’Union européenne* 343 – 362; K. Pöhle ‘Das Demokratiedefizit der EU und die nationalen Parlamente’ (1998) 29 *Zeitschrift für Parlamentsfragen* 77-89; J. Rideau ‘National Parliaments and the European Parliament - Cooperation and Conflict’ in Eivind Smith (ed.) *National Parliaments as Cornerstones of European Integration* (London, Den Haag, Boston 1996) 159-178.

³⁹ See Article 10 of the Protocol (No 1) to the Treaty on European Union (Lisbon) on the Role of National Parliaments in the European Union.

⁴⁰ For a detailed description, see C. Harlow, R. Rawlings, Promoting Accountability in Multi-Level Governance: A Network Approach, *European Governance Papers* No. C-06-02, 19-27 (<http://www.connex-network.org/eurogov/pdf/egp-connex-C-06-02.pdf>).

institution.⁴¹ Cooperation between the Ombudsman and similar authorities and authorities concerned with protection of fundamental rights in the Member States is permitted in accordance with the relevant national law.

This said however, the network characteristics of executive integration in the EU do not facilitate effective parliamentary supervision organised either on the Member State or on the European level. The intense executive cooperation for the creation and implementation of law is a fast-paced activity, in which responsibilities are often distributed amongst many different actors.

Two-Level Judiciary

Judicial supervision of action of the integrated executive as well as the various legislative bodies in the EU is undertaken either by Courts on the Member State level or on the EU level. Judicial review of actions at first view seems well linked. Maduro for example explains the success of European integration as being based on the concept of supremacy and direct effect at least in part by the ECJ having developed an elaborate system of cooperation between Courts. He finds that

‘The ECJ is the highest court of this legal system and therefore enjoys the monopoly of interpretation of the rules. But the success of this process of creation of a European legal order was only possible because the Court looked for and found the cooperation of different national legal actors. For this, it also had to ‘negotiate’ with those actors, in particular, but not only, with national courts.’⁴²

Many important cases of the ECJ’s history reached the ECJ as references for a preliminary ruling under Article 234 EC. This preliminary reference procedure, which can be requested by any national Court assured that the relations between the Courts were non-hierarchic in so far as national law could not – against the explicit wording of Article 234 EC - request the exhaustion of national remedies prior to a request for preliminary ruling by the ECJ. The result is a system in which the national judge is also a Community judge and supremacy of Community law does not imply inferiority of national Courts.

However, equally characteristic of the preliminary reference procedure is that the ECJ only decides the Community law aspects of cases. The final decision of the case rests with a national judge. Also, in some dimensions, individuals were put on the same level as Member States. Individuals were

⁴¹ European Ombudsman, Annual Report 2006, 129

⁴² M. Maduro, ‘Contrapunctual Law: Europe’s Constitutional Pluralism in Action’, in: Neil Walker, *Sovereignty in Transition*, Hart (Oxford 2003), 501-538, at p. 512.

empowered by Article 234 EC in combination with the principles of supremacy and direct effect to enforce Community law and to request the review of the compliance of national provisions with Community law.

Problems with this cooperation in view of integrated executives arise from the fact that the cooperation structures provided through Article 234 EC are a one-way street only. They only allow for vertical cooperation initiated by national courts. Other dimensions of a network such as vertical cooperation initiated by the ECJ or horizontal cooperation between Courts are not provided for. The latter might be particularly helpful in the context of judicial review of the increasing amount of composite procedures in the areas of implementation of policies and executive rule-making.

The Two Gaps - Consequences

Judicial and parliamentary integration are far less developed than executive integration. For accountability of the system this has consequences. Integrated executives function through the notion of strong procedural cooperation in various forms of networks. This organisational element is only marginal for the work of parliaments and judicial review. Procedurally they act separately. There is thus a gap between the forms of organisation of activities and their major accountability mechanisms. Accountability and supervision mechanisms, especially possibilities of judicial review mostly follow the traditional pattern of a two-level system with distinct national and European levels much more closely than the executive bodies. Such traditionally organised supervisory structures face difficulties in allocating responsibility for errors during the procedures and finding adequate remedies for poor performance within a network. They also have difficulties coping with the fact that the substance of executive cooperation in composite procedures is the joint gathering and subsequent sharing of information.

