



Legal Challenges in EU Administrative Law

Towards an Integrated Administration

Edited by

Herwig C.H. Hofmann

Alexander H. Türk

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Preface

This book is a collection of contributions to the conference entitled ‘European Administrative Law – The Move Towards an Integrated Administration’ held in Luxembourg in February 2007. The editors would like to thank the Fonds National de la Recherche Luxembourg and the Centre of European Law at King’s College London for their generous financial support for the conference and the book project.

Introduction: towards a legal framework for Europe's integrated administration

Herwig C.H. Hofmann and Alexander H. Türk

This book aims to explore the legal challenges for the dynamically developing field of EU administrative law. They arise most importantly from the development towards an integrated administration in the EU.¹ The book's task is to contribute to a deeper understanding and discussion of this development's underlying concepts and consequences. The contributions to this book look at how to ensure accountability, legality, legitimacy and efficiency of the actors involved in administration in the EU and their actions. In short, this volume is a contribution to the developing understanding of the fast evolving area of EU administrative law.

The development towards today's system of integrated administration of the EU has been defined through the evolution of legal, political and administrative conditions of administering joint policies. Legal problems of an integrated administration exist against the background of the transformation of both the EU Member States and the E(E)C and EU in the process of European integration. National administrations had developed under national public law as state-specific structures. These reflected different identities, historical traditions of organization and certain underlying values such as regionalization or centralized unification within a state. The effect of European integration has been to open Member States' public law systems, obliging them to establish administrative institutions, bodies and procedures required for an effective exercise of shared sovereignty under the system of EU law. The reality of integrated administration thus is the story of the development of a system of decentralized yet cooperative administrative structures.

An explanation of this phenomenon lies in the fact that implementation of EU legislation is still undertaken mostly at the level of the Member States. However, uniform application of the provisions and the creation of

¹ See for the development of the concept Herwig C.H. Hofmann and Alexander H. Türk (eds) *EU Administrative Governance*, Edward Elgar Publishing (Cheltenham, 2006).

an area without internal frontiers require cooperation and coordination. Such cooperation and coordination can take place, for example, through information exchange, joint warning systems, coordinated remedies for problems arising and a wealth of other similar systems. Since the Single Market programme in the late 1980s and early 1990s, increasingly diverse forms of implementation of EU/EC law have been developed, mostly aimed at providing for joint administration of EU/EC policies. These types of cooperation have mostly taken the form of administrative networks with participants from the Member States (MS), Community institutions and private parties. Administrative cooperation between the national and European administrations has reached levels of sophisticated complexity. The main characteristic of structures of administrative cooperation is their procedural nature. These structures now increasingly integrate European and national administrations to a degree well expanding an understanding of the EU as a quasi-federal two-level structure.²

Integrated administration in Europe is therefore not so much a multi-level system in the sense of a hierarchy superimposed on MS administrations.³ It is rather a system of integrated levels the inherent characteristics of which are relevant to the understanding of the conditions for legitimacy and accountability of administrative action in Europe. Questions which need to be addressed from a legal point of view are mostly related to assuring procedural and substantive rights for individuals, sub-national and national actors and establishing a system in which accountability of the exercise of public powers within networks is ensured. The questions are how to provide for accountability through supervision structures in joint planning and implementation, comitology and agency networks as well as in composite, multi-stage administrative procedures. More abstractly formulated, the issues which need to be faced in the legal debate very often depend on an understanding of the exercise of public powers within the EU through increasingly non-hierarchic network structures.

This book has organized the contributions to this set of questions in three parts. The first part contains different perspectives on integrated administration. The second part of the book focuses on the structural

² See e.g. Paul Craig, *EU Administrative Law*, Oxford University Press (Oxford, 2006); J. Hayward and A. Menon (eds), *Governing Europe*, Oxford University Press (Oxford, 2003).

³ Many of the developments of administrative cooperation across jurisdictions have certain parallels in some federal legal systems. Despite this, the EU legal system has taken such a specific evolutionary path that many of the problems arising are distinct and require specific understanding from an EU, a constitutional and an administrative point of view.

forms and procedural models of integrated administration. The third part then looks at more specific questions of assuring accountability and quality of decision-making in integrated administration through various forms of judicial and administrative supervision, as well as ensuring elements such as transparency and participation. In the concluding chapter, we then seek to summarize and further develop solutions for the legal challenges arising from integrated administration.

The first part of the book presents different conceptualizations of administrative cooperation in the EU. Edoardo Chiti discusses models of cooperative administration in the EU in the area of single-case decision making for the implementation of EU law across the range from indirect administration over bottom-up and top-down procedures to direct administration. Paul Craig's chapter enlarges this perspective towards forms of 'shared administration', thereby including administrative rule-making. The notion of shared administration originated from the Committee of Independent Experts investigating the alleged misconduct of the Santer Commission in 1999. Shared administration in this definition encompasses forms of administrative cooperation for the management of Community 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 'is thus central to the delivery of Community policies', notwithstanding the fact that the nature of the powers accorded to the various actors differs considerably from one policy area to another. Paul Craig's critical spotlight falls on the *modus operandi* of shared administration in various policy areas, using as examples energy law, telecommunications law and general competition law.

The first part of the book focussing on concepts thus gives an impression of the multiple forms in which issues of integrated administration are discussed in current legal debate. The legal challenge consists in structuring the procedures to allow for, on the one hand, an effective discharge of public tasks without a large central European bureaucracy, as well as, on the other hand, establishing an effective system of transparency and accountability through forms of judicial, administrative and political supervision. These problems arise in all forms of integrated administration, whether they are called bottom-up or top-down procedures or are referred to as shared administration. The difficulties often arise from the specific mixes of policy tools such as mutual assistance, comitology committees, agency networks, multi-stage composite procedures and the like in the different policy areas.

These topics are largely the subject of the second part of the book, which opens with two contributions to the continuing debate about the system of comitology, one of the central structures for cooperative administrative rulemaking and decisionmaking. Christine Neuhold looks at the role and possibilities of parliamentary supervision through the European Parliament of EU-specific developments in the field of comitology over time. Political supervision of integrated administration in the form of interaction between the Commission and comitology committees is one of the central issues of the accountability of these structures. Such supervision is situated not only at the interface between national and European decisionmaking but also between scientific expertise and political as well as executive decisionmaking. Neuhold sets out to explore avenues of increasing modes of accountability of comitology procedures which will be interesting also with respect to the post-Lisbon debate. This analysis is followed by Manuel Szapiro's outlook on the future of comitology, especially the 2006 comitology reforms and consequences of the Lisbon Treaty. His evaluation begins, like that of Neuhold, with the observation that despite considerable efforts towards increasing transparency since 2000, there are serious structural problems to allocating responsibility, especially within the more complex comitology committee procedures. The evolutionary nature of EU administrative law and policy nowhere becomes more evident than with respect to comitology. Changes within the constitutional framework will impact on the conditions for administrative cooperation as well as the forms of accountability and supervision of comitology, which has developed as a major structure of vertical cooperation between Member States and the Community executive as well as a structure of horizontal cooperation between Council and Commission, and to a certain degree the European Parliament. This will have profound consequences for the debate on accountability and legitimacy of the EU executive and its integration with Member State administrations.

Next to comitology, agencies are a central form of integrating administrations in the EU into administrative networks. Michelle Everson's contribution to this book analyses the development of agencies mainly from a perspective of whether they represent a 'considered and appropriate response to the technical demand for EU regulatory action' or whether they 'might also go that one step further, promising a significant renewal in Monnetist integration methods'. Thereby she touches upon the very discussions which have bedevilled the issues of comitology for the past half century such as accountability of network actors in non-hierarchic relations. She enquires how to achieve the balance between independence and accountability cumulating in the demand that '*no one* party controls the agency, yet the agency is under control'. The additional problem *vis-à-vis*

comitology is that agencies have not yet benefited from the more systematic approach in the field of comitology as reflected in the comitology decisions of 1987, 1999 and 2006. Everson concerns herself however not only with organizational aspects but with the very nature of a broad delegation of powers to technocratic executive bodies acting within a network. She warns against an all too powerful political administration arising not least due to the impossible task of distinguishing 'technical' risk evaluation and assessment from 'political' risk management decisions.

In addition to the structural aspects of comitology and agencies, several procedural developments of integrated administration require attention. Amongst these are the rise of composite administrative procedures involving actors from different EU jurisdictions, as well as the rise of administrative cooperation between the EU and third country administrations. The former topic is addressed by Herwig Hofmann. He explores the increasingly integrated nature of administrative procedures in EU law. Composite procedures in which actors from national and European administrations interact in multi-stage proceedings create problems not only for the political supervision of their activities, but also for their judicial review. Hofmann highlights that it is the particularly informal nature and the purpose of information exchange which exacerbate supervision problems.

Questions of international administrative cooperation are highlighted in the contribution by George Bermann on transatlantic regulatory cooperation. He outlines with the example of EU–US regulatory cooperation how international administrative cooperation can raise problems of accountability and supervision and presents solutions which are not dissimilar to those addressed within the EU.

The third part of this book turns to forms of accountability and supervision more generally. Gerard Rowe's contribution opens this part by looking at the various forms of administrative supervision of integrated administration. While supervision is a consequence of the rule of law, the principle of democracy and that of good administration, he cautions that operational effectiveness must be achieved together with 'an appropriate balance between supervisory needs'. His contribution takes a critical view of the overall complexity and lack of systematic approach to the design of administrative supervision within the EU.

This discussion leads to Alexander Türk's analysis of judicial review of integrated administration. Therein he looks at the forms of remedial action and the lacunae of judicial supervision of administrative activity within the network structures prevalent in EU administrative law. His topic and his analysis reveal that the underlying concept of judicial review in EU law is based on a traditional quasi-federal two-level model in which a neat separation between the European and the Member State levels, each

with distinctive responsibilities, was possible. The chapter shows that the reality is far more complex and that means of judicial review in the EU have not been adapted to meet the challenges posed by the fast-paced evolutionary development of integrated administration in the EU.

Joana Mendes's chapter then illuminates a different aspect of the debate by looking at questions of participation by individuals in integrated administrative procedures within the EU – both with respect to single-case decisions and administrative rulemaking. She uses the example of state aid control for undertaking this study and carefully draws general conclusions from this example.

The contribution by Christopher Bovis looks at an alternative model of administrative integration. Public procurement rules influence the interface between the private and the public spheres of actors, and the rules developed to govern public procurement procedures in the EU have established a highly sophisticated toolkit to ensure individual rights and reviewability of decision-making in this twilight zone. Much can be learnt from a study of the solutions found in this area of European administrative law, not least due to the fact that the tools applied therein are not traditionally administrative in the narrow sense of the word.

Many of the rights developed in the framework of an increasingly integrated administration have been associated in one way or another with the notion of good administration or good governance. Hanns Peter Nehl critically evaluates the claim that good administration constitutes a general principle or specific right of EU law. He does so in the context of procedural rights of individuals. He critically reviews the contribution of specific general principles of law under the umbrella term good administration to the fine-tuning of rights in the context of EU administrative law.

This volume closes with a summary of the results of the various studies assembled in this book. The conclusions set out some possible solutions to the difficulties which the movement to an ever more integrated administration in Europe poses. The approach we advocate is to adapt forms of supervision and accountability to the network nature of EU administrative law. This requires thinking beyond the traditional solutions developed in administrative law.

PART I

Models

1. The administrative implementation of European Union law: a taxonomy and its implications

Edoardo Chiti

1. PURPOSE

What are the main schemes for the administrative implementation of European Union law? Do they tend to converge around a general mechanism of joint execution, based on the stable cooperation among the national administrations and between the latter and the European authorities, as it is often assumed in the current scientific discussion on the European integration process? If this is the case, do the specific forms of joint execution vary from case to case or is it possible to identify certain prevailing models? And what are the distinguishing features of the emerging models, both in organizational and functional terms?

Such questions have received increasing attention by legal scholarship, which in recent times has proposed a number of classifications of the various schemes for the administrative execution of European Union law. For example, it has been argued, in line with the traditional approach to the subject, that administrative implementation in the European Union legal order is still essentially a matter of direct and indirect execution and responds to the general model of executive federalism.¹ In a different vein,

¹ See, for example, S. Kadelbach, 'European Administrative Law and the Law of a Europeanised Administration', in C. Joerges and R. Dehousse, *Good Governance in Europe's Integrated Market*, Oxford (Oxford University Press, 2002), pp. 167 ff., where it is argued that direct and indirect execution are governed by two distinct bodies of administrative law, while a third set of legal provisions is that of national rules and institutes governing sectors without direct relation with the implementation of EU policies but nevertheless influenced by EU law. See also J. Ziller, 'Introduction: les concepts d'administration directe, d'administration indirecte et de co-administration et les fondements du droit administrative européen', in J.-B. Auby and J. Dutheil de la Rochère (eds.), *Droit Administratif Européen*, Bruylant (Brussels, 2007), pp. 235 ff., where it is stated that '*la co-administration n'est pas à proprement parler une troisième catégorie d'administration*

an influential reconstruction has juxtaposed the notion of executive federalism with the notion of ‘networks of administration’, pointing to ‘the complex interaction between supranational and national administrative bodies in the enforcement of EU law’ and identifying four main ‘structures of EU administrative governance in the policy phase of implementation’, namely governance by committees (including the Lamfalussy type procedures), governance by agencies, governance by administrative networks and governance by private parties acting as recipients of delegation.² Further, an important study on European administrative law has carefully analysed the ‘shared management’ in the implementation of the Common Agricultural Policy and the Structural Funds.³

communautaire, qui serait apparue chronologiquement après l’administration directe et l’administration indirecte La co-administration n’est que la coordination des deux types d’administration, directe et indirecte, qui passe par différentes modalités organisationnelles . . . : c’est la distinction entre administration directe d’une part, administration indirecte de l’autre qui reste la clé de compréhension, et ceci tant qu’il n’y aura pas une réforme radicale des compétences et modes de saisine de la Cour de justice et du Médiateur européen’. It should be noticed that the connection with the model of executive federalism is not always explicitly made: see for example J.P. Jacqué, *Droit Institutionnel de l’Union Européenne*, 3rd edition, Dalloz (Paris, 2004), pp. 758 ff. For the use of such notion see K. Leanerts, ‘Regulating the Regulatory Process: “Delegation of Powers” in the European Community’, [1993] *European Law Review* 23; more recently, P. Dann, ‘European Parliament and Executive Federalism: Approaching a Parliament in a Semi-Parliament Democracy’, [2003] *European Law Journal* 549f.

² The reference is to H.C.H. Hofmann and A.H. Türk (eds), *EU Administrative Governance*, Edward Elgar (Cheltenham, 2006); see in particular H.C.H. Hofmann and A.H. Türk, ‘An Introduction to EU Administrative Governance’, p. 1 f., where the notion of ‘networks of administration’ is presented; H.C.H. Hofmann and A.H. Türk, ‘Policy Implementation’, p. 74, discussing the main structures of EU administrative governance in the policy phase of implementation referred to in the text; H.C.H. Hofmann and A.H. Türk, ‘Conclusions: Europe’s Integrated Administration’, p. 573.

³ P. Craig, *EU Administrative Law*, Oxford University Press (Oxford, 2006), p. 57. See also J.Á. Fuentetaja Pastor, *La administración europea. La ejecución europea del derecho y las políticas de la Unión*, Civitas (Navarra, 2007); and C. Scott, ‘Agencies for European Regulatory Governance: A Regimes Approach’, in D. Gerardin, R. Muñoz and N. Petit (eds), *Regulation through Agencies in the EU: A New Paradigm of European Governance* (Cheltenham and Northampton, MA, Edward Elgar 2005), p. 67, at p. 67, where it is observed that the different components of the European regulatory system ‘are widely dispersed among different organisations, at different levels, and of both governmental and non-governmental character’; this essay, however, essentially aims at reconstructing the main models of regulatory governance currently in play at the supranational level, leaving aside the analysis of the mechanisms of administrative integration underlying the existing regime types.

Yet, the existing classifications do not fully clarify the matter. It is easy to object to the reaffirmation of the direct–indirect dichotomy by saying that it over-simplifies or simply ignores the developments of legal reality in the last two decades: during that time, co-operation among national administrations and among national administrations and European authorities in the implementation of EU law has assumed such a quantitative and qualitative challenge to be no longer captured within the traditional model of executive federalism and distinction between centralized and decentralized administrative action.⁴ As for the identification of modes of administrative governance implying intense cooperation between national and European powers, one can only be deeply sympathetic with the overall intuition concerning the emergence of a European integrated administration. Furthermore, there is little to disagree with in the observation that EU administrative governance structures differ considerably according to the different policy areas, where administrative settings are elaborated in response to specific needs and in an evolutionary way, outside a genuine relation with general EU administrative law.⁵ Yet, the proposed classification of the modes of EU administrative governance in the policy phase of implementation seems on the one hand to catch only certain structures, on the other hand to be susceptible of further elaboration, in particular in so far as the ‘network’ category is concerned.

It may be useful, then, further to reflect on the possibility of a taxonomy of the various schemes for the administrative implementation of European Union law. Such an attempt could improve our understanding of the overall features of the European administrative system, meant as a body of organizations and procedures made up of national and European components and aimed at the exercise of European functions. In particular, it could contribute to identifying to what extent the descending phase of the European regulatory process is a matter of cooperation among national and European administrations and to what extent it is left to the action of national or European authorities only; and which forms of administrative cooperation may be considered as emerging models in the process of administrative implementation of EU rules and policies.⁶ Yet, a

⁴ For a first formulation of the necessity to go beyond the traditional dichotomy to give a proper account of the developments of legal reality see E. Chiti, ‘The Emergence of a Community Administration: The Case of European Agencies’, (2000) *Common Market Law Review*, vol. 37, 309.

⁵ See, e.g., H.C.H. Hofmann and A.H. Türk, ‘Conclusions: Europe’s Integrated Administration’, above n. 2, 584.

⁶ The present chapter, therefore, aims at contributing to the reconstruction of one specific dimension of the EU administrative governance. For an account of the forms of administrative cooperation in the various phases of the European

classificatory effort could also provide the basis for carrying out a number of specific inquiries, such as those concerning the processes of negotiation, cooperation and adjustment among public powers within the European administrative system, the effectiveness of its way of functioning and its possible reforms, the accountability and normative foundations of the European administrative system, the scope and meaning of the tendency towards the 'Europeanization' of the national administrations and the position of private parties (individuals, undertakings, lobbies, consumers' associations, etc.) *vis-à-vis* the European public powers.

In the following pages, we will try to present a taxonomy of the main schemes for the administrative execution of European Union law and policies (section 2). We must clarify that the inquiry will consider the phase of administrative implementation only, leaving aside the different stage of normative implementation, which probably represents the most investigated dimension of the EU administrative governance, at least as far as delegated rulemaking and technical standards are concerned, and in any case deserves autonomous consideration.⁷ The method used for the elaboration of such taxonomy is simple enough: it is based on the empirical observation of legal reality, in an attempt to identify the processes of emergence and consolidation of legal institutes and regulatory schemes; further, it takes into consideration both organizational and procedural elements, on the assumption that the mechanisms of administrative execution of European Union law and policies essentially depend on the combination of organizations and proceedings. This approach will lead to identifying four main types of administrative execution of European Union law: indirect execution (section 2 a), execution implying the provision of bottom-up mechanisms of administrative integration (section 2 b), execution implying the provision of top-down mechanisms of administrative integration (section 2 c) and direct execution. As will become clear, such classification essentially reflects the different degree of involvement of the supranational component and its possible combination with the

policy cycle see E. Chiti and C. Franchini, *L'integrazione amministrativa europea*, Il Mulino (Bologna, 2003), in particular chapters I–III; and H.C.H. Hofmann and A.H. Türk (eds), *EU Administrative Governance*, above n. 2.

⁷ Among the most recent contributions on delegated rule-making see in particular the comprehensive study by M. Savino, *I comitati dell'Unione europea. La collegialità amministrativa negli ordinamenti compositi*, Giuffrè (Milan, 2005); on standardization as a specific form of administrative integration see E. Chiti, 'La normalizzazione', in S. Cassese (ed.), *Trattato di diritto amministrativo* vol. IV, *Diritto amministrativo speciale*, 2nd edition, Giuffrè (Milan, 2003), p. 4003, where the distinguishing features of the European common administrative system responsible for standardization are analytically reconstructed.

transnational component. Some general implications of the proposed taxonomy will be briefly discussed in the last section (section 3).

2. THE MAIN SCHEMES FOR THE ADMINISTRATIVE IMPLEMENTATION OF EUROPEAN UNION LAW

a. Indirect Execution

The first scheme for the administrative implementation of European Union law is that of indirect or decentralized execution.

The functional rationale of such a regulatory scheme is manifold, as indirect execution responds simultaneously to the exigency of preserving the autonomy and traditional prerogatives of the Member States,⁸ of the objective of insulating the Commission from the influence of the national authorities, and of the need to exploit the best equipped organizations, '*les puissantes machineries des Etats*',⁹ for the purpose of the implementation of European law.

Three elements characterize this model of administrative execution. Firstly, it is based on a clear-cut distinction between lawmaking, representing the core of European Union action, and administrative execution, which is left to the exclusive responsibility of national administrations. Secondly, national administrations are expected to pursue European Union objectives while remaining anchored in their own domestic administrative systems. Thirdly, the competent administrations of the various Member States operate autonomously one from the other, given the absence of mechanisms of reciprocal coordination.

It would be erroneous, however, to believe that indirect execution entirely excludes any involvement of the European authorities in the implementation process. Actually, the European authorities intervene in such process both informally, through the many contacts taking place with the relevant national offices, and formally, through the exercise of control tasks, as happens in the monitoring function which the Commission carries out in the administrative phase of the enforcement proceedings under Article 226 of the EC Treaty. In addition to this, by virtue of the normative integration between domestic and supranational sources

⁸ S. Cassese, 'Le basi costituzionali', in S. Cassese (ed.), *Trattato di diritto amministrativo* vol. IV, 2nd edition, *Diritto amministrativo speciale*, Giuffrè, (Milan, 2003), p. 173, 293.

⁹ J. Monnet, *Mémoires*, Fayard (Paris, 1976), p. 436.

realized in the Community pillar by the combination of the supremacy and direct effect doctrines, the national administrations do not operate as domestic agencies giving execution to international obligations taken by the State, but rather as offices of decentralised implementation of the law of a unitary legal order. European Union regulation, moreover, may influence, directly or indirectly, the organization and the way of functioning of the national administrations: the most common case is that in which the European regulation requires of the Member States the establishment or identification of an administration with specific tasks and organizational features; for example, Article 9 of Directive 2006/24, aimed at harmonizing the retention of data by service providers for the purpose of the investigation, detection and prosecution of serious crimes, requires each Member State to designate one or more independent authorities to be responsible for monitoring the application within its territory.¹⁰

b. Bottom-up Mechanisms of Administrative Integration

The second scheme for the administrative execution of European Union law implies the provision of bottom-up mechanisms of administrative integration.

The simplest case is that in which EU objectives are pursued through stable and formalized cooperation among the competent national administrations without any form of coordination by the Commission or other European bodies. This case represents a specific development of the scheme of indirect execution, as EU regulation makes the competent national administrations subject to specific requirements of mutual assistance, while at the same time avoiding European coordination. For example, the Council Framework Decision 2006/960, on the one hand, requires the effective and expeditious exchange of information and intelligence between the law enforcement authorities of the various Member States as a EU objective, functional to the more general EU target of a high level of security for EU citizens; on the other hand, it establishes a set of detailed rules of cooperation among the Member States' law enforcement authorities through which such an objective may be achieved.¹¹ It

¹⁰ Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, OJ 2006 L 105, p. 54.