Legal realists will acknowledge these facts as part of their review of the institutional and procedural architecture of the system of EU public law. In absence of strong networks for shared and procedurally integrated judicial and parliamentary review, it seems that responsibility for review of all forms of action by executives and networks needs to be undertaken. In other words, what is required is a clearer recognition of the actual transformations that have taken place within European institutional architecture and to adapt the approaches to accountability therein. This requires not only transparency in structures, procedures and access to information. It also requires matching *ex ante* and *ex post* supervision and control structures to the realities of the forms of exercise of public powers in the EU. It is not sufficient to cling to a vision of separation of levels when those structures

in reality would seem very unrealistic in the way the modern system of EU public law is. It seems more promising to develop adapted approaches.

Approaching the Future Challenges

From a legal 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. The integrated nature and the reduced role of clear separation of powers requires careful thinking for maintaining transparency for example with respect to allocation of responsibilities for action and accountability of actors. Since most of the network structures in European law have developed in an evolutionary, trial and error fashion, often in single policy areas, 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. It can be repeated with respect to other problems of European governance. The Treaty of Lisbon is a step in that direction by leading to a certain degree of harmonisation throughout the former pillar structure. Its proposed typology of acts and procedures however is far from a simplification and might not make all that much of a difference in reality.

Looking at a systematisation of approaches and clarification of accountability mechanisms has often loosely be termed 'constitutionalisation'.⁴³ What is necessary in my view is to develop a 'network constitution' to address the different network integration problems. Such would not have to be a formal constitutional treaty or even a treaty amendment. A material constitution establishing rules and principles through case law, general principles and common accords for addressing real problems of a networked and integrated legal order might suffice. Such 'network constitution' will thus be specifically a process-oriented material constitution of the EU. In establishing these basic constitutional provisions, it is however necessary not stand paralysed and frozen in an outdated conceptional fiction of a two-level legal system in which powers and competences can be neatly distinguished and kept apart. The reality is marked by fading borders and clear limitations between public and private, international, supranational, national and sub-national. This in turn reduces the importance within the EU of notions of territorial reach of public law, and sovereignty as a concept

⁴³ See e.g. C. Joerges, M. Everson, Law, economic and politics in the constitutionalization of Europe, in: E.O. Eriksen, J. E. Fossum, A.J. Menéndez, *Developing a Constitution for Europe*, London-New York (Routledge 2004), 162-179.

of something which needs to be protected against encroachments from the 'outside'. Instead the search can be for the best political solution to a problem and the best procedural mix of actors involved for the task at hand. This will not be the end of separate actors such as the Member States. It instead argues more for a lawyers' focus on framing conditions for transparency and accountability in joint and composite procedures created to realistically reach public goals for which joint action is necessary.

A network constitution as material constitution therefore does not replace the Treaties or in any way encroach on their scope of applicability. It would instead be a collection of concepts, rules and principles established to address network issues arising from the reality of the EU legal system. Some elements for a network constitution exist of course. These are concepts that *inter alia* address requirements within network situations. They include rights and obligations in the area of access to information, obligations of justification, principles of good administration, rules on delegation and supervision of delegated powers, principles of law such as proportionality and others more. Other attempts at establishing elements of constitutionalising a network system have been much less of a success. This can for example be seen in the Treaty of Lisbon's models for linking the European and national levels in rule-making and policy implementation. Here, the Treaty of Lisbon provides for a two different procedures in Article 290 TFEU on delegated acts and Article 291 TFEU on implementing acts. The parallel existence of both categories raises the question of why to differentiate between the two categories of sub-legislative act?⁴⁴ The differentiation shows that the problem of the distinction between delegated acts and implementing acts needs to be seen in view of differing conceptions of multi-levelism consistent in the EU. A more federal-style model would follow an approach of distinguishing clearly between a two-level structure with the Member States on one level and the EU as quasi-federal structure on the other. The Treaty of Lisbon's strengthening of executive federalism by legal definitions in Articles 290 and 291 FEU, however, runs fundamentally counter to the developments in reality of an ever more integrating legal system in the EU. The EU is thus in reality characterised by its multi-level cooperative structures, designed to include the different