¹¹ Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union, OJ 2006 L 386, p. 89.

should be highlighted that cooperation among national administrations may also take place on a voluntary basis. This situation is exemplified by the European military forces responsible for the carrying out of specific operations under the European security and defence policy, which do not necessarily have plenary composition but are constituted by national and multinational contingents made available only by the states or groups of states opting for participation in the mission on a case by case basis.¹²

A more elaborate bottom-up mechanism of administrative integration is represented by the establishment of transnational 'European common systems', meant as forms of composition of organizations and activities referring to the European and the national levels of administration taken together.¹³

Some examples are provided by the system for police information coordinated by Europol,¹⁴ the system for transnational investigations and prosecutions coordinated by Eurojust,¹⁵ and the system for training of senior officers of police forces coordinated by the European Police College (Cepol).¹⁶

In all these cases, the EU discipline expressly divides the administrative tasks necessary to carry out the relevant European function among a plurality of national, mixed and European administrations, with the exclusion of the Commission. All such offices are thus jointly responsible for the achievement of specific European objectives and the function is distributed on various levels. For example, the tasks necessary to carry out the function of police information are conferred, at the European level, on Europol, the collegiate body composed of the Heads of Europol

¹² On the features of the European Security and Defence administration see E. Chiti, 'The European Security and Defense Administration Within the Context of the Global Legal Space', NYU School of Law, Jean Monnet Working Paper 7/2007.

¹³ On the notion of 'European common system' see S. Cassese, 'European Administrative Proceedings', in F. Bignami and S. Cassese (eds), *Law and Contemporary Problems*, vol. 68, 2004, n. 1, *The Administrative Law of the European Union*, p. 21 ff.

¹⁴ Convention based on Article K.3 of the Treaty on European Union, on the establishment of a European Police Office (so called Europol Convention), in OJ 1995 C 316, p. 49.

¹⁵ Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime, OJ 2002 L 63, p. 1, as amended by Decision 2003/659/JH, OJ 2003 L 245, p. 44.

¹⁶ Council Decision 2000/820/JHA, OJ 2000 L 336, p. 1, amended by Decision 2004/567/JHA, OJ 2004 L 251, p. 20, and repealed by Council Decision 2005/681/JHA of 20 September 2005 establishing the European Police College (CEPOL) and repealing Decision 2000/820/J, OJ 2005 L 256, p. 63.

National Units, the Liaison Officers and the Joint Supervisory Board; at the national level, the tasks are conferred on the National Units, the competent national authorities and the National Supervisory Bodies.

A second common feature is the provision of several instruments of administrative integration among the various competent bodies. Such instruments may have organizational or procedural character and differ from case to case. In all hypotheses, however, the instruments of administrative interconnection envisaged by the EU discipline determine the integration of the various competent offices in a functionally and structurally unitary administration. For example, in the case of the system coordinated by Cefpol, the effect of administrative integration is achieved both by subjecting the national police training institutes in the Member States to a general obligation of cooperation with Cefpol and by setting up in each state a 'Cefpol national contact point'. This contact point may be organized as the state sees fit, but should preferably be composed of the Member State's delegation to the Cefpol Governing Board; and again its function consists in ensuring effective cooperation between Cefpol and the national training institutes.

The third and last common element is the conferment of the role of coordinator of the overall European common system to an EU office endowed with legal personality and designed as a mechanism of administrative cooperation. In particular, such an office constitutes a mechanism of 'bottom-up' cooperation – that is to say a mechanism of association of the national bodies, where cooperation, though encouraged and structured, remains on an essentially voluntary basis. Moreover, this administrative cooperation involves national administrations only, assigning an absolutely marginal position to the Commission. For example, the internal organization of Europol gives 'voice' to the national security administrations, distinguishing between the bodies at the top of the national administrative systems, which are 'represented' in the Management Board and in the Financial Committee, and the police forces, which are 'represented' in the expert committees set up with reference to specific technical issues. The Director, the Deputy Directors and the employees of Europol, instead, are called to be guided in their actions by the objectives and tasks of Europol and not to take or seek orders from any government, authority, organization or person outside Europol. Such a position of independence, however, is not sufficient to identify a supranational element within Europol and may be better reconstructed in negative terms, as an ab-national element, as the Director and the Deputy Directors are appointed and may be dismissed by a decision of the Council, and the Director is in charge of the staff. As for the Commission, the Convention simply provides that it is invited to attend meetings of the Management Board with non-voting

status, clarifying that the Management Board may decide to meet without the Commission representative.¹⁷

c. Top-down Mechanisms of Administrative Integration

The third scheme for the execution of European Union law implies the provision of top-down mechanisms of administrative integration. As in the previous case, such a scheme finds several applications, characterized by the different degrees of complexity of the mechanisms of administrative integration envisaged.

In the systematic perspective of this chapter, it seems possible to identify five main types of top-down mechanisms of administrative integration. The first one is characterized by the establishment of European common systems composed of national and European independent authorities. In this case, EU regulation distributes the administrative tasks that are necessary to carry out the relevant European function among a variety of national and European offices provided with a specific status of independence *vis-à-vis* the economic power and the European and the national political power. This implies that the Commission, as a body independent of the national governments but linked to the political majority expressed by the European Parliament, is not granted any power or task in the exercise of this function. As for independence of the competent bodies, such status is pursued through the provision of a number of organizational arrangements aimed at allowing the European and the national bodies to act in a position of neutrality with respect to all those interests which could influence and condition their decisions. The most obvious example is that of price stability: the relevant administrative tasks and powers are distributed by EU regulation among the national central banks and the European Central Bank, whose independence is required by the EC Treaty in so far as the latter provides that, while exercising their powers and carrying out their duties and tasks, neither the European Central Bank, nor a national central bank, nor any member of their decision making bodies is allowed to seek or take instructions from any other national or supranational body; and that the European and national bodies undertake to respect this principle and not to seek to influence the members of the

¹⁷ An analogous discipline is laid down with reference to Cepol, while the role of the Commission seems to be more promising in the decision establishing Eurojust and in its rules of procedure, where it is established that the Commission shall be fully associated with the work of Eurojust, in accordance with Article 36(2) of the Treaty on the European Union (Articles 11 of the establishing decision and 21 of the rules of procedure, OJ 2002 C 286, p. 1).

decision making bodies of the European Central Bank or of the national central banks in the performance of their tasks.¹⁸

Moreover, the competent national and European offices are interconnected through a number of organizational and procedural instruments, which produce the effect of their integration in a functionally and structurally unitary administration. This is particularly clear in the case of price stability, where the unitary character of the administrative network is formally recognized by the EC Treaty, which establishes a 'European System of Central Banks' (ESCB), and put into place by a detailed regulation laid down by the Treaty itself and the ESCB Statute. The latter, in particular, regulates tasks of the various competent bodies and their administrative relations. One example is provided by Article 14 (3)–(4) of the Statute, providing that the national central banks shall act in accordance with the guidelines and instructions of the European Central Bank, and that the Governing Council of the latter shall take the necessary steps to ensure compliance with those guidelines and instructions and shall require that any necessary information be given to it.¹⁹

In addition to this, the function of coordination of the European common system is conferred on the European authority participating in the network. The design of such European authority is peculiar, as it not only constitutes a body which is granted a particularly incisive independence, but also represents a mechanism of cooperation among the national independent authorities which have a voice within the European body itself. For example, the Governing Council of the European Central Bank, one of the two collegiate bodies governing, according to the Treaty provisions, the European System of Central Banks is composed of all the members of the Executive Board of the European Central Bank and the governors of the national central banks of the Member States, and it is therefore envisaged as an office intended to create and manage a plurality of relationships involving the national independent administrations.

The result is a construction partly correspondent to and partly differing from the European common systems coordinated by Europol, Eurojust

¹⁸ On the independence of the European Central Bank see, *ex multis*, R. Smits, *The European Central Bank*, Kluwer (The Hague, 1997); C. Zilioli and M. Selmayr, *The Law of the European Central Bank*, Hart (Oxford, 2001); A. Malatesta, *La Banca centrale europea*, Giuffrè (Milan, 2003).

¹⁹ On the evolution of the national independent authorities into independent federal authorities see in particular F. Merusi, 'Le autorità indipendenti tra riformismo nazionale e autarchia comunitaria', in F.A. Grassini (ed.), *L'indipendenza delle autorità*, Il Mulino (Bologna, 2000), p. 19; F. Merusi and M. Passaro, 'Autorità indipendenti', in *Enciclopedia del diritto*, Giuffrè (Milan, 2003), VI updating, p. 143 ff., p. 146.

and Cepol. As in those cases, the relevant administrative tasks are distributed among a plurality of national and European offices; the various competent bodies are integrated in a functionally and structurally unitary administration; and the body responsible for the coordination of the overall system is a European body designed in such a way as to structure and develop administrative cooperation among the national authorities. At the same time, however, the European common systems exemplified by the European System of Central Banks are peculiar insofar as they represent networks of independent powers, inclined to interconnect in a self-referential sub-system by sector. Moreover, the European body acting as the coordinator of the system, though built as a mechanism of association of the national bodies, finds its essential regulation in the Treaty itself and is engaged in a number of relations with the European institutions, such as the European Parliament. In this sense, the establishment of this type of European common system may be considered a top-down rather than a bottom-up mechanism of administrative integration.

The second type of top-down mechanism of administrative integration for the administrative execution of European Union law is characterized by the establishment of European common systems composed of national independent authorities, a European independent authority in embryo and the Commission. This is the case, for example, of the second generation of Community directives in the sector of telecommunications²⁰ and of the regulation of the sector of gas and electricity.²¹

²⁰ As is well known, the first generation of Community directives in the matter of telecommunications were issued between 1990 and 1997 and were aimed at deregulating the market and establishing a common system of regulation; the second generation dates to March 2002 and was aimed at establishing a convergence of the sectors including telecommunications, the mass media and information technologies within a unitary regulatory framework, as well as the convergence of the organizational arrangements. See, for the purpose of the present analysis, Directive 2002/21 of the European Parliament and of the Council of 7 March 2002, OJ 2002 L 108, p. 33, on a common regulatory framework for electronic communications networks and services (so called Framework Directive) and Commission Decision n. 627/2002 of 29 July 2002, OJ 2002 L 200, p. 38, establishing the European Regulators Group for Electronic Communications Networks and Services.

²¹ See Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003, OJ 2003 L 176, p. 37, concerning common rules for the internal market in electricity and repealing Directive 96/92/EC; Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003, OJ 2003 L 176, p. 57, concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC; and Commission Decision n. 796/2003 of 11 November 2003, OJ 2003 L 296, p. 34, on establishing the European Regulators Group for Electricity and Gas.

In these fields, EU regulation envisages the direct involvement in the implementation process of the national independent regulators, which are granted specific powers and tasks. National independent regulators, moreover, are themselves integrated in a unitary administration by means of the provision of a number of 'horizontal' relationships as well as, in certain cases, by the unitary configuration of the 'network' of the various regulators *vis-à-vis* third parties: a legal situation which is particularly clear in the 'framework directive' in the sector of telecommunications. In addition to this, EU regulation places some strictures on the autonomy of the states, with respect both to the organizational features of the regulatory authority and to its way of functioning. Thus, for example, the 'framework directive' in the matter of telecommunications provides that the tasks assigned to the national authorities by European norms shall be entrusted to a competent body, legally distinct and functionally independent of the operators; that it shall exercise its powers impartially and in a transparent manner; and that it shall respect some basic procedural principles, such as participation and cross-examination according to the notice and comment model.

However, the distinguishing feature of this mechanism of administrative integration is the establishment at the Community level of a collegiate body, composed of representatives of the national regulators and exercising a number of relevant tasks, ranging from providing assistance to the Commission and to the Member States, to the promotion of codes of conduct and control over the enforcement of Community law. Such a collegiate body, usually defined as the 'European group of regulators', shows some signs of independence: by virtue of its composition, it reflects the status of the national regulators, which are independent *vis-à-vis* the national governments; and the president or chairperson is elected from among the heads of the national regulatory authorities or their representatives. At the same time, however, independence is not always expressly recognized with respect to the Commission,²² but is also often associated with the work of the Group and has to approve the rules of procedure adopted by the Group.²³

²² See, e.g., Commission Decision 2002/627, establishing the 'European Regulators Group for electronic communications networks and services', OJ 2002 L 200, p. 38, which limits itself to providing that the group represents an 'independent advisory group' (Art. 1) that shall provide an interface between the national regulatory authorities and the Commission in such a way as to contribute to the development of the internal market (sixth recital).

²³ See, e.g., Article. 2(4) of Commission Decision 796/2003 of 11 November 2003, OJ 2003 L 296, p. 34, on establishing the European Regulators Group for Electricity and Gas, which provides that the Commission 'shall be present at the

Moreover, the establishment of a European collegiate body acting as a European independent authority in embryo is compensated for by the attribution to the central Community administration, assisted by a number of committees, of a position of functional pre-eminence, particularly evident in the telecommunications sector. Far from removing the tasks and powers of the Commission, therefore, the setting up of a collegiate body with a certain degree of independence takes place in the context of a complex system, centred around the coordinated action of the European Group of Regulators, the Commission and the competent expert and comitology committees. It should also be noted that the overall system is characterized by the different degree of independence of its various components, which is particularly high in the case of the national regulators, more limited in the case of the Commission and even more restricted in so far as the European Group of Regulators is concerned.

As a whole, this mechanism of administrative integration has several similarities with the previous one: in particular, the doubly composite (national and Community, and, at the Community level, direct and indirect) architecture and the provision of organizational and procedural instruments of administrative integration. Yet, the European independent body is not a body with legal personality and relying on a complex internal organization, but a simple collegiate body. Moreover, its independence is less clear than the independence characterizing the European bodies of the previous scheme, such as, for example, the European Central Bank. And the Commission participates in tasks relevant to the common system, although the coordination of the overall common system is a responsibility which the Commission itself shares with the European Group of Regulators, which advises and assists the Commission and facilitates coordination and cooperation among the national regulatory authorities and among the latter and the supranational institution. The top-down character of this mechanism of administrative integration, in other words, results not only from the establishment of a network of independent powers, but also from the combination of the transnational component with the supranational one.

What has been said so far also indicates that the present mechanism of administrative integration is designed as a variant of the previously mentioned model, based on the establishment of a genuine European independent authority responsible for the implementation of the relevant European discipline together with the competent national authorities. The

meetings of the Group and shall designate a high-level representative to participate in all its debates'; see also Article 3(5)–(8).

contiguity of the two regulatory schemes is exemplified by the evolution of the European privacy regime, originally based on the so-called 'Group 29', later flanked by an independent Community authority, the European Data Protection Supervisor, charged with overseeing the enforcement of Community standards for specific sectors on Community institutions and bodies. But it is also demonstrated by the recent proposal of the Commission to establish in the energy field an Agency for the Cooperation of Energy Regulators as a genuinely 'separate entity, independent and outside the Commission', in the context of a redistribution of powers and tasks between the new European regulator and the Commission.²⁴ And nonetheless, the regulatory scheme at stake maintains its own functional specificity, as an alternative to the establishment of independent Community authorities integrated with the national authorities and as a relatively flexible instrument for interaction, co-ordinated at the Community level, among the national authorities.

The third type of top-down mechanism of administrative integration is a variant of the previous one. In this case, the administrative execution of European law is carried out by a European common system characterized by the combination of the transnational and the supranational components, but the transnational component is deprived of the independent character which is characteristic of the 'networks' of regulators in the abovementioned fields of electronic communications and electric energy and gas. Such design results from the distribution of tasks among non-independent national administrations, the Commission and a collegiate office made up of 'representatives' from non-independent national authorities and the Commission. This does not mean that the supranational component is granted a prominent position over the transnational one. Such effect cannot be ruled out, given that the transnational component may show a tendency to operate instrumentally to the Commission. But this hypothesis should be supported by empirical evidence. Rather, the distinction with the previous case is to be found in the different character of the transnational component, which involves non-independent, ordinary national administrations.

²⁴ Draft of the proposal for a Regulation of the European Parliament and of the Council establishing an Agency for the Cooperation of Energy Regulators, in particular p. 10 ff. of the Explanatory Memorandum. On the tasks of the Commission see in particular § 3.5 of the Explanatory Memorandum, where it is stated that the Agency would have no power of discretionary substantive decision, which is left to the Commission; and it is provided that it would be for the Commission, through the adoption of binding Guidelines, further to specify and lay down the role of the Agency, COM(2007)530.

An example is the system responsible for the implementation of the European Programme for Critical Infrastructure Protection (CIP) proposed by the Commission in late 2006. This programme is aimed at protecting critical infrastructure from terrorism and other threats. Such a system consists, at the national level, of one CIP Contact Point for each Member State, called upon to coordinate all relevant issues within the Member State and with other Member States, the Council and the Commission. At the EU level, the system consists of a CIP Contact Group established at the EU level, bringing together the CIP Contact Points from each Member State and chaired by the Commission, called to serve as a strategic co-ordination and co-operation platform; of CIP Expert Groups set up by the Commission where specific expertise is needed; and of the Commission itself.²⁵

The fourth type of top-down mechanism of administrative integration provides the most nuanced combination of transnationalism and supranationalism. An example is the European common system for information in the field of drugs and drug addiction, established in 1993 and coordinated by the European Monitoring Centre for Drugs and Drug Addiction.²⁶ A second, more recent example is that of the European common system for operational cooperation at the external EU borders, established in 2004 and managed by a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex), which coordinates the operational cooperation between the national administrations in the process of implementation of the EU rules on standards and procedures for the control of external borders, aimed at ensuring a uniform and high level of control and surveillance.²⁷

As in the regulatory schemes previously considered, EU regulation distributes the administrative tasks necessary to carry out the European function among a variety of national, composite and European offices. All such offices are thus competent simultaneously, although the legal patterns through which the allocation of tasks is accomplished vary considerably from case to case and give place to different degrees of polycentrism and differentiation in the administration responsible for the implementation of EU regulation by sector. Moreover, the various competent bodies are interconnected through a number of organizational and procedural instruments

²⁵ COM(2006)786 final.

²⁶ Council Regulation 302/93 of 8 February 1993 on the establishment of a European Monitoring Centre for Drugs and Drug Addiction, OJ 1993 L 36, p. 1.

²⁷ Council Regulation 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ 2004 L 349, p. 1.

aimed at guaranteeing their integration in a functionally and structurally unitary administration. As for the competent bodies at the European level, they include the Commission. The coordination function, however, is not conferred on a 'dual regulator', represented by both a mixed office and the Commission. Rather, the coordination function is granted to a EU office provided with legal personality and based on a complex internal organization. More precisely, the EU body acting as the coordinator is, in this case, a Community office established under the first pillar, and has two main features: it is auxiliary to the Commission; and its internal organization is structured around various collegiate bodies composed in such a way as to establish and manage a plurality of relationships involving the Commission and the national administrations. In functional terms, such design, to which one could shortly refer as the typical design of a 'European agency',²⁸ responds to the double exigency of technical decentralization and administrative integration: on the one hand, it is intended to ensure the performance of an activity which, for political or technical reasons, cannot be directly carried out by the Community's central administration (the Commission); on the other hand, it aims at ordering the interactions among the various components of the overall common system, by allowing and structuring such interactions within the context of a Community body. In some cases, such a construct is further complicated by the envisaging of an institutionalized and stable dialogue with the private sector, as happens in the case of the European Network and Information Security Agency, the internal organization of which includes a Permanent Stakeholders' Group composed of experts representing the information and communication technologies industry, consumers' groups and academic experts.

The result is a design where the transnational element is corrected with the supranational component. The Commission participates with relevant tasks to the common system. But the coordination function is carried out by a decentralized European body which restrains the administrative powers of the Commission and is internally structured in such a way as to give 'voice' to the competent national administrations. In this sense, this regulatory scheme is based on a peculiar combination of decentralization and integration.

Such connection between decentralization and integration also provides an explanation of the success of this model of implementation of EU

²⁸ On the reconstruction of such model see E. Chiti, *Le agenzie europee. Unità e decentramento nelle amministrazioni comunitarie*, Cedam (Padova, 2002); for a shorter account of the matter and the discussion on some further implications see id., 'Decentralisation and Integration into the Community Administrations: A New Perspective on European Agencies', [2004] *European Law Journal* 403.

regulation, exemplified by the establishment, in recent years, of common systems such as those coordinated, respectively, by the European Railway Agency (2004), the European Network and Information Security Agency (2004), the European Centre for Disease Prevention and Control (2004), the already mentioned Frontex (2004), the Community Fisheries Control Agency (2005) and the European Fundamental Rights Agency (2007). Actually, the establishment of a European common system coordinated by a 'European agency' represents the quantitatively prevailing mechanism for managing the administrative execution of EU law. This is so because such a model, despite the reasonable criticism that can be made concerning the overly complex and dysfunctional choices intrinsic to the overall architecture of the European common system by sector, represents a sustainable balance between three different exigencies: on the one hand, the necessity for 'pluralization' deriving from the specific features of the function; on the other hand, the necessity to grant to a Community body the coordination function; again on the other hand, the imperative, both organizational and political, not to overburden the central Community administration.

The fifth and last type of top-down mechanism of administrative integration implies the establishment of a European common system coordinated by the Commission itself. In this case, the system maintains its transnational element, in so far as it is based on the participation of national administrations, but the supranational institution is placed in a position of functional prominence over the other components of the system.

Among the various examples one could mention the so-called Schengen Borders Code, providing for the absence of border control on persons crossing the internal borders between the EU Member States and establishing rules governing border control of persons crossing the EU's external borders.²⁹ In this case, the main executive tasks are conferred on the national administrations, cooperating among themselves. However, the national administrations operate in strict contact with the Commission, to which they convey a great amount of information and which participates directly in the implementation process. A second example is that of the Community Mechanism for Civil Protection: national administrations may carry out civil protection assistance interventions in the territory of a Member State which has been affected by a major emergency and

²⁹ Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ 2006 L 105, p. 1.

which has requested assistance. Furthermore, the Commission operates as the coordinator of the system through the Monitoring and Information Centre, which was set up within the DG Environment and is responsible for receiving assistance requests and matching state offers of assistance to the needs of the disaster-stricken country.³⁰

d. Direct Execution

The fourth and last scheme for the administrative implementation of European Union law is direct execution. Among the various examples one may recall Article 85, providing that ‘the Commission shall ensure the applications of the principles laid down in Articles 81 and 82’ in the field of competition, and Article 274 of EC Treaty, according to which ‘the Commission shall implement the budget, in accordance with the regulations made pursuant to Article 279, on its own responsibility and within the limits of the appropriations, having regard to the principles of sound financial management’.

Contrary to the usual representations, direct execution does not refer to a situation in which the Commission has the exclusive responsibility for the administrative implementation of European Union regulation. What is characteristic in this model, and capable of differentiating direct execution from execution through common systems coordinated by the Commission considered in the previous pages, is the Treaty-based guarantee of the Commission’s administrative prerogatives. In this case, the position of functional prominence of the Commission is required by the Treaty itself: the supranational component has not only a particularly strong role in the process of administrative execution of the European Union regulation, but it is also subject to a specific ‘constitutional’ protection. Misleading as it may be, the ‘direct execution’ label refers to the strongest protection of supranationalism in the administrative implementation process and identifies the other extreme of the line opened by direct or decentralized execution.

Provided that the Treaty-based guarantee of the Commission’s administrative prerogatives is respected, the process of administrative execution may be designed in a variety of different ways, ranging from a fully centralized execution, i.e. based on the exclusive action of the Commission, to a remarkable involvement of national administrations,

³⁰ See Council Decision 792 of 23 October 2001 establishing a Community mechanism to facilitate reinforced cooperation in civil protection assistance interventions, OJ 2001 L 297, p. 7; see also the Commission proposal for a recast of Council Decision n. 792/2001, COM(2006)29.

which may be called to intervene in the implementation process both informally and through the exercise of formal tasks and powers.

It is well known that strictly centralized execution has been the traditional option to comply with the Treaty requirements. Current developments of EU regulation, however, show an unambiguous tendency toward the modification of such traditional choice in two directions. On the one hand, one can register a move towards a complication of fully centralized execution, insofar as the direct action of the Commission may be complemented by the action of EU delegated bodies, in the perspective of combining the exigencies of accountability and responsibility with the objective of a flexible and efficient implementation process. For example, in order to manage a Community programme in the context of the implementation of the budget, the Commission may decide, within the limits and under the conditions envisaged by the 2002 financial regulation, to set up an ‘executive agency’, organizationally and functionally designed as a body strictly dependent on the Commission itself.³¹ On the other hand, the function of the Commission has often been redefined in connection with a more incisive participation of national and composite administrations in the execution process. A clear example is provided by Council Regulation 1/2003, concerning the implementation of Treaty rules on competition, where the Commission’s monopoly in the enforcement process has been substituted by a mechanism of joint execution, managed by a common system resulting from the interconnection of the national competition authorities and the Commission and coordinated by the latter, which is placed in a position of functional prominence over the other components of the ‘network’.³²

³¹ For an analysis of the so-called executive agencies, in the context of a wider examination of the new financial regulation see P. Craig, *EU Administrative Law*, Oxford University Press (Oxford, 2006), p. 33 ff.; P. Craig, ‘A New Framework for EU Administration. The Financial Regulation 2002’, in *Law & Contemporary Problems*, vol. 68, 2004, no. 1, p. 107.

³² For a short account of the mechanisms of administrative integration, the peculiar position of the Commission and the possibility of identifying a European common administrative system in the field of competition see E. Chiti, ‘I “sistemi comuni” europei di pubblici poteri indipendenti’, in S. Battini and G. Vesperini (eds), *Lezioni di diritto amministrativo europeo*, Giuffrè (Milan, 2006), p. 1, p. 12 ff. The general discussion on the modernization of EC antitrust law has been too wide to be usefully recalled here; among the contributions more directly concerned with the organizational aspects of the new regulation see A. Pera and V. Falce, ‘The Modernization of EC Competition Law and the Role of National Competition Authorities – Revolution or Evolution’, [2003] *Il diritto dell’Unione europea* 433; P. Fattori and M. Todino, *La disciplina della concorrenza in Italia*, Il Mulino (Bologna, 2004), p. 323; A.H. Türk, ‘Modernisation of EC Antitrust

3. IMPLICATIONS

The taxonomy which has been proposed in the previous pages evidently provides only a general framework for classifying the main schemes for the administrative implementation of European Union law. Such a framework might be detailed and specified in several directions. Thus, the organizational features of the administrative bodies competent in the various schemes should be further investigated, in order not only to draw a less sketchy picture of the different boxes, but also to cast light on the borderline cases: for example, the hypotheses of European bodies which are granted scientific or technical independence but may nevertheless be considered to fall into the category of the decentralised European agencies, such as the European Food Safety Authority, the European Centre for Disease Prevention and Control and the European Network and Information Security Agency.

In addition to this, the proposed taxonomy could be detailed through a consideration of the specific techniques of administrative integration laid down in order to manage the intricate web of horizontal and vertical relations characterizing most of the identified models. This investigation would highlight that, beneath the surface of a number of common mechanisms of administrative integration, each scheme for the administrative implementation of European Union law presents its own specific technique of administrative cooperation. For example, the ‘decentralized integration’ model, characterized by the establishment of European agencies, relies on two peculiar types of mechanism of administrative integration: on the one hand, the provision of administrative proceedings falling within the category of the European ‘composite proceedings’,³³ but differing from the mainstream of such proceedings in so far as all their phases are regulated by Community law only and the procedural regulation is meant to stabilize the cooperation between the plurality of the competent

Enforcement’, in H.C.H. Hofmann and A.H. Türk (eds), *EU Administrative Governance*, above n. 2, p. 215.

³³ The notion of composite proceedings was initially worked out by C. Franchini, *Amministrazione italiana e amministrazione comunitaria. La coamministrazione nei settori di interesse comunitario*, 2nd edition, Cedam (Padova, 1993), p. 174. For a recent discussion of the category and the main legal issues related to it see S. Cassese, ‘European Administrative Proceedings’, in F. Bignami and S. Cassese (eds), *Law and Contemporary Problems*, vol. 68, 2004, n. 1, *The Administrative Law of the European Union*, p. 21 ff.; and G. della Cananea, ‘The European Union’s Mixed Administrative Proceedings’, in F. Bignami and S. Cassese (eds), *Law and Contemporary Problems*, vol. 68, 2004, n. 1, *The Administrative Law of the European Union*, p. 197 ff.

(national, supranational and mixed) offices according to modes subtracted from the negotiation of the single authorities; on the other hand, the provision to the competent European agency of specific coordinating and organizational tasks and powers, to be accomplished through soft law measures.³⁴

Like most taxonomies in social sciences, moreover, the proposed classification is destined to quick obsolescence. The developments of legal reality in this field of the European Union system, mostly following an *ad hoc* rationale, tend to escape the boundaries of a systematic reconstruction. The most intense force, in any case, is not internal to the European Union itself, but is represented by the ongoing evolution of the 'global legal space'.³⁵ Actually, the EU administration is increasingly becoming not only a matter of relationships between national and European bodies, but also a matter of relationships among the European sectorial organizations and the relevant global regulatory systems. The position of the EU organization *vis-à-vis* such global regulatory systems essentially depends on the relationship between the EU and global regulation. In this regard, it is possible to identify at least two different situations: the case in which the EU regulation and the global regulation are on an equal footing; and the case in which the global regulation prevails over the EU regulation. In the first case, the relationship between the EU administration and a global system has a 'horizontal' character and aims at a more effective exercise of the tasks conferred on each of the administrations involved. For example, Article 42 of the Europol Convention provides that, insofar as is required for the performance of its tasks, Europol may establish and maintain relations with international organizations and other international public law

³⁴ For a detailed account of such mechanisms of administrative integration see E. Chiti, 'Decentralisation and Integration into the Community Administrations: A New Perspective on European Agencies', [2004] *European Law Journal* 403. Specifically on the first type of mechanisms, based on the provision of composite administrative proceedings, see E. Chiti, 'Administrative Proceedings Involving European Agencies', in F. Bignami and S. Cassese (eds), *Law and Contemporary Problems*, vol. 68, 2004, n. 1, *The Administrative Law of the European Union*, p. 219 ff. The most interesting recent contribution to the analysis of mechanisms of administrative integration is that of L. Saltari, *Amministrazioni nazionali in funzione comunitaria*, Giuffrè (Milan, 2007).

³⁵ On this notion see S. Cassese, 'Lo spazio giuridico globale', [2002] *Rivista trimestrale di diritto pubblico*, 323, also published in S. Cassese, *Lo spazio giuridico globale*, Laterza (Bari-Rome, 2003), p. 3; see also B. Kingsbury, N. Krisch, R.B. Stewart and J.B. Wiener, 'Foreword: Global Governance as Administration – National and Transnational Approaches to Global Administrative Law', in *Law and Contemporary Problems*, vol. 69, 2005, n. 3–4, p. 1, where the notion of 'global administrative space' is used.

bodies.³⁶ In the second case, the EU organization is called on to implement the regulation of the relevant global regulatory system and the EU implementing regulation, and it may establish a relationship with the bodies of the global regulatory system. An example is provided by the measures imposing financial restrictions on individuals adopted in the late 1990s by the Security Council of the United Nations,³⁷ where the multi-level EU administration carried out UN objectives defined by the UN regulation and by the implementing EU regulation. The investigation of the relationships between the European and global administrations, which seems destined to engage several scholars in the next few years,³⁸ will clarify the legal issues inherent in the matter. But it is a simple prediction to identify in the gradual interconnection of the European and global administrations the main source of transformation of the mechanisms for the administrative implementation of EU law. In this sense, it is the emergence of a global administrative space which makes the proposed taxonomy a particularly unstable edifice.

Despite these shortcomings, the classification which has been presented in the previous pages seems useful in so far as it gives an account of a number of general features of the process of administrative implementation of European Union law at its current state of development. It highlights, first of all, the composite character of the process of administrative implementation of European Union law. On the one hand, such process is mainly a matter of joint action among the national authorities and among the national and the European authorities. On the other hand, the models of direct and indirect administrative execution still maintain a significant role, although, as has been argued in the previous pages, they are not meant as purely centralized and decentralized administrative action. In this sense, one should certainly confirm that the notion of executive federalism has become inadequate to explain the overall features of the process of administrative implementation of European Union law. But it should also be recognized that the emerging framework has not cancelled direct

³⁶ The list includes the International Criminal Police Organization (ICPO), the International Money Laundering Information Network (IMoLIN), the International Narcotics Control Board (INCB) and International Organization for Migration (IOM).

³⁷ See Resolution 1333 of 19 October 2000, § 8 (c), and Resolution 1373 of 28 September 2001.

³⁸ Building on global administrative law studies, on current research in the field of European administrative law, and on the 'multilevel regulation' studies (exemplified by A. Follesdal, R. Wessel and J. Wouters (eds), *Multilevel Regulation and the EU: The Interplay between Global, European and National Normative Processes*, Brill (Leiden, 2008)).

and indirect execution from the mechanisms actually used to implement EU law and policies.

The proposed classification, moreover, illustrates the variety of the organizational arrangements corresponding to the different schemes for the administrative implementation of European Union law. The recognition of such variety runs against many reconstructions of the European administrative system, showing the imprecision of those readings which emphasize the unitary character of certain developments of the European administrations: this is the case, for example, of those studies referring to an excessively loose category of 'independent regulatory agencies', including a number of supranational bodies (such as the European Medicines Evaluation Agency) actually lacking full legal independence or sharing an only seemingly equivalent independent status (as in the case of the Commission and the European Central Bank).³⁹ The classic imperative to *distingue frequenter* seems to find fruitful application in this field. An analytical and pluralist approach reveals that each scheme for administrative implementation is based on its own specific organizational arrangement, and it sheds light on the highly differentiated character of European administrative organization.

Thirdly, the different schemes for the administrative implementation of EU law may be represented as variations on the same general theme. Actually, they are based on different combinations of two main elements: transnationalism on the one side, and supranationalism on the other. And in most cases the combination builds complex architectures, where nuanced solutions prevail over clear-cut arrangements, in line with an incremental and experimental rationale.⁴⁰ The overall result is akin to Gerhard Richter's *Farbtafeln* grids, where the 1,024 colour sample pictures represent contingent degrees of colour on a single painting starting with the primary colours and grey.⁴¹

In addition to this, the process of administrative implementation is governed by a peculiar 'game of forces' between unity and fragmentation. On the one hand, the emerging European administration is founded on

³⁹ See, e.g., the overall approach of D. Gerardin, R. Muñoz and N. Petit (eds), *Regulation through Agencies in the EU. A New Paradigm of European Governance*, cit.

⁴⁰ For a positive assessment of experimentalism in the making of a European administration, see M. Everson, *Good Governance and European Agencies: The Balance*, in D. Gerardin, R. Muñoz and N. Petit (eds), *Regulation through Agencies in the EU. A New Paradigm of European Governance*, above n. 3, p. 141.

⁴¹ On Gerhard Richter's *Farbtafeln* see B. Corà, 'Gerhard Richter: The Experience of Painting in the Knowledge of Reality', in B. Corà (ed.), *Gerhard Richter*, Gli Ori (Prato, 1999), p. 23.

pluralization, dispersion, overlaps and, to a certain extent, competition: a picture suggesting the paradox of the making of an *administration en miettes*.⁴² On the other hand, the mechanisms for the implementation of European Union law identified in the previous pages are also, at the same time, instruments of institutional stabilization, aimed at liberating forces and at structuring them in coherent organizations and procedures. Whether the balance between fragmentation and unity is effectively achieved is an open question which should be answered through complex examination of the relationship between the needs of the European system and the design of each specific administrative mechanism. What has to be noticed here, however, is that fragmentation and unity are, at this level of the European administrative governance, conflicting but co-existing forces, the interplay of which shapes the character of the emerging European administration.

Finally, the classification proposed in this chapter shows the very limited practical importance of the legal constraints usually invoked by legal scholarship and by the European institutions themselves when discussing the establishment of new administrative bodies. The so-called *Meroni* doctrine, with its distinction between delegation of discretionary and non-discretionary powers, is probably the most celebrated of such constraints. But one may really wonder, observing the developments of the last two decades, whether *Meroni* is actually considered by the Commission and the other political institutions as a genuine limitation to the setting up of a European administration. And after all there are very good reasons to propose an interpretation of the *Meroni* doctrine much less strict than that usually endorsed in the inter-institutional discussion.⁴³

This chapter ends where at least three inescapable questions arise. If the mechanisms for the administrative implementation of European Union law are those presented in the present chapter, what are the features of administrative law governing their functioning and the relationships between private parties and the relevant public powers? In a functional perspective, what is the degree of effectiveness of the various modes of administrative implementation of European Union law and policies? And what are their normative foundations? So far, these questions have received uneven consideration by legal scholarship, which has engaged in particular in the discussion of the 'accountability issue', leaving aside

⁴² To use in this context the well known expression of F. Dupuy and J.C. Thoenig, *L'administration en miettes*, Fayard (Paris, 1985).

⁴³ For a development of this argument see E. Chiti, 'Beyond Meroni: the Community Legitimacy of the Provisions Establishing the European Agencies', in G. della Cananea (ed.), *Regulatory Agencies in Europe*, Rive Droite – Collection Iuspe (Paris, 2005), p. 75.

the investigation of the character of European administrative law and the functional assessment of the emerging European administration.⁴⁴ It would be definitely beyond the scope of the present chapter to develop the proposed taxonomy in relation to such issues.⁴⁵ It is perhaps superfluous, but not unwise, to observe that the identification of a number of schemes for the administrative implementation of European Union law does not at all bring with it a functional and normative justification of legal reality.

⁴⁴ The literature on the normative foundation of the European administration is too abundant to be usefully recalled here; see however the recent work of D. Curtin and A. Wille (eds), 'Meaning and Practice of Accountability in the EU Multi-Level Context,' Connex Report Series Nr. 07. As for the reconstruction of the features of European administrative law see in particular S. Cassese, 'Il diritto amministrativo europeo presenta caratteri originali?' [2003] *Rivista trimestrale di diritto pubblico* 35, and L. Torchia, *Il governo delle differenze. Il principio di equivalenza nell'ordinamento europeo*, Il Mulino (Bologna, 2006); see also M. Everson and C. Joerges, 'Re-conceptualising Europeanisation as a Public Law of Collisions: Comitology, Agencies and an Interactive Public Adjudication', in H.C.H. Hofmann and A.H. Türk (eds), *EU Administrative Governance*, above n. 2, p. 512.

⁴⁵ See, however, E. Chiti, *On European Agencies*, in *European Governance, Deliberation and the Quest for Democratisation*, in E.O. Eriksen, C. Joerges and J. Neyer (eds), *European Governance, Deliberation and the Quest for Democratisation*, Arena Report 2003, n. 2, p. 271 ff., where the specific phenomenon of European agencies is discussed in the light of the deliberation model.

2. Shared administration, disbursement of community funds and the regulatory state

Paul Craig*

There are a variety of ways in which national administrations interact with the EU institutions, and these differ in areas such as Comitology, agencies and the Open Method of Coordination. It is nonetheless important to distinguish these various modes of administrative interaction from shared administration *stricto sensu*. The concept of shared administration was accurately captured by the Committee of Independent Experts, which stated that shared management connoted:¹

[M]anagement of those Community programmes where the Commission and the Member States have distinct administrative tasks which are inter-dependent 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 management/administration in this sense is central to the operation of the EU. It is the mode of administration used for implementation in areas such as the Common Agricultural Policy (CAP) and the Structural Funds. It is however also used in other areas as diverse as customs, the regulation of telecommunications and energy utilities, and competition policy.

The rationale for and prevalence of shared administration as defined by the Committee of Independent Experts is readily explicable. A number of factors are relevant in this respect, although the extent to which they apply will vary from area to area.

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¹ Committee of Independent Experts, *Second Report on Reform of the Commission, Analysis of Current Practice and Proposals for Tackling Mismanagement, Irregularities and Fraud* (10 September 1999), Vol. I, para. 3.2.2 (hereafter Second CIE).

The most obvious rationale for shared administration is simply workload. The Commission does not possess anything like sufficient resources to administer directly the complex regimes which apply in relation to agriculture, regional aid, customs, utility regulation and the like. Using national administrations to administer command and control type regulation which has in the past characterized the CAP was therefore the obvious choice.

A second factor underlying shared administration is that it facilitates the expression of Member States' preferences and the drawing on Member States' expertise in the application of the relevant Community policy. This is exemplified by the Structural Fund regime. The nature of the projects which should be funded will clearly be influenced by Member States' preferences concerning the types of projects to which it accords priority, and the legislative regime allows full use to be made of local expertise. The regime of shared administration is in this sense reflective of subsidiarity.

A third factor which is closely related to, albeit distinct from, the second is that shared administration may be required because the very nature of the Community rules requires application that is Member State-specific. This is exemplified by the universal service obligations applicable to network industries, which require, *inter alia*, that certain services should be available to consumers at 'affordable' prices. The determination of affordable price is left to the national regulatory authority, and this may be different as between Member States.

The subject matter which is dealt with through shared administration could be analysed in various ways, and differing taxonomies could be adopted *within* the overall regime of shared administration. There is nonetheless one feature which is of particular relevance in this overall area, and that is whether the shared administration entails disbursement of Community funds, or whether it is designed to effectuate some other facet of Community policy which does not in itself involve expenditure of Community funds. The CAP and Structural Funds exemplify the former category, while the regulation of telecommunications and energy utilities and the application of competition policy typify the latter.

The application of shared administration within the latter category will, of course, have an impact on the overall economic health of the EU. This does not alter the fact that the design and implementation of a successful method of shared administration will be markedly affected by whether the objective is the disbursement of Community funds or the attainment of some other Community regulatory goal.

The critical spotlight has fallen in particular on the *modus operandi* of shared administration in relation to the CAP and the Structural Funds, precisely because they involve expenditure of large sums from the

Community budget. It will however be seen that equally pressing issues arise in relation to the way in which shared administration operates in other areas, even where there is no such expenditure of money from Community coffers.

1. SHARED ADMINISTRATION AND THE DISBURSEMENT OF COMMUNITY FUNDS

Space precludes detailed treatment of the complex regime of shared administration which operates in relation to the CAP and the Structural Funds. I have in any event addressed this matter in detail elsewhere.² The following point is however of particular importance.

The success of any scheme of shared administration is crucially dependent on the content of the legislative regime which the respective national and Community administrators are instructed to apply, and on the deployment of sufficient resources to ensure that this legislative regime, whatever its content may be, is effectively administered. Legislative choice will therefore inevitably have a marked impact on administrative effectiveness, and so too will administrative resource allocation.

This is readily apparent from the legislative regimes which apply to the CAP and the Structural Funds. In both areas the legislation which has to be administered has been marked by tension between the collective Community interest and the interests of individual Member States, and by deficiencies in resource allocation to administer the legislative schema.

This point can be briefly exemplified in relation to the Structural Funds. The tension between the collective Community interest and that of the individual states is apparent, albeit in different ways, in relation to both the criteria for access to these Funds, and supervision of funded projects in order to prevent fraud and the like.

In terms of the criteria for access, the successive regulations on the Structural Funds embodied commitments to concentration, additionality, partnership and programming as ideals which shaped the collective interest in a rational EU regional policy. The legislation however accorded the individual Member States significant discretion concerning the application of these ideals in the context of project selection, or it has been amended as a result of Member State pressure, thereby weakening the peremptory force of the particular collective commitment, especially that of additionality.

² P. Craig, *EU Administrative Law* (Oxford University Press, 2006), Chap. 3.

In relation to the supervision of funded projects, it is clear that the collective interest favours the proper deployment of EU resources to attain the goals of EU regional policy. This requires machinery to ensure that projects and programmes selected pursuant to a Community Support Framework are properly monitored, that there is effective machinery to detect financial irregularity through audit and the like, and that the rules provide a meaningful regime for compliance by the relevant players. Individual Member States may however have an incentive to avoid these consequences in relation to projects conducted on their own territory, more especially where the consequences could be financial penalties imposed on the state itself, or the withholding of further disbursements to particular projects. This issue is all the more significant given that the strategy in the 1999 Regulations³ has been to devolve more responsibility for monitoring and the like on the Member States, since the Commission does not possess the resources to do the job itself. It is then all the more important that the legislative rules casting the Member State as gamekeeper do not allow it to become poacher or to turn a blind eye to poaching by others.

The tensions between the collective interest and that of the Member States were recognized in the Second Report of the Committee of Independent Experts, as were deficiencies in administrative oversight of the Structural Fund regime. Thus the Committee was critical of certain aspects of the legislative design embodied in the Structural Fund Regulations even after 1999. The Committee concluded that the balance of decision-making power had shifted to the Member States, but that a number of factors tended to divest them of responsibility:⁴ the criterion for additionality was weak;⁵ the shift to programming post-1988 removed the greater part of Commission control over individual projects;⁶ and the ceiling of expenditure for each Member State was in effect also a target, with implications for project selection, evaluation and control,⁷ this being exacerbated by Member States' ability to substitute projects for those declared ineligible.⁸

The Committee also expressed concern about the practical effectiveness of the powers possessed by the Commission. Thus while the Committee was mindful of the improvements in the 1999 Regulations concerning Member

³ Council Regulation (EC) 1260/1999 of 21 June 1999, Laying Down General Provisions on the Structural Funds, OJ 1999 L161/1.

⁴ Second CIE, n 1, Vol I, at 3.22.

⁵ *Ibid*, Vol I, 3.19.

⁶ *Ibid*, Vol I, 3.18.

⁷ *Ibid*, Vol I, 3.15.6.

⁸ *Ibid*, Vol I, 3.18.1–3.18.3.

States' obligations to have proper management and control systems, it felt that the resources for control were 'woefully inadequate to ensure proper implementation of the new Regulation'.⁹ It expressed similar reservations about the powers relating to on-the-spot checks, and the paucity of claims for recovery in cases of financial irregularity. These provisions were of limited efficacy, not because of inadequacies in the legislation per se, but because of inadequate implementation by the Commission combined with resistance by the Member States.¹⁰ The Committee was equally concerned about the gap between what the Commission was apprised of relating to financial irregularity, and the error rate concerning financial transactions revealed by the Court of Auditors.¹¹

2. SHARED ADMINISTRATION AND THE ATTAINMENT OF REGULATORY GOALS: ENERGY

The application of shared administration in relation to agriculture and the Structural Funds has received most attention because of the reports of the Committee of Independent Experts and those of the Court of Auditors. We should nonetheless press further and understand the framework of shared administration that is applicable in areas where the EU functions in its 'classic mode' as regulatory state.¹² The regimes which apply to energy and telecommunications can be taken by way of example. The nature of the difficulties that beset shared administration in the diverse areas where the EU operates as a regulatory state may well differ. This should come as no surprise. It is nonetheless interesting and important to understand more precisely the nature of these difficulties.