⁴⁴ Two explanations seem plausible. First, the distinction between the two categories of act can be interpreted in view of the historic development as the result of a compromise between two schools of thought on the horizontal separation of powers between Community institutions which were represented within the convention leading to the Constitutional Treaty: One opinion held that the Commission as the prime EU executive body should play an eminent role in implementing and forming EU legislation. This approach would argue in favour of far reaching delegation to the Commission, which would have resulted in stronger 'regulatory' legitimisation of the Union. The other school of thought claimed that a restricted and controlled role of the Commission in implementing EU law can be achieved by implementation under the supervision of comitology or similar procedures to parliamentary supervision. Thus the strengthening of the EP's position in the area of delegated acts through the new comitology procedure called 'regulatory procedure with scrutiny' introduced in the 2006 Comitology Decision. Both opinions are represented in the solution of the Lisbon Treaty. See: H.C.H. Hofmann, Legislation, Delegation and Implementation under the Treaty of Lisbon, 15 *ELJ* [2009] forthcoming.

decision-making levels and generate knowledge in the administrative system prior to taking decisions.⁴⁵

Such considerations as to a network constitution might be well accompanied by establishing best practice approaches in EU administrative sphere.⁴⁶ So far in the reality of EU law, there is often a growing gap between the prolific creation of new forms of administrative action in the EU and their regulatory framework and embedding in various control and legitimacy mechanisms. EU legislation has been a true laboratory of experimental institutional and procedural design. This richness however has led to an overburdening complexity of often overlapping rules and principles. It can lead to a lack of transparency, predictability, intelligibility and trust in European administrative and regulatory procedures and their outcome. One of the key issues to be addressed in this context is the great potential but also need for simplification. A creation of a best-practice approach might thus serve to improve visibility, transparency, allocation of responsibility and accountability of administrative and more generally executive action in the EU.

These attempts should contribute to addressing the issue of public accountability. It seems important though to me to stress that such accountability can not be established by internal checks and balances within a system of integrated executives alone, as important as these internal structures may be. Also the parliamentary and party political aspects as well as the judicial aspects are important. On the European level, there is often not so much a deficit of democracy and representation of interests as a deficit of truly political debate. Politicising the policy choices made in the integrated legal system is an important part of parliamentary supervision and control of executive action in networks.

The review of EU public law both from what generally might be viewed as a constitutional and an administrative point of view therefore has shown us that in many cases first appearances in EU law might be false. An attempt to frame a legal system along constitutional understanding well familiar to a scholar of, for example, a federal constitutional model risks not creating legal structures adapted to addressing the challenges which the legal system of EU law. The challenge is to develop of network accountability by constitutionalising networks that fit the specific nature of the EU. That is defined by its nature of exercising shared sovereignty by integrated executives and the ensuing network character of an increasing amount of actors and procedures in policy areas. The normative challenge for lawyers in EU public law is to develop the transparency, accountability structures from all sides.

⁴⁵ See for further analysis of the developments of the past decades is further developed in H.C.H. Hofmann, A. Türk, 'The Development of Integrated Administration in the EU and its Consequences', 13 *European Law Journal* [2007], 253-271 and H.C.H. Hofmann and A. Türk, 'Conclusions - Europe's Integrated Administration', in H.C.H. Hofmann and A. Türk (eds.), *EU Administrative Governance* Elgar (Cheltenham 2006).

⁴⁶ See for example the in-depth analysis by O. Mir Puigpelat, 'Die Koodifikation des Verwaltungsverfahrensrechts im Europäischen Verwaltungsverbund', in: *Die Verwaltung Beiheft 8*, Duncker und Humblot (Berlin 2009) 177-210.