In the area of energy, the regulatory goal of enhancing cross-border competition has been relatively constant. There were however both substantive and institutional difficulties with the realization of this regime. In substantive terms, the 2003 legislative scheme was simply not tough enough in certain crucial respects, thereby enabling established firms to avoid the full rigours of cross-border competition. In institutional terms,

⁹ *Ibid*, Vol I, 3.17.3.

¹⁰ *Ibid*, Vol I, 3.17.4–3.17.6.

¹¹ *Ibid*, Vol I, 3.17.9.

¹² G. Majone, 'The Rise of the Regulatory State in Europe' (1994) 17 *West European Politics* 77; G. Majone, *Regulating Europe* (Routledge, 1996); G. Majone, 'From the Positive to the Regulatory State: Causes and Consequences of Changes in the Mode of Governance' (1997) 17 *Jnl of Public Policy* 139.

there were weaknesses in the structure and powers of national regulatory agencies, which administered the regime within the Member States. There were moreover coordination problems between national regulatory authorities. We shall see how reforms proposed in 2007 have sought to address these substantive and institutional problems.

(A) The 2003 Framework

The regime for electricity is embodied in Directive 2003/54,¹³ which replaced the earlier provision dating from 1996.¹⁴ The main aim of Directive 2003/54 is to complete the internal market in electricity and to speed up the process of liberalization in this area. Thus the recitals to the Directive are phrased in terms of completing the liberalization of the energy markets, the principal remaining obstacles being issues of access to the electricity network, tariff issues and the different degrees to which markets had been opened between Member States.¹⁵ The principal provisions of the Directive are therefore directed towards addressing these obstacles to the completion of the internal market.

The Directive therefore establishes common rules for the generation, transmission, distribution and supply of electricity. It lays down rules relating to the organization and functioning of the electricity sector, access to the market, the criteria and procedures applicable to calls for tenders, the granting of authorizations and the operation of the system: Article 1. Thus in relation to generation, which for these purposes means production of electricity, Member States must adopt authorization procedures for the construction of new generation capacity, and these procedures must be objective, transparent and non-discriminatory. It is also incumbent on the Member States to lay down substantive criteria for the construction of generating capacity in their territory, and the Directive lists the kind of criteria that may be adopted, such as protection of public health and

¹³ Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92, OJ 2003 L176/37. See also Directive 2005/89/EC of the European Parliament and of the Council of 18 January 2006 concerning measures to safeguard security of electricity supply and infrastructure investment, OJ 2005 L33/22. The analogous provision relating to gas is Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30, OJ 2003 L176/57.

¹⁴ Directive 96/92 of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market of electricity, OJ 1996 L27/20.

¹⁵ Directive 2003/54/EC, above n. 13, recitals 1–5.

safety, land use and energy efficiency: Article 9. Other provisions of the Directive are designed to ensure network access and non-discriminatory transmission and distribution tariffs.

The market orientation of the Directive is however qualified by detailed provisions setting out public service obligations designed to ensure protection of the customer, and Member States must inform the Commission of all measures adopted to fulfil these obligations.¹⁶ The public service provisions vary, both in terms of their content and as to whether they are discretionary or mandatory. Thus Article 3(2) accords a discretionary power to Member States. It provides that, subject to relevant provisions of the EC Treaty, in particular Article 86 EC, Member States may impose on electricity undertakings, in the general economic interest, public service obligations. These obligations may relate to security, including security of supply, regularity, quality and price of supplies, and environmental protection. If such obligations are imposed they must be clearly defined, transparent, non-discriminatory, verifiable and must guarantee equality of access for EU electricity undertakings to national consumers.

By way of contrast, Article 3(3) of Directive 2003/54 is mandatory. It stipulates that Member States shall ensure that all household customers and, where Member States deem it appropriate, small enterprises enjoy universal service. This is defined as the right to be supplied with electricity of a specified quality at reasonable prices, which are easily and clearly comparable as between electricity operators. Member States may appoint a supplier of last resort to ensure the provision of a universal service. Member States must also impose on distribution companies an obligation to connect customers to their grid under terms set in accord with a procedure laid down in the Directive. Member States can give compensation or exclusive rights to undertakings for the fulfilment of these obligations.¹⁷

Article 3(5) is also cast in mandatory terms, obliging Member States to take appropriate measures to protect final customers, in particular those who are vulnerable or who live in remote areas. The Member States are enjoined to ensure high levels of consumer protection, more especially relating to contractual terms and conditions, and they must further make sure that customers can switch to a new supplier. Detailed specification of contractual terms and conditions is laid down in Annex A to the Directive.

Article 3(8) allows a Member State to decide not to apply Articles 6, 7, 20 and 22 of the Directive in so far as their application would obstruct the performance of public service obligations imposed on electricity

¹⁶ *Ibid*, Art. 3(9).

¹⁷ *Ibid*, Art. 3(4).

undertakings and in so far as the development of trade would not be affected to such an extent as would be contrary to the interests of the Community, these interests including competition with regard to eligible customers in accordance with this Directive and Article 86 EC.

The regime in the Directive is overseen at national level by regulatory authorities. Article 23 stipulates that these must be wholly independent of the interests of the electricity industry. The national regulatory authorities are responsible for ensuring non-discrimination, effective competition and the efficient functioning of the market, and the Directive specifies a series of more specific monitoring functions.

(B) The 2003 Framework: Difficulties and Limits

It is clear that national regulatory authorities are assigned a central role in ensuring that the principal aims of the Directive are fulfilled, both in relation to the liberalization of the market and in relation to the universal service obligations specified in the Community legislation. The energy sector is therefore a prominent example of shared administration, fitting the definition provided by the Committee of Independent Experts. The nature of the Community legislative schema which applies in this area is however different from that found in the CAP and the Structural Funds. The Community legislation on energy is a classic example of the EU as regulatory state, where the force of EU law is not manifest through direct disbursement of funds, but rather through the enactment of regulatory goals that are to be administered at national level through national regulatory authorities. It is therefore unsurprising that the nature of the problems revealed in this area of shared administration are somewhat different from those identified in the previous section, although there are also some commonalities.

There were once again tensions between the collective Community interest and that of some Member States. Space precludes detailed analysis, but this is most manifest in the slow progress made towards the core aim of market liberalization. The Commission's principal focus, post-2003, has, not surprisingly, been on monitoring the extent to which the market liberalization which lies at the heart of energy directives has been fulfilled. Progress in this respect has been slow. Thus the Commission noted the 'lack of integration between national markets', and the fact that, with few exceptions, 'electricity and gas markets in the EU remain national in economic scope'.¹⁸ It must be recalled, said the Commission,

¹⁸ Report on Progress in Creating the Internal Gas and Electricity Market, COM(2005)568 final, 2.

that ‘the objective of opening the market is to create a single electricity and gas market, not a juxtaposition of 25 national markets’.¹⁹ A year later the message had changed little. The Commission concluded that while liberalization had produced efficiency gains, meaningful competition still did not exist in many Member States, and that often customers did not have any real possibility of opting for an alternative supplier.²⁰ There was moreover much evidence that energy suppliers from other Member States could not compete equally with the existing national companies in certain states.²¹ Some Member States clearly fear the consequences for their own industries of enhanced Community liberalization in the energy sector. Further research is needed to identify how far this is the result of lax enforcement by national regulatory authorities, and how far it is due to other factors.

The national regulatory authorities appear in general to have done a reasonable job in protecting universal service obligations. Thus in 2005 the Commission concluded that the objective of the energy directives to improve the position of customers had largely been met. Prices had become more competitive within Member States, notwithstanding the limitations of cross-border competition. Moreover, ‘fears that the introduction of competition would lead to a decline in service standards or problems in the provision of universal service have proved unfounded’.²² There are nonetheless indications of difficulties. The Commission included in the list of problems flowing from improper implementation of the existing rules the fact that Member States were often not complying with the obligation to give information to the Commission on public service obligations, especially as regards regulated supply tariffs.²³ This was exacerbated more generally by the fact that there was no clear picture of the national measures taken by Member States to transpose the energy Directives with regard to consumers.²⁴ The data which did exist indicated, for example, that Member States had made limited use of targeted public service obligations to address vulnerable consumers.²⁵ The Commission is therefore minded to develop an Energy Customers’ Charter to address energy poverty, to improve information available to customers to help them choose between

¹⁹ *Ibid*, 4.

²⁰ Prospects for the Internal Gas and Electricity Market, COM(2006)841 final, 2. See also Sector Inquiry under Article 17 of Regulation (EC) 1/2003 on the Gas and Electricity Markets (Final Report), COM(2006)851.

²¹ *Ibid*, 7.

²² COM(2005)568, above n. 18, 13.

²³ COM(2006)841, above n. 20, 6.

²⁴ *Ibid*, 21.

²⁵ *Ibid*, 21.

suppliers, to combat red tape when consumers switch supplier and to protect customers from unfair selling practices.²⁶

(C) The 2007 Reforms: Substantive and Institutional Change

The Commission's concerns expressed in the preceding paragraphs have led to important proposals for legislative amendments to the pre-existing scheme, which are significant in both substantive and institutional terms.

i. Substantive change

In substantive terms, the reforms are directed towards remedying the malaise identified above and increasing competition in the electricity and gas markets.²⁷ The Commission noted that its assessment, and that carried out by Europe's energy regulators, demonstrated that the process of developing real competitive markets was far from complete. The result was that too many EU citizens and businesses lacked a real choice of supplier. The principal reasons why a truly internal market was still lacking was the continuation of 'market fragmentation along national borders, a high degree of vertical integration and high market concentration'.²⁸ Existing legislation required that network operations should be legally and functionally separated from supply and generation or production activities, but Member States had complied with this requirement in different ways. Some had created a totally separate company for network operations, while others had created a legal entity within an integrated company. The latter was however felt to be unsatisfactory, since the transmission system operator could treat its affiliated companies better than competing third parties in ways which were difficult to detect.²⁹

The legislative amendment to the 2003 scheme is designed therefore to attain 'ownership unbundling', in the sense that Member States must ensure that the same person or persons cannot exercise control over a supply undertaking and, at the same time, hold any interest in or exercise any right over a transmission system operator or transmission system. The proposed provision is symmetrical; thus control over a transmission

²⁶ *Ibid*, 20–21. See also An Energy Policy for Europe, COM(2007)1 final, 10.

²⁷ Proposal for a Directive of the European Parliament and of the Council amending Directive 2003/54/EC concerning common rules for the internal market in electricity, COM(2007)528 final; Proposal for a Directive of the European Parliament and of the Council amending Directive 2003/55/EC concerning common rules for the internal market in natural gas, COM(2007)529 final.

²⁸ COM(2007) 528, n. 27, 2.

²⁹ *Ibid*, 4.

system operator precludes the possibility of holding any interest in or exercising any right over a supply undertaking.³⁰

ii. Institutional change: national regulatory authorities

In institutional terms, the 2007 reforms will make important changes in the agency structure through which this species of regulation is delivered, and these changes are moreover of interest outside the confines of this particular area.³¹ They entail the strengthening of the powers of national regulators, and the creation of a new agency within the EU. These will be considered in turn.

National regulatory agencies are, as we have seen, central to the 2003 regime. The Commission noted however the variation between national regulatory agencies across the Member States, and that in some Member States the regulatory authority was relatively weak, while in others regulatory authority was dispersed. Strong regulators were, said the Commission, necessary for a properly functioning internal market.³² Directive 2003/54 is therefore to be amended so as to ensure strong and independent regulatory authorities within the Member States. Draft Article 22a of the revised Directive requires that each Member State designate a single national regulatory authority, guarantee its independence and ensure that it exercises its powers impartially and transparently. The regulatory authority must be legally distinct and functionally independent from any other public or private entity, and cannot seek or take instructions from any government or other public or private entity. In order to protect the independence of the regulatory authority, the Member State must ensure that it has legal personality, budgetary autonomy and adequate human and financial resources to carry out its duties. The management must be appointed for a non-renewable fixed term of at least five years, and can be relieved from office during its term only if it no longer fulfils the conditions of Article 22a or has been guilty of serious misconduct.

The changes to the 2003 regulatory regime are also designed to enhance the powers of the regulatory authorities over the amended regulatory scheme. The powers of the regulator are, more specifically, to be strengthened in relation to:³³ monitoring compliance of transmission and distribution system operators with third party access rules, unbundling

³⁰ *Ibid*, 5.

³¹ Proposal for a Regulation of the European Parliament and of the Council establishing an Agency for the Cooperation of Energy Regulators, COM(2007)530 final.

³² *Ibid*, 8.

³³ COM(2007)528 final, above n. 27, draft Art. 22c.

obligations, balancing mechanisms, congestion and interconnection management; reviewing the investment plans of the transmission system operators, and assessing whether they are consistent with the European-wide 10-year network development plan; monitoring network security and reliability, and reviewing network security and reliability rules; monitoring transparency obligations; monitoring the level of market opening and competition, and promoting effective competition, in cooperation with competition authorities; and ensuring that consumer protection measures are effective.

The emphasis placed on having strong regulatory authorities is apparent once again in provisions stipulating that Member States must ensure that their regulatory authorities have the requisite powers to enable them to carry out their newly expanded range of duties 'in an efficient and expeditious manner'.³⁴ Thus they must have the power: to issue binding decisions on electricity undertakings; to carry out in cooperation with the national competition authority investigations of the functioning of electricity markets, and to decide, in the absence of violations of competition rules, on any appropriate measures necessary and proportionate to promote effective competition and ensure the proper functioning of the market, including virtual power plants; to request any information from electricity undertakings relevant for the fulfilment of their tasks; to impose effective, appropriate and dissuasive sanctions to electricity undertakings not complying with their obligations under this Directive or any decisions of the regulatory authority or of the Agency; to have rights of investigations; and to approve safeguards measures.

iii. Institutional change: a new EU agency

The strengthening of the national regulatory authority is but one part of the institutional change introduced by the 2007 reforms. The other is the creation of a new agency at EU level.

It is important to appreciate that there were, even prior to the 2007 reforms, certain mechanisms designed to foster discussion of cross-border issues: the Florence Forum in relation to electricity³⁵ and the Madrid Forum in relation to gas.³⁶ There was in addition an advisory group established in 2003, the 'European Regulators Group for Electricity and Gas' (ERGEG),³⁷ which was composed of representatives of the national regulatory authorities. The ERGEG facilitates coordination and cooperation

³⁴ *Ibid*, Draft Art. 22c(3).

³⁵ http://ec.europa.eu/energy/electricity/florence/index_en.htm.

³⁶ http://ec.europa.eu/energy/gas/madrid/index_en.htm.

³⁷ http://www.ergreg.org/portal/page/portal/ERGEG_HOME/ERGEG.

between the national regulatory authorities in the Member States, and between these authorities and the Commission.

The Commission was positive about the contributions made by these self-regulatory forums, but it felt nonetheless that they had not resulted in the development of common standards necessary to make 'cross-border trade and the development of first regional markets, and ultimately, a European energy market a reality'.³⁸ This was more particularly so given that the technical rules which electricity companies operated under, 'grid-codes', differed significantly between Member States and there needed to be some convergence followed by harmonization if there was to be an integrated energy market in the EU.

The Commission considered differing organizational options to cope with this problem. It rejected the idea that the matter should be done in-house by the Commission itself, since it did not possess the requisite expertise. It was, said the Commission, necessary and desirable to draw on the specialist expertise in the 27 national regulatory agencies in order to amend their national grid codes. The Commission therefore concluded that the tasks required could be best fulfilled by a separate entity, independent of and outside the Commission. This view was endorsed by the European Council and the European Parliament.

The Commission was careful to ensure that the new Agency for the Cooperation of Energy Regulators, ACER, fitted within the established mould for EU agencies.³⁹ Such agencies cannot be accorded autonomous power to make regulatory norms, nor can they have independent authority over discretionary choices. Such agencies can however make detailed recommendations to the Commission concerning such regulatory provisions, and the Commission will normally adopt these and transform them into hard law where so desired. They can also be accorded power to make individual decisions which are binding on third parties, provided that the relevant criteria pursuant to which such decisions are made are clearly laid down in advance.⁴⁰

The powers given to ACER are therefore to complement the regulatory tasks performed by national regulatory authorities. In more specific terms,⁴¹ ACER *provides a framework for national regulators to cooperate* in order to improve the handling of cross-border situations, increase the exchange of information and the apportionment of competence where

³⁸ COM(2007)530 final, above n. 31, 9–10.

³⁹ *Ibid.*, 10–11.

⁴⁰ The legal and political reasons for these constraints are analysed in Craig, above n. 2, Chap. 5.

⁴¹ COM(2007)530 final, above n. 31, draft Arts 5–8.

more than one Member State is involved. ACER is to exercise *regulatory oversight of the cooperation between transmission system operators*. The Agency will have responsibility for monitoring and reviewing the activities of the European Network of Transmission System Operators for Electricity and of the European Network of Transmission System Operators for Gas. In relation to technical and market codes, the Agency will be empowered to ask transmission system operators to modify their drafts or address issues in greater detail. ACER can recommend that the Commission make these codes legally binding where voluntary implementation by transmission system operators does not suffice or is ill-suited to certain issues. The aim is therefore for a constructive dialogue between the Agency, transmission system operators and the Commission. ACER is also to have *individual decision powers* in certain types of case, such as the decision on the regulatory regime applicable to infrastructure within the territory of more than one Member State, and on individual technical issues. ACER is, in addition, given a *general advisory role*, with the power to issue non-binding guidelines on good practice and, at the request of the Commission or on its own initiative, to provide an opinion on all issues for which it was established.

3. SHARED ADMINISTRATION AND THE ATTAINMENT OF REGULATORY GOALS: TELECOMMUNICATIONS

The telecommunications sector has much in common with energy. The Community legislative strategy is similar, market liberalization combined with protection of universal service obligations, policed by national regulatory authorities. The problems of shared administration are nonetheless somewhat different from those considered above.

In the context of energy regulation, we saw that the principal problems were substantive and institutional deficiencies in the 2003 regulatory regime, which are now being addressed through the 2007 reforms. The difficulties which beset the telecommunications sector are related, but somewhat different. They are related in so far as the telecommunications regulatory regime, like that of energy, suffered from some substantive and institutional limitations, which are to be addressed by reforms initially floated in 2007. They are different in so far as the pace of technological change in the telecommunications sector is such that some of the initial premises which underlie the regulatory regime for telecommunications have been rendered out of date, or at the very least qualified.

(A) The 2002 Regulatory Framework

A brief outline of the relevant legislation is necessary. Telecommunications liberalization has been carried through by a series of directives, consisting of a Framework Directive⁴² and a number of other directives dealing with specific issues, such as the Universal Service Directive.⁴³ It is clear that the competitive market is regarded as the optimal method for the distribution of these services, but that legislative intervention via universal service obligations is required to correct market failure. Thus Article 1 states that the overall aim is to ensure the availability throughout the Community of good quality publicly available services ‘through effective competition and choice and to deal with circumstances in which the needs of end-users are not satisfactorily met by the market’. This same theme recurs in Article 2, which speaks of the provision of universal service within an environment of open and competitive markets, by defining a minimum set of services of specified quality to which all end-users have access, at an affordable price, in the light of specific national conditions, without distorting competition.

The general strategy is to specify in the Directive the particular services that must be made available to end-users, while leaving Member States to determine the best method of implementation in their territory, subject to respect for principles of objectivity, transparency, non-discrimination and proportionality. Member States must however seek to minimize market distortions, defined as the provision of services on terms and conditions different from those prevailing in normal commercial conditions, while at the same time safeguarding the public interest.⁴⁴

The Directive then sets out the universal service obligations applicable in this area. Thus Member States must ensure that all reasonable requests for connection at a fixed location to the public telephone network and for access to publicly available telephone services at a fixed location are met by at least one undertaking. The connection must enable the user

⁴² Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), OJ 2002 L108/33.

⁴³ Directive 2002/22 of the European Parliament and the Council of 7 March 2002 on universal service and users’ right relating to electronic communications networks and services (Universal Service Directive), OJ 2002 L108/51; W. Sauter, ‘Universal Service Obligations and the Emergence of Citizens’ Rights in European Telecommunications Liberalization’, in M. Freedland and S. Sciarra (eds), *Public Services and Citizenship in European Law – Public and Labour Law Perspectives* (Clarendon Press, 1998), Chap. 7.

⁴⁴ *Ibid*, Art. 3.

to make and receive local, national and international calls, facsimile and data communication, including in this respect Internet access.⁴⁵ There must be at least one comprehensive directory inquiry service available,⁴⁶ and Member States must ensure that national regulatory authorities are empowered to impose obligations on undertakings so as to make sure that there are sufficient public-pay telephones in terms of geographical coverage.⁴⁷ There are moreover provisions dealing with specific measures for the disabled, in terms of both access to and affordability of the service.⁴⁸ Member States may designate one or more undertakings to guarantee the provision of the universal service obligations, and different undertakings can be designated to provide different elements of universal service and/or to cover different parts of the country.⁴⁹

The preceding provisions would be of diminished importance if the Directive did not impose controls concerning affordability of tariffs. This issue is addressed in Article 9. National regulatory authorities must monitor the evolution and level of retail tariffs for the services set out above, taking account of national consumer prices and income. Member States *may*, in the light of the relevant national conditions, require that designated undertakings provide tariff options or packages to consumers which depart from those provided under normal commercial conditions, in particular to ensure that those on low incomes or with special needs are not prevented from accessing or using the publicly available telephone service. The Member States may, in this regard, require undertakings to apply common tariffs, which includes geographical averaging, throughout the territory, in the light of national conditions. They may also be required to comply with price caps. These provisions concerning affordability are reinforced by obligations concerning the transparency of the tariffs, and by the need to comply with the principle of non-discrimination. The *raison d'être* of the overall scheme is further reinforced by provisions which prevent the undertaking providing the service from requiring the subscriber to pay for services that are not necessary or not requested.

The substantive universal service obligations set out above are also backed up by provisions dealing with quality of service. Thus national regulatory authorities *shall* ensure that undertakings publish adequate information concerning their performance of the universal service obligations,

⁴⁵ *Ibid*, Art. 4.

⁴⁶ *Ibid*, Art. 5.

⁴⁷ *Ibid*, Art. 6.

⁴⁸ *Ibid*, Art. 7.

⁴⁹ *Ibid*, Art. 8.

in accord with quality service criteria set out in the Directive.⁵⁰ It is also open to national regulatory authorities to specify additional quality service standards.⁵¹ Persistent failure to meet performance targets can lead to measures taken in accord with the Authorization Directive.⁵²

It is readily apparent that universal service obligations impose costs on the service providers. Where the national regulatory authority considers that the provision of these services represents an unfair burden on certain undertakings, then the authority calculates the net cost to the undertaking of that provision.⁵³ If the national regulatory authority decides that the undertaking is indeed subject to an unfair burden, the Member State must then, on a request from the undertaking, decide whether to introduce a compensation mechanism from public funds or to share the net cost of the universal service obligations between providers of electronic communications services.⁵⁴

The Universal Service Directive contains important additional regulatory controls on undertakings with significant market power in specific markets. The regulatory scheme is in essence as follows.⁵⁵ The national regulatory authority undertakes a market analysis. If the result is that a given retail market is not effectively competitive, and if the national regulatory authority concludes that obligations imposed under the Access Directive⁵⁶ or Article 19 of the Universal Service Directive would not achieve the result in Article 8 of the Framework Directive,⁵⁷ then the national authority shall impose appropriate regulatory obligations on the undertakings having significant market power in accordance with Article 14 of the Framework Directive. These obligations may include an obligation not to charge excessive prices, inhibit market entry or restrict competition by setting predatory prices, show undue preference to specific end users or unreasonably bundle services. It is open to the national regulatory

⁵⁰ *Ibid*, Art. 11(1), and Annex III.

⁵¹ *Ibid*, Art. 11(2).

⁵² *Ibid*, Art. 11(6); Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorization of electronic communications networks and services (Authorization Directive), OJ 2002 L108/21, Art. 10.

⁵³ Directive 2002/22, above n. 43, Art. 12.

⁵⁴ *Ibid*, Art. 13.

⁵⁵ *Ibid*, Arts 16–17.

⁵⁶ Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive), OJ 2002 L108/7.

⁵⁷ Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), OJ 2002 L108/33.

authority to impose retail price caps on such undertakings and control individual tariffs. There are analogous provisions concerning regulatory controls on the minimum set of leased lines, where the national regulatory authority determines that this market is not effectively competitive.⁵⁸

National regulatory authorities are obliged to notify to the Commission the names of undertakings having universal service obligations and also those undertakings deemed to have significant market power for the purposes of this Directive, as well as obligations imposed on them pursuant to this Directive.⁵⁹

(B) Technological Change and the Regulatory Regime

The speed and nature of technological change in telecommunications have posed major challenges for the 2002 regime. The current regime is premised on the existence of separate markets for telecommunications, media, computer information and the like. This premise has however been overtaken by technological change.

Thus Viviane Reding, Commissioner for Information Society and Media, states that ‘traditionally separate markets – such as telephony, internet and television – are changing fast and converging while market players quickly have to adjust their strategies to this new reality’.⁶⁰ This development is echoed by Foster and Kiedrowski who state that ‘market structures are changing, bringing into commercial competition firms that have been undisputed masters of their “own patch”, sometimes for decades’.⁶¹ This is reinforced by the fact that ‘a decade ago, mobile, broadband, digital TV and radio, wireless networks and WiFi hotspots were niche products or non-existent’, whereas ‘today they are all part of the mass market’.⁶² The change in the nature of the overall market is far-reaching:⁶³

[T]here will be a shift from a communications sector characterised by relative stability, high-entry barriers and monopoly, to one which is fast changing, subject to disruptive competition and increasingly open. Market boundaries will be redefined, and there will be increasingly blurred boundaries between

⁵⁸ Directive 2002/22, above n. 43, Art. 18.

⁵⁹ *Ibid*, Art. 36.

⁶⁰ V. Reding, ‘Foreword’, in E. Richards, R. Foster and T. Kiedrowski (eds), *Communications, The Next Decade* (Ofcom, 2006), 3.

⁶¹ R. Foster and T. Kiedrowski, ‘Overview’, in Richards, Foster and Kiedrowski (eds), above n. 60, 25.

⁶² *Ibid*, 26.

⁶³ *Ibid*, 26.

what is considered broadcasting, entertainment and publishing; fixed or mobile; a supplier or a consumer.

This transformation has been recognized by the EU in the ‘i2010’ project. Building on the Lisbon strategy and instructions from the European Council in Spring 2005, the Commission initiated the i2010 project, designed to foster a fully inclusive information society, which is based on the widespread use of information and communication technologies (ICT) in public services, small and medium-sized enterprises and households.⁶⁴ It promotes ‘an open and competitive digital economy and emphasizes ICT as a driver of inclusion and quality of life’.⁶⁵

The project has three more particular parts:⁶⁶ the completion of the single European information space, based on an open and competitive internal market for information society and media; the strengthening of innovation and investment in ICT research to promote growth and foster employment; and the achievement of an inclusive European information society, which is consistent with sustainable development and which prioritizes better public services and quality of life. The i2010 strategy therefore is premised on a similar duality to that characterizing previous EU initiatives. Liberalization and completion of the single market through the free interplay of market forces are the principal driving forces, but these are tempered by provisions designed to combat exclusion, as exemplified by universal service obligations, but including also a range of other initiatives.⁶⁷

The transformation of communication raises a plethora of issues which go beyond those that can be considered here. These developments have important implications for what is to count as a universal service obligation and the way in which such obligations are financed. These will be analysed in turn.

The technological changes throw into sharp relief what should be counted as universal service obligations. Richards, the Chief Executive of Ofcom, captures the duality of technological change, noting that the proliferation of digital media will result in more choice, innovation and

⁶⁴ i2010 – A European Information Society for Growth and Employment, COM(2005)229 final.

⁶⁵ *Ibid*, 3.

⁶⁶ The more detailed initiatives can be found at http://europa.eu.int/information_society/index_en.htm.

⁶⁷ For an overview of these initiatives see http://ec.europa.eu/employment_social/knowledge_society/society_en.htm#Policies. See also Riga Declaration on e-inclusion, 11 June 2006, available at http://ec.europa.eu/information_society/events/ict_riga_2006/index_en.htm.

better prices for consumers, ‘but the flip side to this is that these new and innovative technologies can also exclude certain sections of the community and further isolate them from the rest of society’.⁶⁸ Similar themes are apparent in the EC working group on digital exclusion, which reported that ‘participation in contemporary society now requires a minimum (and ever-increasing) level of access to, and competence to use, ICT tools and services’.⁶⁹

Debate as to the reach of the universal service obligations is readily apparent at EU level. Thus the 2006 review of the scope of universal service considered a host of important specific issues, such as whether mobile communications and broadband should come within the scope of universal service, and whether matters such as directory inquiry services and public pay phones should still be characterized as universal service obligations.⁷⁰ While the Commission felt that neither mobile communications nor broadband should be treated as within the universal service provisions, the Commission is also aware of the very real benefits of broadband access, noting that lack of access constitutes a digital divide which has to be addressed urgently.⁷¹ It is clear moreover that the Commission will conduct a more far-reaching debate on the role of universal service obligations in the twenty-first century, prompted in part at least by the changing nature of communication and information technology.⁷²

The technological changes relating to communication may also have a profound impact on the other issue set out above: the financing and viability of universal service obligations. It is trite that obligations imposed on undertakings which differ from those resulting from market principles entail costs. This is recognized in the Directive on Universal Service, which, as we have seen, has provisions concerning who should bear the cost. This is *prima facie* borne by the undertaking designated as having

⁶⁸ E. Richards, ‘Promoting Access for all in the Digital World’, TAG Seminar on Emerging Technologies, 17 May 2006, 4, available through <http://www.ofcom.org.uk/>.

⁶⁹ Kaplan Report, July 2005, 17, available at http://ec.europa.eu/information_society/newsroom/cf/itemlongdetail.cfm?item_id=3723.

⁷⁰ Report regarding the outcome of the Review of the Scope of Universal Service in accordance with Article 15(2) of Directive 2002/22/EC, COM(2006)163 final.

⁷¹ Bridging the Broadband Gap, COM(2006)129 final, 3. See further the EU Conference in 2007 on ‘Bridging the Broadband Gap’, launched by four EU Commissioners, with the aim of facilitating access to broadband in less developed regions, rural and isolated areas, available at http://europa.eu.int/information_society/eeurope/i2010/digital_divide/index_en.htm.

⁷² The Review of the EU Regulatory Framework for electronic communications networks and services, COM(2006)334 final, 5.4.

the universal service obligation, subject to compensation and/or sharing mechanisms if the national regulatory authority decides that this imposes an unfair burden on that undertaking.⁷³ This regime is premised on the existence of designated undertakings which can bear such costs through cross-subsidy, without this normally being regarded as being unfair, because of the undertaking's privileged market position.

The changing nature of communications has however undermined some of the assumptions as to whether the designated undertaking can afford these costs. Thus, as Giles states, in a world of less monopoly power British Telecom has less scope to cross-subsidize loss-making activities from profitable ones, with the consequence that 'if the monopoly rents are not there, you cannot demand that BT lowers its profits for the greater good of the British households'.⁷⁴ Richards, the Chief Executive of Ofcom, echoes the same theme. He notes that periods of innovation and technological change may disrupt 'traditional' mechanisms for achieving social objectives.⁷⁵

The Universal Service Obligation was funded by the monopoly surplus of incumbent telcos. That is a surplus that is being swept away by competition and convergence. Commercial public service broadcasting rested on privileged spectrum in return for programming obligations. Competition, whether from terrestrial satellite, cable or IPTV erodes that privilege and with it the ability to deliver commercial public service in the manner of the last 50 years.

This theme is developed at greater length by Currie and Richards, who highlight the intimate connection between the changing nature of the communications market, and the way in which these changes affect universal service and its financing:⁷⁶

In the days of stable technology and a limited range of one-size-fits-all services – basic voice telephony, internet access, television and radio reception, and access services for disabled people – universal service was a straightforward concept and not unduly expensive to impose, often through implicit cross-subsidy requirements on a limited number of incumbents. In today's and tomorrow's

⁷³ Directive 2002/22, above n. 43, Arts 12–13.

⁷⁴ C. Giles, 'The Public Interest Challenges for the Communications Sector over the Next 10 Years: Contestable Public Service Funding', in Richards, Foster and Kiedrowski (eds), above n. 60, 104.

⁷⁵ E. Richards, Chief Executive, Ofcom, 'Communications and Convergence Challenges for the 21st Century for Digital Economies', 30 November 2006, available at <http://www.ofcom.org.uk/sitemap>.

⁷⁶ D. Currie and E. Richards, 'Introduction', in Richards, Foster and Kiedrowski (eds), n. 60, 20. See also, Foster and Kiedrowski, 'Overview', in Richards, Foster and Kiedrowski (eds), n. 60, 31–2.

much richer and more diverse communications markets, the task of determining which services should be universally available is a much more complex issue.

The emergence of multiple geographic markets within a single national market also begs a question: namely, must a universal service be at a universal price? It is not even just the matter of availability but also of the ability to take up and use new communications services that is prompting public policy concern and debate about digital inclusion and the digital divide.

Quite how sharp those social concerns will be in reality, and how far the market will address them, must be moot. What is evident is that great clarity will be needed in the criteria for determining what should be universal services in the future. And, as the (declining) monopoly rents that enabled the implicit cross-subsidies which supported universal services are fully competed away, the question of 'who pays?' comes into much sharper focus.

These challenges raise contestable positive and normative issues as to the future role for universal service obligations and the optimal way to fund them. Thus Giles argues that the best way to secure public interest objectives in the future is through contestable funding organized through auction.⁷⁷ Tambini reflects more broadly on the normative dimension of universal service provision from the perspective of citizenship.⁷⁸ He argues that 'electronic communications are becoming ever-more central to exercising citizenship rights, just as a basic level of education and welfare have been'⁷⁹ and that digital exclusion can undermine citizenship. For Tambini, a 'notion of rights, and one that sees information citizenship as a relative poverty issue, is the best long-term framework to ensure that communications in the UK perform their integrative, democratic role'.⁸⁰

(C) The 2007 Reforms: Substantive and Institutional Change

In 2007 the Commission began in earnest the process of reforming the 2002 telecommunications regime, with the aim of having the modified regime in place by 2010. There are, as with the case of energy, both substantive and institutional aspects to the reforms.

i. Substantive change

It is too early at the time of writing to be clear about the detailed substantive reforms. The thrust of the changes is nonetheless relatively clear: it

⁷⁷ Giles, above n. 74.

⁷⁸ D. Tambini, 'What Citizens Need to Know. Digital Exclusion, Information Inequality and Rights', in Richards, Foster and Kiedrowski (eds), above n. 60.

⁷⁹ *Ibid*, 121.

⁸⁰ *Ibid*, 123.

is to have more effective but more focused regulatory intervention in the telecommunications market.

It aims to be more effective in the following respect. The Commission, with justification, notes the benefits that have been forthcoming from market liberalization.⁸¹ However competition bottlenecks have persisted, in, for example, the broadband market, and some former state monopolies still hold a position of structural dominance linked to their networks. The objective is therefore to concentrate on these bottlenecks.⁸² Regulators will be given a new instrument, functional separation, for overcoming the main network access bottlenecks in cases where standard remedies have failed.⁸³ There are moreover to be changes which will ensure faster implementation and greater consistency of regulation across Europe.⁸⁴

The modified regime is also designed to be deregulatory in important respects. Thus whereas the 2002 regime was premised on 18 separate markets, which would be regulated at national level, this will henceforth be reduced to seven, this being reflective of the advances made towards competitive markets in the other areas.⁸⁵ The deregulatory aspects of the new regime will not however markedly affect consumer interests, which will continue to be protected under the reformed regime.⁸⁶

ii. Institutional change: national regulatory authorities

We saw in the discussion of energy that strengthening the position of national regulatory authorities was a key component of the reform strategy. The same is true in relation to telecommunications.

The Commission made explicit in this respect what had been implicit in its discussion of energy: the strengthening of national regulatory authorities was due in part at least to shortcomings in the accession states. Thus the Commission stated that most such Member States have a telecoms sector where incumbent operators are still very dominant and ‘where

⁸¹ Commission Information Society and Media, *2007 EU Telecoms Reform #1: The Need for Reform* (2007), available at http://ec.europa.eu/information_society/newsroom/cf/itemlongdetail.cfm?item_id=3723.

⁸² Commission Information Society and Media, *2007 EU Telecoms Reform #8: Less But Better Regulation* (2007), *ibid.*

⁸³ Commission Information Society and Media, *2007 EU Telecoms Reform #2: More Competition for a Stronger Europe* (2007), *ibid.*

⁸⁴ Commission Information Society and Media, *2007 EU Telecoms Reform #10: A More Effective Regulatory System* (2007), *ibid.*

⁸⁵ *More Competition for a Stronger Europe*, above n. 83, 2.

⁸⁶ Commission Information Society and Media, *2007 EU Telecoms Reform #4: Empowering European Consumers* (2007), *ibid.*

independent, well-equipped national regulators are still the exception to the rule'.⁸⁷

It is clear that reforms akin to those proposed for energy will be forthcoming in relation to telecommunications: the national regulators will have to be truly independent, free from external political pressure, have their own independent budget and sufficient human resources.⁸⁸

iii. Institutional change: a new EU agency

The strengthening of the powers of the national regulator is to be complemented by the creation of a new EU agency, and the rationale for this is similar to that in energy.

A European Regulators Group, ERG, already exists in relation to telecommunications and it was established at the behest of the Commission.⁸⁹ The Commission paid tribute to the ERG's valuable work, but recognized its limitations: the ERG's need to proceed by way of consensus and the consequential tendency to lowest common denominator regulation.

The Commission has therefore argued that a new EU agency, the European Telecom Market Authority, ETMA, should be established. The existence of 27 regulatory systems had made it hard for companies to deliver pan-European or cross-border services, more especially because the way in which the regulatory regime was applied varied considerably from country to country, and because of the differing degrees of independence of national regulators.⁹⁰

The new ETMA will therefore aim to: improve the quality and consistency of EU regulation; reinforce cooperation between national regulators and the Commission; and provide expertise for regulatory issues linked to cross-Community telecoms services. The ETMA will, *inter alia*: ensure that the 27 national regulators work as an efficient team on the basis of common guiding principles; deliver opinions and assist in preparing single market measures of the Commission for the telecoms sector; improve the accessibility of telecoms services and equipment for users with disabilities; facilitate cross-border EU services in relation to rights-of-use for scarce resources such as spectrum and numbers; and address network and information security issues.

⁸⁷ Commission Information Society and Media, *2007 EU Telecoms Reform #3: The European Telecom Market Authority* (2007), 2, *ibid*.

⁸⁸ Commission Information Society and Media, *2007 EU Telecoms Reform #8: Less But Better Regulation* (2007), *ibid*.

⁸⁹ <http://www.erg.eu.int/>.

⁹⁰ *The European Telecom Market Authority*, above n. 87.

4. SHARED ADMINISTRATION AND COMPETITION

(A) The 2003 Reform

The enforcement regime for Articles 81 and 82 EC was, as is well known, reformed in 2003. The traditional approach to the enforcement of EC competition law had two foundations. Agreements had, subject to certain exceptions, to be notified to the Commission, and the Commission had a monopoly over the application of Article 81(3). The system was, in this sense, centralized, although there were decentralized aspects. Articles 81 and 82 had direct effect and national courts could therefore apply Article 81(1), but could not grant an individual exemption under Article 81(3).

The traditional approach came under increasing strain. The Commission did not have the resources to deal with all the agreements notified to it, nor did it have the resources to adjudicate on anything but a handful of individual exemptions. The Commission therefore encouraged national courts to apply Articles 81 and 82.

However, in the *White Paper on Modernization*⁹¹ it proposed a thorough overhaul of the enforcement regime, abolishing notification and the Commission's monopoly over Article 81(3). National courts and national competition authorities (NCAs) would be empowered to apply Article 81 in its entirety and Article 82. The *White Paper* generated a voluminous literature, which contained all shades of opinion.⁹²

(B) The 2003 Regime

Article 1 of Regulation 1/2003, which implemented the new regime,⁹³ provides that agreements, etc., caught by Article 81(1) which do not satisfy the

⁹¹ White Paper on Modernization of the Rules Implementing Articles 85 and 86 of the EC Treaty, Commission Programme 99/27, 28 April 1999.

⁹² See, e.g., R. Wesseling, 'The Commission White Paper on Modernisation of EC Antitrust Law: Unspoken Consequences and Incomplete Treatment of Alternative Options' [1999] *ECLR* 420; C.-D. Ehlermann, 'The Modernization of EC Antitrust Policy: A Legal and Cultural Revolution' (2000) 37 *CMLRev* 537; A. Schaub, 'Modernisation of EC Competition Law: Reform of Regulation No. 17', in B. Hawk (ed.), *Fordham Corporate Law Institute* (Fordham University, 2000), Chap. 10; R. Whish and B. Sufin, 'Community Competition Law: Notification and Exemption – Goodbye to All That', in D. Hayton (ed.), *Law's Future(s): British Legal Developments in the 21st Century* (Hart, 2000), Chap. 8; M. Monti, 'European Competition Law for the 21st Century', in B. Hawk (ed.), *Fordham Corporate Law Institute* (Fordham University, 2001), Chap. 15.

⁹³ Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003

conditions of Article 81(3) shall be prohibited, no prior decision to that effect being required. The same principle is applicable to abuse of a dominant position in Article 82. NCAs and national courts can apply the entirety of Articles 81 and 82.⁹⁴ The Regulation contains wide-ranging powers of investigation,⁹⁵ and far-reaching provisions concerning fines and penalty payments.⁹⁶

There are provisions facilitating cooperation between an NCA and the Commission.⁹⁷ NCAs have an obligation to inform the Commission of proceedings begun in the Member States,⁹⁸ and the NCAs are also obliged to inform the Commission before they adopt a decision requiring an infringement of Articles 81 or 82 to be brought to an end, before they accept commitments or withdraw the benefit of a block exemption.⁹⁹ The NCAs are 'relieved of their competence' to apply Articles 81 and 82 if the Commission initiates proceedings for the adoption of a decision.¹⁰⁰ NCAs cannot make rulings in relation to Articles 81 and 82 which are counter to a decision already reached by the Commission on that same subject matter.¹⁰¹

There are also provisions facilitating cooperation between NCAs in different Member States,¹⁰² and a European Competition Network has been established for discussion and cooperation between NCAs.¹⁰³ Where two or more NCAs have received a complaint, or are acting on their own initiative, against the same agreement, etc., 'the fact that one authority is dealing with the case shall be sufficient grounds for the others to suspend proceedings before them or to reject the complaint'.¹⁰⁴ The Commission may also reject a complaint on the ground that an NCA is dealing with the matter. Where a case has already been dealt with by an NCA, or by the Commission, any other NCA may reject it.¹⁰⁵

There are separate provisions dealing with cooperation with national

L1/1; J. Venit, 'Brave New World: The Decentralization and Modernization of Enforcement under Articles 81 and 82 of the EC Treaty' (2003) 40 *CMLRev* 545.

⁹⁴ Reg. 1/2003, above n. 93, Arts 5 and 6.

⁹⁵ *Ibid*, Arts 17–22.

⁹⁶ *Ibid*, Arts 23–26.

⁹⁷ *Ibid*, Arts 11–12.

⁹⁸ *Ibid*, Art. 11(3).

⁹⁹ *Ibid*, Art. 11(4).

¹⁰⁰ *Ibid*, Art. 11(6).

¹⁰¹ *Ibid*, Art. 16(2).

¹⁰² Commission Notice on cooperation within the Network of Competition Authorities, OJ 2004 C101/43; Joint Statement of the Council and the Commission on the Functioning of the Network of Competition Authorities, available at http://ec.europa.eu/comm/competition/ecn/more_details.html.

¹⁰³ http://ec.europa.eu/comm/competition/ecn/more_details.html.

¹⁰⁴ Reg. 1/2003, above n. 93, Art. 13(1).

¹⁰⁵ *Ibid*, Art. 13(2).

courts.¹⁰⁶ National courts may, in proceedings for the application of Articles 81 and 82, ask the Commission for information in its possession, or for its opinion on questions concerning the application of Community competition rules.¹⁰⁷ Member States are obliged to send the Commission copies of judgments applying Article 81 or 82.¹⁰⁸ NCAs may submit written observations to national courts in relation to cases concerning Articles 81 and 82, and may submit oral argument with the permission of the national court. The Commission may do likewise where the coherent application of Articles 81 and 82 so requires.¹⁰⁹ National courts cannot make rulings in relation to Articles 81 and 82 that are counter to a decision already reached by the Commission on the same subject matter, and they must avoid giving decisions which would conflict with a decision contemplated by the Commission in proceedings which it has initiated.¹¹⁰

The Commission continues to have enforcement power under the new regime. It can act on a complaint or on its own initiative and find an infringement of Article 81 or Article 82.¹¹¹ It can impose behavioural or structural remedies, although the Regulation is framed in favour of the former.¹¹² The Commission has power, for reasons of the Community public interest, acting on its own initiative to make a decision either that Article 81(1) is inapplicable to an agreement or that the conditions of Article 81(3) are fulfilled. The Commission has an analogous power in relation to Article 82.¹¹³ The Commission must consult an Advisory Committee on Restrictive Practices and Dominant Positions prior to taking decisions under Article 7, 8, 9, 10, 23, 24(2) or 29(1).¹¹⁴ The Committee is composed of representatives of the NCAs, and the Commission must take 'utmost account' of its opinion.¹¹⁵

(C) Competition, Consistency and Shared Administration

The 2003 competition regime epitomizes shared administration, notwithstanding the fact that the scheme is somewhat different from those

¹⁰⁶ Commission Notice on the cooperation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC, OJ 2004 C101/54.

¹⁰⁷ Reg. 1/2003, above n. 93, Art. 15(1).

¹⁰⁸ *Ibid.*, Art. 15(2).

¹⁰⁹ *Ibid.*, Art. 15(3).

¹¹⁰ *Ibid.*, Art. 16(1).

¹¹¹ *Ibid.*, Art. 7.

¹¹² *Ibid.*, Art. 7(1).

¹¹³ *Ibid.*, Art. 10.

¹¹⁴ *Ibid.*, Art. 14(1).

¹¹⁵ *Ibid.*, Art. 14(5).

considered thus far. It is nonetheless an area where the Commission and Member States have distinct tasks laid down in the empowering legislation which are inter-dependent and where effective performance by both parties is necessary for the legislative schema to be attained.

The very nature of the subject matter and the decentralized regime embodied in the 2003 regime necessarily gives rise to problems of consistency. Thus, as Gerber and Cassinis note,¹¹⁶ ‘national authorities and courts may have divergent interpretations within a single system; there may be differing interpretations among Member States; and individual Member States may diverge from the interpretations of the Commission’. These difficulties are however, as Gerber and Cassinis persuasively argue, alleviated in a number of ways, some of which are found in the empowering legislation, while others have been developed outside the strict confines of the legislative text.

Thus an important mechanism for ensuring consistency is the obligation imposed by Regulation 1/2003 on Member States’ courts and competition authorities to apply EC competition law to cases which come before them, and not to prohibit activity on the basis of national competition law where that is more restrictive than would be required under Article 81 EC. The Commission moreover has a central role in fostering consistency, in relation to both what Gerber and Cassinis term ‘systemic consistency’, consistency in outcomes among different cases within the system, and ‘single-case consistency’, the treatment of a single set of facts by multiple institutions.¹¹⁷ The ECN is also important in this respect, providing a forum within which regulators within national competition authorities can discuss issues of common concern, thereby fostering a shared understanding of the precepts of EC competition law.

This does not mean that issues of consistency will magically disappear, and there may be more cause for concern about consistency between national judges than between national competition authorities. The formal and informal powers which are contained within the 2003 regime will, nonetheless, serve to minimize the risk of inconsistency.

5. CONCLUSION

Some more general concluding remarks are in order in the light of the preceding analysis. The points are related, albeit distinct.

¹¹⁶ D.J. Gerber and P. Cassinis, ‘The “Modernization” of European Community Competition Law: Achieving Consistency in Enforcement: Part 1’ [2006] *ECLR* 10, 11.

¹¹⁷ *Ibid.*, 14. See also D.J. Gerber and P. Cassinis, ‘The “Modernization” of European Community Competition Law: Achieving Consistency in Enforcement: Part 2’ [2006] *ECLR* 51.

First, shared administration as defined by the Committee of Independent Experts remains central to the delivery of Community policy in diverse areas where the EU has competence. This is so notwithstanding the fact that the nature of the powers accorded to the Commission and the Member States may differ as between those areas.

Secondly, an understanding of the substantive law which governs any such area is crucial in order to comprehend the nature of the difficulties that beset a particular regime of shared administration. This is equally true for those who come to the topic as EU administrative lawyers. We must be willing to delve into the substantive law in order to make informed judgements concerning reforms which might improve the efficiency, effectiveness and justice of such administrative regimes.

Thirdly, while the nature of the difficulties which beset a particular area will perforce be dependent on the nature of the legislative and regulatory regime that pertains thereto, this does not preclude the drawing of more general conclusions which cut across certain areas. This point can be exemplified by considering the difficulties which have beset energy and telecommunications, where the EU acts in a classic regulatory mode. The recent reform initiatives in both areas reveal analogous problems. There has been the need to modify the relevant substantive law, in order that the market liberalization objectives can be effectively attained, and in order to ensure that the regulatory regime kept pace with technological developments in that area. There is the continuing concern to ensure that national regulators have the requisite independence, autonomy and power to perform the tasks required of them by the Community regulatory regime, and this concern has become more pronounced with the expansion of the EU from 15 to 27 Member States. There is the increasing recourse to formal EU agencies to supplement the pre-existing system. The expansion of the EU to 27 Member States has clearly generated coordination problems which cannot, in the Commission's view, be satisfactorily resolved simply by reliance on the pre-existing networks of national regulators, whether this be in terms of the ERGEG for energy or the ERG for telecommunications.

The nature and complexity of some of these issues should come as no surprise. The task of delivering policy across a Community of 27 Member States, which have diverse administrative cultures and traditions, was never going to be easy. The multi-level governance which is inherent in the very idea of shared administration will nonetheless continue to be central to the delivery of many important Community initiatives.

PART II

Procedures and structures

3. ‘Glass half empty or glass half-full?’: accountability issues in comitology and the role of the European Parliament after the 2006 reform of comitology¹

Christine Neuhold

1. INTRODUCTION

Ever since the 1960s, the European Commission has played a major role as regulator in the process of implementing European legislation. Just looking at the most recent figures on implementing measures one will find that the Commission adopted more than 2500 such legal acts per year. As is well known, the Commission is not alone in this domain of regulating the implementing process, but is assisted and controlled by ‘comitology’ committees composed of civil servants from the administrations of the Member States. The system has been under pressure for reform almost from its inception. Especially the European Parliament (EP) has been highly critical of the complex system and of – as it claimed – the undemocratic procedures involving two levels of bureaucrats who, to make matters worse, can under certain circumstances refer measures to the Council (European Parliament (EP), 1961). One has to note that the call for reform of the system, notably from the EP but also from the European Commission, has not been unheard: first it was reformed in 1999 and just recently in 2006.

In this context, a new regulatory procedure has been agreed upon, which from the side of the EP is described as ‘a huge breakthrough in parliamentary control over EU legislation’ and as ‘improving accountability

¹ An earlier version of this chapter was published in the European Integration online Papers (EIoP), Vol. 12, 2008, see http://eiop.or.at/eiop/index.php/eiop/article/view/2008_001a.

. . . of the whole Community system'.² This is also echoed in the literature, where the inclusion of Parliament is seen to 'increase the democratic legitimacy of "quasi-legislative" measures and thus contributes to a better acceptance of European legislation by citizens' (Schusterschitz and Kotz, 2007, p. 89).

This chapter wants to come in here and probe these assumptions. More concretely, the question to be examined is whether the latest Comitology Decision actually improves parliamentary control, as it claimed, and as such alleviates the 'accountability deficits of comitology' which have been diagnosed elsewhere (Brandsma, 2007). This evaluation will be made (partly) based on the insights gained from the exercise of parliamentary control according to the provisions of the 1999 Decision. It goes without saying that the 2006 provisions go beyond those of 1999 but certain observations can still be made.

In this quest, the chapter will be structured as follows: first an overview of the system of comitology will be given, followed by a subsequent analysis of accountability issues in comitology. Based on these insights, the *problematique* of holding comitology committees accountable to the EP will be analysed before and after the most recent reform. This builds the basis for a brief analysis of when to exercise parliamentary control in comitology, before the chapter closes with some concluding remarks.

2. THE DEVELOPMENT OF COMITOLGY COMMITTEES: RESPECTIVE LEGAL STIPULATIONS AND THE WORK OF COMITOLGY COMMITTEES

Comitology committees have developed on an ad hoc basis, without any clear legal stipulations in the Treaties guiding their development. Even though they have been the object of much institutional controversy, they have become an intrinsic feature of the EU system of governance. The actual genesis of these committees, controlling and assisting the Commission in the implementing phase of EU legislation, dates back to the early hours of the Common Agricultural Policy (CAP).

These initial steps, at the beginning of the 1960s, already required extensive and detailed technical regulation. The Council, the (then one

² By one of the two EP rapporteurs on Comitology: see www.euractiv.com/en/opinion/parliament-strengthens-control-commission/article-156620.

and only) legislator, lacked not only the relevant insight, but also the resources to respond to the needs of day-to-day management in this area, which included the ability to take quick action. However, it did not wish to delegate the implementation of the acts it adopted to the Commission without retaining some form of control over these measures (Demmke, Eberharter, Schaefer and Türk, 1996, p. 61f.). Several proposals were put forward as to how this could be achieved. The rather unorthodox solution which was finally found provided for the creation of committees known as management committees. These were (and still are) comprised of representatives of the governments of the Member States whose task was, to put it simply, to advise and control the Commission in the implementation of Community law (Neuhold, 2006, p. 140).³

As further Community policies outside the agricultural sector were established, different procedures for their implementation were created. Due to a growing conviction among several Member States that the existing procedures allowed the Commission too much leeway, the Council's control over Commission implementing measures was strengthened by the introduction of the so-called 'regulatory procedure' (Hofmann and Türk, 2006, p. 77f.). One must note that it was not until the Comitology Decision of 13 July 1987⁴ that these procedures were finally legally codified.

It would go beyond the scope of this chapter to provide a detailed analysis of both the Comitology Decision of 1987 and its revised version of 1999. At this point, it suffices to say that the decision issued subsequently to the Single European Act (SEA) of 1987 by no means led to a simplification. The Council maintained not only the three procedures proposed by the Commission,⁵ but added two variants to the management and regulatory committee procedures, and foresaw the possibility of safeguard measures. Within the regulatory procedures, mechanisms were foreseen which, at least on paper, provide the Member States with the most effective control over the Commission. The reform of the very complex procedures in 1999 led to a certain amount of streamlining in so far as the number of

³ Before the end of the transitional period for which the management committees had actually been established (on 31 December 1969), the Council decided to maintain the committees on a permanent basis. Management committees eventually came to be used for the entire agricultural sector. By 1970 there were already 14 such committees, and seven years later there were 18.

⁴ OJ 1987, L 197/33.

⁵ Guided by what had been the practice since the 1960s, the Commission proposed three types of committee procedure: an advisory committee procedure, the traditional management committee procedure and a regulatory committee procedure with a file (safety net).

procedures was reduced and the variants abolished. According to the 1999 decision,⁶ three types of procedures were retained: the advisory, the management and the regulatory. It is important to note that under the management and regulatory procedure the comitology committees have to refer the measure only to the Council – and not to the EP – for a final decision if no consensus can be found at committee level.⁷

One also has to stress the fact that the system has – yet again – just very recently been subject to reform. In July 2006 a new Council Decision amending the 1999 Comitology Decision came into force.⁸ This decision, which introduced a regulatory procedure with scrutiny, giving the European Parliament for the first time the opportunity to recall implementing measures, will be examined below.

2.1. A Brief Overview of the Functioning of Comitology Committees

When examining the work of comitology committees, we see that they contribute to a constant flow of implementing legislation. According to the Annual Report of the Commission on the workings of committees issued in 2005, 250 comitology committees were contributing to the output of implementing legislation (Commission of the EC, 2006). In the same year the number of implementing measures adopted by the Commission reached a staggering 2,654 and, as shown in Table 3.1, consensus is usually found at committee level.

Table 3.1 Total number of comitology committees and predominant policy sectors

2004	2005	Predominant Policy Sectors in 2005
245	250	Transport/Energy (38), Enterprise (32), Environment (32) and Agriculture (31)

Source: Commission of the EC 2006.

⁶ OJ 1999, L 184 23–26.

⁷ According to the management procedure the comitology committee has to block the Commission by qualified majority, whereas under the regulatory procedure the Commission needs a qualified majority or has otherwise to pass the measure onto the Council.

⁸ Council Decision 2006/512/EC amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission, OJ L 2006 11–13. For a detailed overview of the negotiations of the 2006 Decision see Christiansen and Vaccari (2006).

Table 3.2 Number of implementing measures and measures referred to Council (2005)

Implementing measures ¹	Matters referred to Council	Policy Sectors
2 637	11 (less than 0.5 %)	Health and Consumer (5), Environment (4), Europe Aid (1), Statistics (1)

Note: ¹ Adopted under the management or regulatory procedure.

Source: Commission of the EC 2006.

In this context, one has to stress that only a very small number of implementing measures adopted by committees are actually referred to the Council (less than 0.5 per cent: see Table 3.2), and those which result in a referral are predominantly the more politicized and quite often highly mediated issues. It is interesting to note that, although only a relatively small number of legal acts are adopted within the field of environment, these issues seem to be of a more conflictual nature as they are more frequently referred to the Council.

As a study carried out by the European Institute of Public Administration for the EP has revealed (European Parliament, 1999, p. 21), these committees mostly deal with matters which require a high degree of technical expertise. This study has covered 204 implementing acts, mainly from the environmental sector and from economic and monetary affairs. These are sensitive areas, where one could assume that infringements of the legislative and the budgetary rules would occur more regularly than in other areas.

In a majority of the cases studied, it became apparent, however, that the committees dealt with highly ‘technical’ issues which did not give rise to any political controversy, such as the establishment of the ecological criteria for the award of the Community Eco-label to single-ended light bulbs.⁹

Nevertheless one has to stress the fact that representatives in these committees deal not only with matters which require detailed expertise, such as laying down recommendations ‘to publish best-practice in interconnection (telephone) pricing’, but with issues which are both highly technical and strongly politicized, such as problems of biotechnology, BSE and dioxins. More often than not, the boundary between purely technical issues and those with political implications is far from clear. This is one of the reasons

⁹ European Commission (1993): Document n° XI/200/93 – Rev.1.

the accountability of these committees to democratic institutions is such a salient issue.

3. ACCOUNTABILITY ISSUES IN COMITOLOGY

Before examining the issue whether the most recent Comitology Decision actually improved the accountability of the current system, one should try to establish what is actually meant by the term. As Brandsma rightly put it, ‘there seem to be as many definitions of accountability as there are scholars’ (Brandsma, 2007, p. 9). He then settles for the definition of Marc Bovens who defines accountability as a ‘relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgement, and the actor may face consequences’ (Bovens, 2006, p. 9). Another definition along the same lines is provided by Bealey who states, ‘to be accountable is to be in a position of stewardship and thus to be called to order or expected to answer questions about one’s activities. Second, accountable means censurable’ (Bealey, 1999, p. 2). For the purpose of this chapter, both definitions are very useful, as accountability is conceived as a process of interaction between an actor and a larger group of actors (the forum) which holds the former to account. Actors failing to account for their measures may incur consequences. This description thus could at least at first glance easily be applied to the *problematique* of holding members of comitology committees accountable to Members of the European Parliament (MEPs).

This chapter wants to go beyond the mere question whether an ‘accountability deficit’ (Brandsma, 2007) is prevalent in comitology and how this deficit manifests itself, but more importantly how it could be overcome. This is closely linked to the question raised in the introduction: to what extent are the problems at stake solved by enhancing the EP’s role within the system?

When probing into the literature on comitology we find that the question of accountability is usually not examined in great detail, but that other issues which could be subsumed under what seems to have become a ‘catch-all term’, that of the ‘democratic deficit’, have been explored.¹⁰

On the one hand there is a set of literature which tries to open the ‘black box’ of comitology committees by examining the functioning of the committees themselves. Here some conclusions are drawn as regards

¹⁰ Here Brandsma (2007) is an exception.

the deliberative processes in committees which may contribute to consensual and correct decisions which are seen to make up an 'inherent part of democratic governance' (Eriksen and Fossum, 2001, p. 7; Eriksen and Fossum, 2002; Joerges and Neyer, 1997; Joerges, 1999).

In somewhat the same vein, comitology committees are described as arenas where national and Community actors 'pool their respective sources of legitimacy' in order 'to improve the acceptance of the system to the groups involved and to the population at large' (Wessels, 1999, p. 26; Wessels, 1998). Another approach taken to probe into 'democratic' aspects of comitology committees is by way of case studies, notably in the sphere of health and consumer protection, for example in the field of GMOs and BSE (Toeller and Hofmann, 2000).

Other authors put the system of comitology into a wider context by focusing on the *problematique* of transparency in comitology (see especially Türk, 2003) and on its role in the institutional system at large by, for example, probing into the issue of its relationship with the European Parliament (see especially Hix, 2000). In this context, it is notable that the question of accountability is not addressed in great detail, but rather a comparative approach to parliamentary oversight of executive rule making is advocated. Hix (2000) comes to the following conclusion:

Executive power in the EU needs to be more accountable. In designing a system of parliamentary control of the EU executive, rather than 'make it up as we go along', there is a depth of theoretical and empirical knowledge about parliamentary oversight and legislative-executive relations from which we can draw. Only by doing so will the EP be able to learn from the successes and failures of other parliaments' attempts to constrain run-away governments. [Hix, 2000, p. 78]

In what follows we will, *inter alia*, examine whether this call for making executive power more accountable by enhancing parliamentary oversight (based on theoretical and empirical insights) has been translated into the practical political process.

4. ACCOUNTABILITY OF COMITOLOGY COMMITTEES TO THE EUROPEAN PARLIAMENT

The EP has adamantly criticized the system of comitology for the following main reasons:

- The committee structure was considered non-transparent and committees were regarded as resembling 'Trojan horses'. This metaphor was chosen as national interests were seen to be 'carried into' the

implementation process of community law. The EP was thus effectively bypassed and unable to exercise its power of parliamentary scrutiny (Toeller, 1999, p. 342);

- Comitology was seen as a strategy of the Council to devalue the participation of the EP within the (co-)legislative process by reaching agreements in the implementation process which could lead to a distortion of the legislative decision. This being the case, MEPs could no longer be held accountable for their decisions reached within the legislative process, since the decision taken could be substantially modified within the implementing process;
- The EP feared that a transfer of decision-making powers of the Commission to the committees could undermine its ability to hold the EU executive accountable (Toeller, 1999);
- The intransparency of the committee proceedings: although the Comitology Decision of 1999 gives the EP a right to information, committee meetings themselves take place behind closed doors (Türk, 2003).¹¹

The EP expressed its opposition to comitology committees even before these fora were formally established, notably in December 1961 (European Parliament, 1961). During the course of time the EP has resorted to several instruments to try to get across its demands. Examples include the blocking of the budgets for committees and bringing annulment proceedings against the Comitology Decision of 1987 before the European Court of Justice (ECJ).

The conflict came to an all time high after the Maastricht Treaty (1993) placed the EP on an (almost) equal footing with the Council in the legislative process, while the implementing measures remained unchanged. The main demand of the EP was that it should have the same rights as the Council to review, approve and veto proposed implementation measures. For the practical political process this would mean that when executive measures adopted under co-decision were referred to the Council by the relevant comitology committee, they should also be forwarded to the EP (for scrutiny and the chance to be vetoed) (European Parliament, 1993).

Due to the fact that these demands of the EP were not met, the EP vetoed legislation under co-decision due to 'inadequate' comitology procedures, for example in 1994 in the context of the directive on Open Network Provisions (ONP) to voice telephony. Here the Council demanded that

¹¹ The EP has a right to receive documents such as agendas of committee meetings, results of voting and draft implementing measures and lists of the authorities to which the members of the comitology committees belong.

a regulatory procedure be provided for, whereas the EP pushed for the instalment of an advisory committee (Neuhold 2006).¹²

According to the 1999 Comitology Decision, the situation of the EP was improved in so far as the Commission was, from then on, obliged to inform the legislative body of the work of the committees and to send it all draft implementing measures based on basic legal acts adopted according to the co-decision procedure, so that the EP could exercise its right of scrutiny.¹³ An evaluation of the implications of this scrutiny right for the EP reflects that the involvement of the EP boils down to so-called *ultra vires* control. This is to ensure that drafts of implementing measures do not *exceed* the implementing provisions provided in the basic instrument by both legislators according to co-decision.

According to Brandsma, the EP is somewhat of a ‘toothless tiger’ (Brandsma, 2007, p. 7). Indeed, if the EP finds that implementing powers which were laid down under co-decision have been exceeded, it can indicate its view by way of a resolution to the Commission or, according to the regulatory procedure, to the Council as well. It is then somewhat dependent on the goodwill of the other institutions. The Commission can just continue with the procedure,¹⁴ and the Council may act by qualified majority ‘as appropriate in view of this position’.¹⁵ It is noteworthy, however, that if the institutions do not adapt the measure following a parliamentary resolution, the EP can take them before the Court of Justice, a measure it has already resorted to in the practical process (see below).

In order to apply the provisions of the 1999 Comitology Decision within the practical political process, the European Parliament and the Commission concluded an inter-institutional agreement in February 2000.¹⁶ It is noteworthy that the EP, given its cumbersome working procedures, agreed that, except in emergencies, it would have only one month in which to pass a resolution in plenary when it deemed that an implementing measure went beyond the stipulations in the basic legislative act.

One has to stress the fact that, in the first five years of the 1999 Decision being in force, the EP adopted six resolutions, which is a minuscule fraction compared to the 10,000 implementing measures adopted during that

¹² OJ C 263: 20–31. Another example is the proposal for amending two directives in the security sector (OJ L 141/1 and OJ L 141/27).

¹³ As enshrined in Article 8 of Decision 1999/468/EC, OJ L 184 1999, pp. 23–6.

¹⁴ The Commission can also submit a new draft to the committee or submit a legislative proposal to the EP and Council.

¹⁵ Article 8 of Decision 1999/468/EC.

¹⁶ OJ L 265 2000, p. 19.

period (Lintner and Vaccari, 2007). It would go beyond the scope of this chapter to examine each of these six cases in detail,¹⁷ but instead two of the most recent resolutions adopted will be focused upon, as they are also very illustrative of some of the issues and problems at stake.

In 2005, the European Parliament adopted two resolutions¹⁸ in which it claimed that the Commission went beyond the implementing powers conferred on it when adopting implementing measures within the environmental sector. This concerned Directive 2002/95/EC of the European Parliament and of the Council on the restriction of the use of certain hazardous substances in electrical and electronic equipment (RoHS Directive) in the field of waste policy.

It may come as somewhat of a surprise that, in its response to the first resolution, the Commission did not focus on the allegations of the EP, i.e. did not comment on whether it had indeed gone beyond the implementing powers conferred on it. It reasoned, on the other hand, that in its view justification for granting exemptions from the requirements established by the Directive was actually outside the scope of the European Parliament's right of scrutiny (Commission of the EC 2006, p. 3). To back up this claim, the Commission re-examined the work underpinning the draft decision and conducted a study, held a stakeholder consultation and carried out discussions in the Technical Adaptation Committee. It must be underlined that after having resorted to this expertise – provided for within the networks of the Commission – the European executive came to the conclusion that the adoption of the draft measure was indeed in accordance with the provisions of the Directive (Commission of the EC, 2006).

This process is very illustrative of the confined powers of the EP according to the 1999 Decision on Comitology. First of all, the scope of its right of scrutiny is very limited, as it cannot focus on the substance of the draft implementing measures but only on whether a transgression of implementing powers has occurred, i.e. whether the measure goes beyond the implementing provisions laid down in the basic legal act.¹⁹ Secondly, the Commission can refuse to acknowledge the validity of such a claim raised by the EP by putting forward legal reasoning (this case apparently being outside the EP's right of scrutiny) and resort to its own networks of expertise to back up this notion.

Furthermore this case also brings another problematic feature to the fore, namely the transmission of documents of the Commission to the

¹⁷ For an overview of these six cases see Lintner and Vaccari (2007) p. 208–211.

¹⁸ The first on 12 April 2005 (B6-0218/2005) and the second on 6 July 2005 (B6-0392/2005).

¹⁹ This applies to basic legal acts adopted according to co-decision.

EP. Here, one has to note that in the practical process since December 2003, the Commission departments have uploaded a draft implementing measure into a register on comitology giving the references of all documents sent to the European Parliament under comitology procedures. One has to stress the fact that the Commission added a repository as an additional transparency measure, making many (but not all) documents communicated to the European Parliament directly available to the public. Whereas the register indicates the existence of a document and its references, the repository contains the document in downloadable format. The EP demanded, however, a continuous transfer of documents to its own services as well (Christiansen and Vaccari, 2006).

In the resolution on the RoHS Directive, the EP had thus also called on the Commission to undertake a careful review of all transmissions of draft implementing measures.²⁰ The Commission had to admit that 'in certain well-defined policy sectors, a limited number of anomalies had occurred'.²¹ These 'anomalies' concerned 50 draft measures and, as such, amounted to only 1 per cent of the total number of documents adopted during the year 2005. Nevertheless, one has to stress that these fell into policy domains of great political sensitivity: environment, health and consumer protection. In all the cases of the anomalies detected, the Commission proposed an 'ex post' control to the European Parliament, which gave the parliamentary committees concerned the possibility of examining the implementing measures in question. The Commission also offered to repeal any measure the European Parliament so requested. It actually did this with regard to the Commission Decision²² amending Annex II to the Directive on end-of-life vehicles.²³ At the end of the day, one could thus speak of effective parliamentary control, but at considerable cost.

The second resolution adopted on 6 July 2005²⁴ related to the same draft Council decision adopted by the Commission. What was at stake here was the amendment of the annex to the RoHS Directive where, in the comitology committee, it was agreed to exempt a hazardous substance²⁵ from the restrictions of this Directive. The European Parliament considered that the Commission had exceeded its implementing powers, because, in its opinion, a legislative proposal adopted under the co-decision procedure

²⁰ Since the register went into production in December 2003.

²¹ Commission communication dated 20 July 2005.

²² Commission Decision 2005/63/EC of 24 January 2005, OJ L 25 2005, p. 73.

²³ Directive 2000/53/EC, OJ L 269 2000, p.34.

²⁴ B6-0392/2005.

²⁵ This concerns DecaBDE of the family of polybrominated diphenyl ethers (PBDE).

would have been needed for such a measure. Since a qualified majority was not reached in the Council, the original draft decision was finally adopted by the Commission despite the Parliament's resolution. This in turn led the EP to bring an action before the European Court of Justice against the Commission to declare the Commission decision invalid.²⁶ One has to stress the fact that, in this case, the EP claimed not only that the Commission had exceeded its implementing powers, but that it had also wrongly assessed the scientific evidence. It is notable that the Commission defended its position before the Court (Commission of the European Communities, 2006, p. 5). It is remarkable that the Court took sides with the EP and ruled that point 2 of the annex to the Commission Directive was to be annulled and ordered the Commission to pay the costs of the EP and the Kingdom of Denmark as regards this case.²⁷

This example is again illustrative of several critical features of the system:

- First it reflects the complexity of some of the comitology procedures. Even if a matter is referred to the Council, the Commission can actually take the decision at the end of the day, given that the required majority can not be found by the legislator;
- it also sheds light on the role of the EP according to the Comitology Decision of 1999. The Commission can refuse to acknowledge the validity of objections raised by the EP and resort to its own networks of expertise to back up its opinion;
- this in turn can, *inter alia*, give rise to inter-institutional conflict which can end before the European Court of Justice;
- furthermore, it also sheds light on the assessment of scientific evidence. Although the Commission found this evidence sound enough to grant the exemption of a toxic substance from the scope of this Directive, this was questioned by the EP. This brings to mind the previously highly mediatized issue of BSE and the (ab)use of scientific advice,²⁸ which at the end of the day led to a transformation of

²⁶ Case C-14/06, *European Parliament v. Commission*.

²⁷ Judgment of the Court (Grand Chamber) of 1 April 2008 – European Parliament (C-14/06), Kingdom of Denmark (C-295/06) v Commission of the European Communities (Joined Cases C-14/06 and C-295/06), OJ C 116 2008, pp. 2–3.

²⁸ In this specific case, the Commission was assisted by the Scientific Veterinary Committee. In the words of a scientist from the Stuttgart-Hohenheim University, who spoke at the subsequent inquiry conducted by the European Parliament, the advice given went against all 'standard microbiological practices and borders on the irrational' (Agence Europe, No. 6847, 6 November 1996, p. 13).

the system of scientific advisory committees in the Commission.²⁹ The issue nevertheless does not seem to be settled entirely (Neuhold, 2006, p. 150);

- and, last but not least, it reflects the significance of amending annexes to legal acts, as it can be stipulated within an annex that a dangerous substance should in fact be excluded from the scope of the directive, for example. This in turn complicates parliamentary control.

5. OVERCOMING ACCOUNTABILITY PROBLEMS BY WAY OF THE 2006 COMITOLOGY REFORM?

As mentioned above, the system of comitology has recently been subject to reform. It has to be stressed that the Commission put forward its proposal for a new Comitology Decision already in December 2002.³⁰ According to Article 202 of the EC Treaty, consultation of the European Parliament and unanimity are required within the Council to revise the Comitology Decision of 1999.

The Council consulted the EP in January 2003, when the EP proposed nine amendments reinforcing its role and improving the provisions on transparency.³¹ The negotiations on the Comitology Decision in the Council came to a provisional halt, however, as the focus was on the negotiation of the Constitutional Treaty, and it did not seem wise to come out with a new decision before its conclusion. It was thus not until the second half of 2005 – after the Constitutional Treaty was put into ‘cold storage’ – that COREPER set up a ‘Friends of the Presidency’ group in September 2005 to take up the discussion on the proposed comitology reform (Schusterschitz and Kotz, 2007, p. 79). This group met regularly under both the British and the following Austrian Presidencies of the

²⁹ A scientific steering committee was established in 1997 as a coordinating body for the many specialized scientific committees. Members of scientific committees are now selected in a way that ensures a high degree of transparency. Advertisements for available positions on a scientific committee are placed on the internet, where the selection criteria are also clearly outlined: see http://ec.europa.eu/food/fs/sc/index_en.html.

³⁰ Proposal for a Council Decision amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission, COM(2002)719 final, adopted 11 December 2002.

³¹ Resolution adopted on 2 September 2003 (P5- TA(2003)0352).

Council.³² It is notable that the European Parliament mandated two of its Members to conduct political talks with the Council Presidency and the Commission.³³

The EP formally needs only to be consulted, but seems nevertheless to have had a real impact on the negotiations. At the end of the day, a deal on a new Comitology Decision was concluded surprisingly rapidly under the Austrian Presidency in summer of 2006 by the three institutions: Council, EP and Commission (Christiansen and Vaccari, 2006). Part of this agreement was the fact that the Council would agree to a new regulatory procedure ‘with scrutiny’, and the EP would in turn support the fact that so-called sunset clauses would no longer be resorted to in the future. Here one has to note that prior to the 2006 Comitology Decision, MEPs had the ability to limit the Commission’s implementing powers by laying down maximum periods for it to adopt implementing measures (‘sunset clauses’). These provisions stem from the financial services sector where not only a more complex consultation procedure was provided for the adoption of implementing acts, but a four year time-limit applied to the delegation of implementing powers to the Commission (Christiansen and Vaccari, 2006). The Comitology Decision of 2006 provides, however, that MEPs will only be able to confer implementing powers on the Commission for an indefinite period in exceptional cases (Euractiv, 6 July 2006).

A main pillar of the 2006 Comitology Decision is the abovementioned regulatory procedure with scrutiny. This new procedure will have to be chosen by the legislators in order to implement ‘measures of a general scope’ designed to amend, delete or add new ‘non-essential’ elements of basic legal acts adopted under co-decision.³⁴ These non-essential elements have been described by the Commission as executive measures with a ‘legislative substance’ in its original proposal³⁵ and now are often referred to as ‘quasi-legislative measures’ (European Parliament, 2006, p. 8 and Commission of the EC 2006). This might seem somewhat paradoxical and misleading, given that if something is ‘non-essential’ one would think that this would by no means have any implications on the legislative process. However, it is noteworthy that the Council, the Commission and the EP had already agreed during the negotiation process on the Comitology

³² The Austrian Presidency took place during the first half of 2006.

³³ Joseph Daul (FR/PPE, Chair of the Conference of Committee Chairmen) and Richard Corbett (UK/PSE, rapporteur on comitology in the Constitutional Affairs Committee (AFCO)).

³⁴ Amendment of Article 2, Council Decision of 17 July 2006, OJ L 200/11.

³⁵ In page 3 of the Explanatory Memorandum.

Decision of 2006 that some legal acts would be *retroactively* defined as being ‘quasi-legislative’, and that the new regulatory procedure with scrutiny would thus apply to these measures. These 25 legal instruments have been published in the Official Journal. The large majority of these measures falls into the sector of food and health safety and the financial services sector, implying that these are very sensitive areas where the legislators want to retain some form of control.³⁶

The most important provision in the new decision, from the perspective of the EP, is that it will be put on a somewhat equal footing with the Council in the new regulatory procedure for matters which fall under co-decision.³⁷ As such, it will be able to block the quasi-legislative implementing measures by an absolute majority of MEPs.³⁸ This veto right is not unlimited however. It can be exercised only if one (or more) of the following three conditions are present:

- If the draft exceeds the implementing powers provided for in the basic legal instrument;³⁹
- If the draft is incompatible with the aim or content of that instrument;
- Or if it violates the principles of subsidiarity and proportionality.

Given that one of these criteria is present and that one (or both) of the legislator(s) have managed to block the issue, the Commission cannot enact the measures, and has to propose either an amended draft decision or a new legislative proposal according to the co-decision procedure.⁴⁰

One has to stress the fact, however, that, contrary to that of the Council, the veto right of the EP is conditional as the EP can exercise its right of veto only immediately if the comitology committee has a positive opinion.

³⁶ Statement by the European Parliament, the Council and the Commission concerning the Council Decision of 17 July 2006 amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers on the commission (2006/512/EC), OJ C 255/1.

³⁷ Richard Corbett, one of the rapporteurs on comitology, called the compromise ‘a significant step forward for the European Parliament . . . if the EP objects, the Commission cannot enact its measures – though there are limits: it applies only to co-decision matters’ (European Parliament, Legal Affairs Committee, 21. June 2006).

³⁸ The Council can block these measures by qualified majority.

³⁹ This relates to the ‘ultra vires control’ that the EP already boasted according to the 1999 Comitology Decision.

⁴⁰ Article 5a of the procedure, Council Decision of 17 July 2006, OJ L 20/11.

Given that the comitology committee has a negative opinion, or no opinion is delivered, the EP is initially only informed, i.e. shall receive a proposal by the Commission relating to the measures to be taken.⁴¹ It is then the Council, and not the EP, which can block the proposed measures within the next two months. The ball is then back in the court of the Commission, which then submits either an amended proposal to the Council or a new legislative proposal. It is only *if* the Council plans to adopt the measures, or does not act, that the EP receives these draft legal acts for scrutiny and can then eventually block them. It has to be noted that the time constraints are immense – the EP has a maximum of four months to oppose the measures and has to muster more than half of its component members in order to do so successfully.

It has to be stated that the information rights of the EP are to be improved by going beyond the current provisions,⁴² in that particular attention will be paid to the provision of information to the EP on the proceedings of committees in the framework of the regulatory procedure with scrutiny, so as to ensure that the EP takes a decision within the given deadline.

At this stage, three main observations can be made as regards this new procedure:

1. Due to the fact that the legislators, i.e. the Council and the EP, have to determine when this new procedure applies, this could imply that forces are somewhat concentrated within the legislative process. The EP would have an interest in the new procedure being enforced, whereas the Council might want to opt for the regulatory procedure according to the 1999 Decision on Comitology, where the EP, after all, has no veto right. This might lead to disputes (reminiscent of the conflicts after the enforcement of the Maastricht Treaty) over which a comitology committee would be chosen to implement co-legislative acts. This might in turn lead to the involvement of the European Court of Justice being called upon as last resort, if one of the legislators felt that this procedure had not been followed although the criteria were in fact present (Christiansen and Vaccari, 2006, p. 15).

⁴¹ Art 5a (3) of *ibid.*

⁴² The 1999 Decision provides, *inter alia*, that the Commission should inform the EP on a regular basis of committee proceedings and that the Commission should transmit to it documents related to activities of committees and inform it whenever the Commission transmits to the Council measures or proposals for measures to be taken (Article 7).

2. For the first time, according to the regulatory procedure with scrutiny, the EP has the chance of exercising a veto within the comitology framework. This veto is, however, not *ex post* but would enable the 'legislative authority to scrutinise measures before they are adopted'.⁴³ For the practical political process this implies that the EP can, given that certain criteria are fulfilled,⁴⁴ oppose implementing measures proposed by the Commission within the comitology framework. As Hix points out, this practice differs from that of selected states. The German *Bundestag* is allowed an *ex post* veto, but only as far as issues of special political sensitivity are concerned and *after* executive instruments have been enacted.⁴⁵ The US Congress has also found that extensive oversight over federal agencies is extremely costly, and to rely on private interests to challenge decisions can not only be cheaper, but more effective (Hix, 2000, p. 77).
3. The new procedure does not mean, however, that the EP is to be involved in overseeing *all* implementing measures, but will together with the Council have to find a method of ensuring that it is clear when the new regulatory procedure is to be applied, possibly by concretizing the rather vague criteria by way of an inter-institutional agreement. Furthermore, the EP may want to build up a network with other actors to ensure that it is aware of which measures may indeed be of a quasi-legislative nature, i.e. politically highly sensitive in order to avoid having to scrutinise more than 2,000 draft implementing measures to that avail. It also has to be stressed that the Comitology Reform of 2006 is not (although it might sometimes be portrayed as such) an overhaul of the Comitology system, but *adds on* one new procedure. Significant problems that the EP had with the 1999 Decision as such remain, for example that the Commission overrules its resolution and its concerns as it did in the RoHS Directive.

⁴³ Article 1 and Recital 7a, Council Decision of 17 July 2006, OJ L 200/11.

⁴⁴ The measures have to be proposed according to the regulatory procedure with scrutiny and have to implement measures which have been adopted by way of the co-decision procedure. Furthermore, one or more of the criteria stipulated in recital 2 have to be fulfilled (see also p. 72 above).

⁴⁵ The German Federal Constitutional Court argued in favour of participation of the *Bundestag* as it stated that, 'because the regulations to be made can be of considerable economic and political importance it is justified if the legislature reserves for itself a right to participation' (BverfGE 8, 274, pp. 319–322, in Hix, 2000, p. 68).

6. WHERE TO GO FROM HERE? WHEN TO EXERCISE PARLIAMENTARY SCRUTINY POWERS IN COMITOLOGY IN PRACTICE?

As illustrated, the EP now has a veto right as regards quasi-legislative matters and, since 1999, the ability to exercise ‘ultra vires’ control.⁴⁶ The question remains, however, how the EP is made aware of *when* to exercise these powers, i.e. which draft implementing measures are of special sensitivity or where implementing measures exceed the implementing powers provided for in the basic instrument. Hix proposes that the EP could pass on the costs of scrutiny to ‘private actors that are subject of executive actions’ (Hix, 2000, p. 78).

Toeller and Hofmann go a step further by arguing that the representatives of various interest groups should be invited to attend comitology meetings, which in turn would improve the access of civic interest representation, of so-called ‘diffuse interests’ such as representatives of consumers’ or environmental organizations (Toeller and Hofmann, 2000, p. 47).

Opening committee doors, be it only to a selected public, would send the signal that committees have in fact nothing to hide. Currently, acting in an aura of secrecy gives the impression that decisions of great importance are taken in these committees, whereas in fact most of these measures are of a routine nature. In order not to sacrifice efficiency, a possibility would be that the ‘outside’ experts would not attend all committee meetings, but would have to deliver a request to the committee chairman (Toeller, 1999). More importantly, as Toeller and Hofmann argue, this could enhance democratic accountability. Political control of comitology by ‘alternative technical experts and a technical partial public’ would give effect to an ‘intelligence of democracy’. Moreover these experts could liaise with MEPs in such a way as to perform a ‘fire alarm’ function. For the practical political process, that would imply that MEPs were informed whenever issues of great political sensitivity came up, and the EP could thus resort to its control functions under comitology (Toeller and Hofmann, 2000, p. 47f).

One has to note however, that important questions do remain unsolved, such as how these representatives of civic interests are selected and on what grounds. Furthermore it is far from clear why they would have an interest in performing a ‘fire alarm’ function for the EP, i.e. to what extent MEPs could actually rely on these representatives. The EP itself proposed

⁴⁶ This is to ensure that implementing measures do not *exceed* the implementing provisions provided in the basic instrument by both legislators.

solving this problem (already in the mid-1990s) by advocating the idea that MEPs *themselves* should attend comitology committee meetings rather than having to rely on other actors. MEPs thus tried to push this idea again during the negotiations on the new Decision of 2006. This was rejected by the Commission and Council, on the basis that these committees are to be seen as executive bodies, and parliamentary presence is as such incompatible with the role of the EP as co-legislator. The view held by the Presidency was then that enhanced information rights might solve the problem (Schusterschitz and Kotz, 2007, p. 85).

As illustrated above, the Commission agreed to improve the general information system and went even further in the financial sector. Here, the Commission committed itself to ensuring that the Commission official chairing committee meetings informs the Parliament, at its request, after each meeting, of the discussions concerning draft implementing measures submitted to the committees and gives an oral or written reply to any questions regarding the discussions concerning draft implementing measures submitted to comitology committees.⁴⁷ This is a step forward for the EP as opposed to the 1999 Decision as, for the first time, selected committee members are to be answerable to the EP. However, it is deplorable that this is limited to a certain policy field.

7. CONCLUDING REMARKS

Ever since the start of comitology committees in the 1960s, they have been the cause of inter-institutional conflict and have several times undergone piecemeal reform, *inter alia*, to allow for more parliamentary control. The most recent reform of comitology of 2006 has to be judged in the same vein. It can definitely not be seen as a general overhaul of the system, but concentrates on *adding* one procedure, the (highly complex) regulatory procedure with scrutiny.

Let us revisit the judgement of the parliamentary rapporteur on the issue that this most recent reform of comitology is 'a huge breakthrough in parliamentary control over EU legislation' and is 'improving accountability . . . of the whole Community system'.⁴⁸ The new decision has indeed improved parliamentary control in so far as the EP is for the first time able to recall implementing measures, but this parliamentary control is limited to the regulatory procedure with scrutiny and to co-decided acts.

⁴⁷ Council Statements to be entered in the Council minutes of 17 July 2006, OJ 2006 C171/02.

⁴⁸ See www.europarl.europa.eu/news.

Moreover, as mentioned, even under the new procedure the EP is not put on a completely equal footing with the Council. Its veto right is conditional and somewhat dependent on a positive opinion in the comitology committee. Given that Member States are represented in both comitology committees and the Council, one could thus imagine that a decision is blocked in committee in order to try to circumvent the EP. Furthermore, the veto right itself is also conditional, as the legislators have to prove (in co-decision) for example that the draft implementing act is incompatible with the aim or content of that legislative act, or that it violates the principles of subsidiarity and proportionality. In the practical political process one can envisage that the EP will for the most part concentrate on objecting on the ground that violation of the draft is incompatible with the objective or content of the legislative act, as the principle of subsidiarity is difficult to operationalise in the practical political process.⁴⁹ It also has to be noted that, as a trade-off for these competences, the EP had to give up some recently acquired powers, those of setting sunset clauses.

What is very important to note, however, is that, contrary to the 1999 Decision, the EP can already in its (co-)legislative function decide which implementing acts are to be defined as 'quasi-legislative' measures. This implies that it can, at least to some extent, indeed concentrate its forces on the legislative process, which is after all one of its main functions as (co-) legislator. One could also argue that, due to the fact that the EP can scrutinise selected 'quasi-legislative' instruments before they are adopted, it will gain enhanced oversight powers over committee members (including the Commission). This could in turn drive members to give reasons for their decisions and act in a more transparent fashion to answer parliamentary concerns. This has somewhat been institutionalized in the financial sector, as the Commission has committed itself to the fact that the official chairing comitology committee meetings informs the Parliament, at its request, of debates in such meetings and replies to any questions submitted by the EP, be it orally or in writing.

The information rights of the EP are also to be enhanced in so far as the new decision provides that particular attention will be paid to giving the EP information on the proceedings of committees working according to the new regulatory procedure. If any lessons are to be learned from the implementation of the 1999 Decision, the provision of information to the EP worked rather well, despite some anomalies (in politically sensitive domains).

⁴⁹ The third condition according to which the veto right can be exercised is if the draft exceeds the implementing powers provided for in the basic legal instrument. This form of *ultra vires* control for the EP was already provided for in the Comitology Decision of 1999.

When assessing the new decision with regard to whether it has been designed based on empirical examples of parliamentary oversight as advocated by Simon Hix, we find that the new decision is rather unusual, as the EP does not boast an *ex post* veto like that of the German Parliament (the *Bundestag*) for example, but can veto draft executive legislation *before* it is implemented. The procedure is, however, not completely different from that of the *Bundestag*, as it does not apply to *all* implementing measures, but only those which are judged to be politically sensitive in so far as they are deemed to have implications for the (co)-legislative process. We may thus see that the EP will concentrate on exercising its newly acquired scrutiny and veto powers as regards measures in certain policy areas such as those of health and consumer protection and environment. These are fields which are comparatively more conflictual at (comitology) committee level. If we examine the recent data we find that here, relatively speaking, a rather high number of measures resulted in a reference to the Council.

Moreover, one has to stress that experience with the 1999 Comitology Decision – here the EP boasted only an ‘*ultra vires*’ control – has shown that the EP uses its controlling powers very selectively. This could give some indication with regard to the implementation of the new decision. One can thus depart from the assumption that the EP will not use its controlling powers as regards a majority of the implementing acts coming out of the ‘comitology machinery’. The new decision will nevertheless have a considerable impact on the organization of the EP if it wants to exercise its powers effectively within the very tight time limits.

Experience with the 1999 Decision on Comitology has also shown that when the EP uses its powers of scrutiny within the field of comitology, it tries to capitalize upon these functions. This has been illustrated within this chapter by the focus on two resolutions the EP adopted in the field of the environment. Here, the EP not only focused on the content, but examined the transmission of draft implementing measures of the Commission to the EP, and took the Commission to Court at the end of the day, *inter alia* questioning the way the Commission assessed scientific evidence. If any lessons are to be learned from the first years of experience with the 1999 Decision, we may also see that the EP uses its powers selectively, but may try to interpret legal stipulations in its favour. Even so, the EP remains dependent on the Council and Commission according the 1999 Decision, and cannot object to the implementing measure according to its substance, but based on rather legalistic stipulations. Overall, we can thus conclude that the Comitology Decision of 2006 has indeed improved parliamentary control over comitology but with considerable limits.

When assessing the new decision as regards its accountability, one has to stress the fact that the new procedure does little to improve the

accountability of comitology committees when we examine this in terms of definitions coined in this context. Members of comitology committees are not called upon to justify their conduct before the EP (or any other forum for that matter) or called to order, sanctioned or even censured for their behaviour (Bovens, 2006, p. 6; Bealey, 1999, p. 2). One could, of course, argue that vetoing implementing decisions is a sanction in itself, but, as mentioned, even the use of this tool is limited. A small step forward in the direction of more accountability is the fact that committee chairs have to be ready to answer questions by the EP, but this is limited to the financial sector.

The new decision also falls short of exploring other sources of accountability (besides the EP) to hold committee members accountable by, for example, opening the committees to a technical partial public sphere by integrating ‘alternative technical experts’ into policy implementation. This could, as Toeller and Hofmann argued, have increased democratic accountability and political control of comitology (Toeller and Hofmann, 2000, p. 48). One has to note, however, that certain questions in this context, such as the rationale of appointing these experts, remain unanswered.

Overall, one can thus conclude by saying that this piecemeal reform can be seen as a step in the right direction for the EP in the quest of ‘taming the Trojan horse’ of comitology. It falls very much short of a general overhaul of the system however, and due to its complexity it remains to be seen whether it does not create new stepping stones on the new avenue which has just been opened.

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4. Comitology: the ongoing reform¹

Manuel Szapiro²

I. COMITOLOGY IN A NUTSHELL

Comitology has become an emblematic feature of the EU administrative governance system. ‘Comitology’ committees first developed in the 1960s with a view to assisting the Commission in its exercise of delegated implementing powers.³ The choice to delegate executive competence to the Commission was – and still is – made *prima facie* for the sake of speed, so as to avoid a legislative procedure which could otherwise last several years. Before adopting an implementing measure, the Commission consults a committee made up of Member States’ (MS) representatives, which it chairs. Thus, it facilitates downstream implementation and application by the national administrations. Committees allow for the participation of MS upstream in the decision-making process, when implementing measures are being drafted.

In addition to this vertical integration, comitology committees play a decisive role in the horizontal allocation of competence between the two branches of the Community executive: the Council and the Commission. Under two procedures⁴ – management and regulatory – if

¹ Section IV of this chapter draws in part upon another article by the same author: ‘Comitologie: rétrospective et prospective après la réforme de 2006’, (2006) 3 *Revue du droit de l’UE*, 545–86.

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³ For a detailed and updated account of the history of comitology see notably C.F. Bergström, *Comitology: Delegation of Powers in the European Union and the Committee System*, Oxford University Press (Oxford, 2005).

⁴ A specific section in this chapter deals with the Regulatory Procedure with Scrutiny (RPS).

a ‘comitology’ committee opposes⁵ (or simply fails to provide support to⁶) a draft implementing measure prepared by the Commission, the Commission will be deprived of its delegated implementing powers to the benefit of the Council. Comitology committees are the triggering element for the Council to re-intervene in the implementing sphere. They constitute a control mechanism which allows the Council to exercise its call-back (or revocation) rights. Comitology committees thus regulate the allocation of implementing powers between the Commission and the Council.⁷

Referral to the Council is more dissuasive than real, however. According to the Commission’s annual reports on comitology, in practically all cases the committee allows the Commission to adopt the measure. Less than 1 per cent of draft implementing measures are actually submitted to the Council, further to a committee’s negative (or lack of) opinion. The practice of comitology is therefore very much centred on compromise and consensus-building between the Commission and the MS.

Today, there are around 250 such comitology committees. The first were created more than 40 years ago in the agricultural field and gradually expanded into the environmental/veterinary fields, customs, transports and the internal market, among others. The number of implementing measures adopted each year (between 2,500 and 3,000) accounts for nearly 90 per cent of the Community’s normative output, with often inestimable direct consequences on European citizens’ everyday lives. Concrete examples include: the approval of pharmaceutical products, of food additives, of genetically modified organisms; the banning of dangerous substances/products; export subsidies granted to Community farmers; financial subsidies to promote R&D, SMEs, students’ mobility, development aid; measures targeted at the integration of financial markets; adaptation of annexes of basic directives (update to technical and scientific progress). Since the 1990s, the theoretical importance of comitology has also been highlighted by academia, in relation to European integration theories, administrative theories, regulatory governance, legal and constitutional studies.

⁵ Management and regulatory procedures.

⁶ Regulatory procedure.

⁷ If the Council fails to act, the implementing powers are given back to the Commission which can adopt the measure (pendulum movement between the two branches of the executive power). Under regulatory procedure, the Council can however oppose the adoption of the measure by the Commission.

II. AN ACCELERATED REFORM PROCESS

Since 1987, comitology has undergone four landmark reforms. The first framework Decision dates from 1987.⁸ This Decision was adopted on the basis of revised Treaty Article 202.⁹ This Decision constituted an *ex post* codification of the comitology system. It also put an end to the uncontrolled proliferation of procedures by laying down seven procedures (including variants) from which to choose, in each basic act, for the exercise of implementing powers delegated to the Commission.

In July 1999, a new framework Decision¹⁰ replaced the 1987 one. This new instrument rationalized further the number of procedures (reduced from seven to four) and offered some guidelines for their choice (introduction of non-binding criteria). It also introduced important transparency measures (see the next section) and recognized the legitimacy of the European Parliament's (EP) oversight over measures implementing co-decision acts (albeit limited to a '*droit de regard*'/right of scrutiny, i.e. a monitoring/advisory role on the scope – the '*vires*' – of the measures adopted by the Commission). Through this '*droit de regard*', the EP had put its foot in the comitology door. As a result of the Parliament's continued pressure, the door finally opened in 2006 with a reform which gave the EP not only monitoring rights, but a genuine veto power.¹¹

The Lisbon Treaty goes one step further by granting the Parliament its long requested call-back (or revocation) rights over measures of a quasi-legislative nature (Article 290 – delegated acts). This chapter will focus on the most recent reforms, those of 2006 and of the Lisbon Treaty.¹² It will highlight two interrelated issues of this accelerating reform process: transparency and democratic control.

⁸ Council Decision 373/87/EC of 3 July 1987, OJ 1987 L 197/33–35.

⁹ Former Art. 145(3), as amended by the Single European Act: the 'Council shall confer on the Commission, in the acts which the Council adopts, powers for the implementation of the rules which the Council lays down. The Council may impose certain requirements in respect of the exercise of these powers . . . The procedures referred to above must be consonant with principles and rules to be laid down in advance by the Council, acting unanimously on a proposal from the Commission and after obtaining the opinion of the European Parliament.'

¹⁰ Council Decision 99/468/EC of 28 June 1999, OJ 1999 L 184/23–26.

¹¹ Council Decision 2006/512/EC of 17 July 2006 amending the 1999 Decision, OJ 2006 L 200/11–13.

¹² Still under ratification at the time of writing.

III. THE TRANSPARENCY REFORM

The word ‘comitology’ naturally brings to mind the technocratic and self-absorbed nature of EU decision making. Stripped of the jargon, however, comitology has become much more transparent than some of its critics would like to make it seem.

Improved Transparency

Many EU exegetes have focused their attention on the role, decision-making powers, control and interactions of different actors in the implementing sphere at Community level. But very little research exists on the recent transparency developments in this field. This, however, is where most criticisms of the system lie.

The secretive character of comitology stems from its uncontrolled development. As a result, until the end of the 1990s the comitology system suffered from a chronic lack of transparency: no list of committees was published, or only very sporadically (under the ad hoc pressure of the European Parliament). Each committee functioned in a different manner, with no minimal set of governance rules and principles. The number of comitology committees and their fields of activity were unknown to the European Parliament, let alone the general public.

In the past eight years, this picture has been radically altered. A series of transparency measures have been taken by the Commission to improve information on the work of comitology committees, in accordance with – and in some cases going beyond – the rules laid down in Article 7(3) of the 1999 Comitology Decision.

First, reports on the working of committees are published on the Europa website.¹³ These reports review the main comitology developments which took place in the preceding year; give the number of existing committees, the type of procedures involved, the number of meetings and implementing measures adopted per policy sector, together with an annexed list of existing committees. Secondly, the EP is informed of committee proceedings on a regular basis. It receives draft agendas, draft implementing measures transmitted to the committees pursuant to a co-decision basic legal act, the results of voting, the summary records of meetings and the lists of authorities/organizations to which committee members belong. Thirdly, the Commission has created an on-line register where all these documents

¹³ See http://ec.europa.eu/dgs/secretariat_general/mapindex_fr.htm (as at March 2008).

are either referred to or, in most cases, directly downloadable.¹⁴ Fourthly, the Commission has adopted standard rules of procedure for comitology committees which are published in the Official Journal¹⁵ and are used as a basis for every single comitology committee's specific rules.

It is thus fair to say that since 2000, transparency has taken a major leap forward. As far as the implementing sphere is concerned, it compares very favourably with that of the most advanced national systems.

Better Structured Information

There is no room, however, for complacency on the part of the Commission or, as a matter of fact, other institutions. More can be done in terms of quantitative and qualitative access to documents,¹⁶ and the Commission has therefore committed, in the framework of the 2006 comitology reform, to further upgrade the functionalities of the current comitology register. The main objective is to provide better structured information, for the EP and the public alike to follow the different stages of executive decision making. The first version of the online register is therefore being substantially updated to allow for more availability of information and greater user-friendliness.¹⁷ This improved comitology register serves three functions. It is:

- (i) a means of transmission to the European Parliament (and possibly the Council), with the short-term objective of a commonly shared database;
- (ii) a window for the general public; the new version should in particular offer to trace the entire life-cycle of a draft implementing measure;
- (iii) a monitoring tool for the Commission's services.

Communication Gap

Even if access to documents has qualitatively and quantitatively improved, a communication deficit on comitology remains. Active communication on

¹⁴ This register, http://ec.europa.eu/transparency/regcomitology/index_en.htm, indeed serves in great part as a repository.

¹⁵ OJ 2001 C 38/3–5.

¹⁶ The transmission mechanisms to the European Parliament experienced some 'teething' problems in the period 2003–2005, in the environmental field (with 50 measures which the Commission had neglected to send to the EP. Since then, Commission has re-submitted those measures to the EP and reinforced its internal control system).

¹⁷ See the new comitology website at the link in footnote 14 above.

comitology measures is an uneven and almost always reactive process (for example, Commission and other institutions' communication on the avian flu crisis, chicken dioxin, black list of air companies, GMOs authorizations). All actors involved in comitology have to face a common challenge: to explain comitology without getting into the complex technical intricacies of the system. The word is unfriendly, to say the least. But attention could be raised to what lies behind it. In this respect, a few examples are worth more than 1,000 words.¹⁸ An output-oriented communication could prove particularly useful in helping citizens know what the EU is doing. With this in mind, the new 'citizens' summary' that the Commission has committed to issue in each of its strategic/priority proposals could also usefully accompany some of its implementing measures.

Readability and Accountability

The procedure is a complex one, involving schematically the Commission and possibly the Council as policy-makers, and administrative committees made up of MS representatives as arbitrators on the allocation of competences. All in all, it is difficult for the citizen to locate where the political responsibility lies. The regulatory procedure provides that the Commission shall regain its implementing powers if the Council fails to act/oppose (by qualified majority voting). In this case, the Commission is legally bound to adopt ('shall adopt') the measure. In the politically sensitive examples of GMO authorizations (in most cases referred, after comitology committees' lack of opinion, to the Council) should the Commission be held accountable each time the Council fails to act? In terms of perceived legitimacy, the problem is particularly acute when the Commission takes risk-assessment and management measures despite a simple (but not qualified!) majority of MS who oppose. A majority of MS interests is thus overruled. This procedure does no good to the representation of legitimate interests at EU level. It puts the Commission in an awkward position, giving MS an opportunity to embark on a blame-shifting exercise.

¹⁸ Thanks to 'comitology', the Commission has been able swiftly to adopt urgent measures to prevent the spread of avian flu, ensure that only lighters which are child resistant are put on the market, impose a ban on dangerous chemical substances/products (such as ESB; chicken dioxine, etc.), authorize the marketing of medical products or safe food additives, with *inter alia* appropriate labelling requirements, grant subsidies to farmers, adapt legislation to technical or scientific progress, define information to be given by companies whenever securities are offered to the public or admitted to trading, etc.

IV. 2006: THE HOUR OF THE PARLIAMENT

Comitology governance has been subject to strong criticisms not only about its lack of transparency but also due to its accountability deficit. Comitology, as a form of administrative governance, has long developed *outside any form of democratic control*.¹⁹ Until 1999, the EP was, at best, informed about some committees' procedures and – since 1994 – exceptionally (*modus vivendi* – see below) consulted by the Council. It was given no control right.

In this area too, things are changing quite fast.

IV.1 The European Parliament (EP) and Comitology

In 1993–4, the EP insisted that the then newly created 'legislative co-decision should lead to a form of executive co-decision'.²⁰ To make good on its claim, the EP used the powers at its disposal. It rejected the first instrument ever to be adopted by co-decision, in the third reading stage,²¹ precisely because of disagreement on the choice of comitology procedure. It also used its budgetary powers to freeze the funds allocated to comitology committees. A *modus vivendi* was finally signed at the end of 1994 between the three institutions to provide for regular information and consultation by the Council (in case of negative or lack of committee opinion).

The *modus vivendi* was conceived as a provisional instrument until the Treaty revision. The 1996–7 Inter-Governmental Conference (IGC) failed to provide a solution to the thorny issue of comitology (no modification of the then Article 145 of the Amsterdam Treaty), in spite of Commission initiatives to this effect. The Conference contented itself with a statement inviting the Commission to submit a proposal to revise the 1987 Decision (thus '*à traité constant*') before the end of 1998. On the basis of this proposal,²² the Council adopted a new framework Decision in July 1999, after a year of intense negotiations.

Thanks to the 1999 comitology Decision, the EP was given a right to have a say – albeit of very little impact – in the decision making, for implementing

¹⁹ In MS, parliaments usually have little or no say in the process of preparation of the position of MS representatives in comitology committees (with one main exception: the Danish Folketing's imperative mandate – via a systematic screening made by its European Affairs Committee).

²⁰ European Parliament, De Giovanni Report, A3-0417/93 of 6 December 1993.

²¹ Open Network Provision Directive – Report A4-0001/94 of 19 September 1994.

²² COM(1998)380 of 24 June 1998.

measures adopted pursuant to a co-decision act. Article 8 of the Comitology Decision provides that the Parliament can adopt a resolution if it considers that a measure implementing a co-decision act exceeds the powers conferred upon the Commission by the legislator. This new prerogative (also referred to as '*droit de regard*') is however limited to the scope – the '*vires*' – of the measure. Moreover, an EP resolution pursuant to Article 8 remains of a purely advisory nature (i.e. non-binding on the Commission or the Council). These new rights clearly fell short of EP requests.²³

Symbolically, however, this '*droit de regard*' represented the first legal recognition of the legitimacy of parliamentary control over the effective scope of the powers it was delegating, jointly with the Council, in each co-decision act. As far as the implementing sphere is concerned, the EP thus got one foot in the door. The merely symbolic dimension of this first reform was epitomized by the practice of it: the EP used its newly acquired rights with parsimony, to say the least.²⁴ This parsimony also goes to show the difficulty, for the EP, of screening hundreds of highly technical measures on a yearly basis. In this context, the choice of where and when to intervene is made increasingly dependent on the efficient lobbying of well-structured external pressure groups.

IV.2 A First-hand Insight into the 2002–6 Negotiations

The EP quickly made clear that it would not be content with this '*droit de regard*'. As mentioned above, since it delegated jointly with the Council under co-decision, it should be put on an equal footing when controlling the exercise of delegated implementing powers. In the framework of its White Paper on European Governance²⁵ and of the 2002 financial services reform,²⁶ the Commission made a commitment to propose genuine parity between the two branches of the legislative authority. And so it did, as early as 2002, not only by adopting a proposal to revise the 1999 Council

²³ With or without these rights, the EP can in any case adopt an 'own initiative report' on whatever it sees fit.

²⁴ Fewer than 10 such resolutions have been adopted by the EP since the entry into force of the 1999 Decision, and in a majority of cases the EP's concern related more directly to issues of substance than scope.

²⁵ COM(2001)468 of 25 July 2001.

²⁶ Also known as the 'Lamfalussy' process (from the name of the one and only President of the European Monetary Institute, who subsequently chaired the committee of independent experts on the regulation of the European securities markets), whereby the EP schematically agreed to wider delegation of implementing powers to the Commission in exchange for a commitment to substantially enhanced control rights.

Decision on comitology²⁷ but also by proposing, in the framework of the Convention on the future of Europe, to revise substantially Article 202 of the Treaty (TEC).²⁸

Amongst other things, the 2002 proposal granted equal control rights to the two branches of the legislative authority (Council and Parliament), while preserving the Commission's autonomy as executive power. According to TEC Article 202, consultation of the EP and unanimity at the Council apply to the adoption and revision of the Comitology Decision. The Parliament broadly endorsed the Commission's proposal in September 2003.²⁹ To take account of most of the few amendments proposed, the Commission presented a modified proposal in April 2004.³⁰ At that time, however, Council Presidencies did not see a need to embark on what was seen as a temporary reform, in view of the progress made on the Constitutional Treaty. As the much-awaited Constitutional reform became more uncertain due to the French and Dutch referenda, the EP started putting pressure on the re-launch of negotiations on the Commission's proposal, in particular by introducing sunset clauses on the delegation of implementing powers in the financial services sector³¹ and by resorting to the more traditional freezing of budget appropriations for the functioning of comitology committees. This prompted the UK Presidency into establishing a 'Friends of the Presidency' group in September 2005 to revive negotiations on the Commission's proposal and find a solution which could be acceptable to the Parliament. The group met almost 20 times between September 2005 and June 2006. Two MEPs³² were mandated by the Conference of Presidents of the EP to conduct talks with the Presidency and the Commission negotiating teams.³³

²⁷ COM(2002)719 of 11 December 2002.

²⁸ The Commission proposed to make a distinction between delegated regulation which would be subject to an equal control right by the Parliament and the Council (with a possible direct call-back) and merely executive measures, adopted by the Commission under the supervision of the MS. This proposal served, to a large extent, as a basis for the relevant Articles of the Constitutional Treaty (Arts. I-36 and I-37) and the Lisbon Treaty (Arts. 290 and 291 – see below).

²⁹ P5_TA (2003) 0352 of 2 September 2003.

³⁰ COM(2004)324 of 22 April 2004.

³¹ According to these sunset clauses, the delegation of implementing powers would lapse after a given period of time (generally four years) unless the basic acts concerned were amended by the legislator in accordance with the procedure provided for in the Treaty.

³² Joseph Daul, then Chair of the Conference of Committee Chairmen, and Richard Corbett, AFCE rapporteur on comitology.

³³ For an interesting and more detailed account of these negotiations by other protagonists see G. Schusterschitz and S. Kotz, 'The Comitology Reform

Negotiations proved particularly difficult. There are several basic reasons for this:

- As mentioned above, unanimity applied in the Council;
- Comitology is a very technical and upstream issue for Member States on which to organize inter-ministerial coordination;
- In this framework, the very diverse national political cultures of parliamentary control were in great part mirrored in the negotiations at EU level;³⁴
- The European Parliament and Council started negotiations with traditionally antagonistic views on the nature of the EU political system.³⁵

Thanks mainly to the cooperative stance of all mandated negotiators, the three institutions eventually managed to reach a political compromise *ad referendum* on 13 June 2006. This compromise was to be subsequently endorsed by the EP on 5 July and approved by the Council on 17 July 2006.³⁶

IV.3 The 2006 Decision: Strengthened Parliamentary Control

The outcome of negotiations can be summarised as follows. Council Decision 2006/512/EC introduces, under a new Article (5a), a ‘Regulatory Procedure with Scrutiny’ (RPS). This new procedure is added to the existing ones (advisory, management, regulatory and safeguard). The new procedure gives a *veto right* to the EP over ‘measures of general scope designed to *amend* non-essential elements of that ([a co-decision]) instrument, inter alia, by deleting some of those elements or by *supplementing* the instrument by the addition of new non-essential elements’ (new Article 2(2)). The *conditions* for applying the new procedure are thus threefold:

of 2006 – Increasing the Powers of the European Parliament without Changing the Treaties’ (2007) 3 *European Constitutional Law Review*, 68–90 – NB. only omission by the authors concerns the Commission’s active participation in the trilogues.

³⁴ For an analysis of some national constitutional systems see M. Andenas and A. Türk (eds), *Delegated Legislation and the Role of Committees in the EC*, Kluwer Law International, 2000.

³⁵ For a summary of the positions of the different institutional actors *vis-à-vis* comitology see M. Szapiro, ‘Comitologie: rétrospective et prospective après la réforme de 2006’ (2006) 3 *Revue du droit de l’UE* 567.

³⁶ Decision 2006/512/EC of 17 July 2006, OJ 2006 L 200/11–13.

1. the *basic act* is adopted under *co-decision*. This concerns both acts originally adopted under co-decision and those the legal basis of which has been changed to co-decision further to Treaty revision.
2. the *implementing measures* are of *general scope*.³⁷
3. these measures *amend the non-essential elements*³⁸ of the basic act. ‘Amendments’ to the basic act can be understood as:
 - (i) *formal amendments* to an Article or an annex to the basic act adopted under co-decision. The rationale is as follows: these formal amendments could have been adopted by the legislator itself. For the sake of speed and efficiency, the latter has however decided to delegate its decision-making power to the Commission. Thus the co-legislators (Parliament and Council) should be able to object on an equal footing to changes brought to their original instrument. A good example is the update of annexes to scientific and/or technical progress; or
 - (ii) by *supplementing* the basic legal act with a new set of rules which would come on top of the corpus constituted by the basic instruments (as opposed to a mere application of the criteria/rules set out in the basic act). It is worth noting that Article 2(2) of the amended Comitology Decision refers to ‘amend by supplementing’. This is a piece of constructive ambiguity designed to cater for Lamfalussy/financial services measures which delegate widespread implementing powers to the Commission

³⁷ Distinguishing acts of general application from those of individual application can prove difficult: ‘the notion of what constitutes an act of general application has mainly been developed by the Community Courts . . . the complexity and ambiguity of the case-law in this area is an indication of the difficulties the Community Courts have to define the boundaries between acts of general and individual application with accuracy’, A. Türk, *The Concept of Legislation in European Community Law: a Comparative Perspective*, Kluwer Law International, European Monographs, 2006, p. 239. A. Türk also refers to ‘legislation in substance’ (as opposed to ‘legislation in form’).

³⁸ According to the case law, the essential elements have to be contained in the basic act. Therefore the legislator can only delegate the adoption of non-essential elements to the executive. See the judgments of the ECJ of 16 June 1987 in *Albert Romkes v Officier van Justitie for the District of Zwolle* Case 46/86 [1987] ECR 2671 and of 27 October 1992 in *Federal Republic of Germany v Commission* Case C-240/90 ECR I-5383. The distinction between essential and non-essential elements is also difficult and is made on a case-by-case basis: see A. Türk, ‘The notion of basic elements is not taken from any abstract general concept of gravity of topics, but instead results from the interpretation of the treaty provisions describing each individual policy area’ op. cit. footnote 37, p. 229.

(‘supplementing’) without however providing for formal amendments to be made to the basic act.³⁹ This ambiguity enshrined in the definition will have to be interpreted and applied on a case-by-case basis by the institutions when deciding which procedure applies. So far, a rather liberal interpretation has prevailed.⁴⁰ But it is clearly a grey zone which will allow for the inter-institutional political dynamics to continue doing their work.

It is worth noting that, as opposed to other comitology procedures for which there are only guiding principles, the abovementioned criteria for choosing the regulatory procedure with scrutiny are *mandatory*. This means that each time these criteria are met, the RPS has to be provided for in the basic act. Failing that, any basic act adopted after the entry into force of the 2006 Comitology Decision could, at least in part, be illegal. Measures of a quasi-legislative nature which would implement this basic act following a procedure other than the RPS, could be challenged before and annulled by the Court of Justice.

If the RPS applies, the EP and/or the Council may oppose on three different types of *grounds*:

- if the Commission *exceeds the powers* provided for in the legal basic act (*ultra vires*), or
- if the draft is not compatible with the aim or the content of the basic instrument, or
- if the draft does not respect the principles of subsidiarity or proportionality.

These grounds are very wide-ranging and in practice can be interpreted as giving the EP a virtual say on the substance. In principle, it excludes only opposition on the basis of mere political opportunity.⁴¹ But this say on

³⁹ I offer an example in relation to the Prospectus Directive (Directive 2003/71/EC): the Commission is empowered to detail the information to be contained in prospectuses for launching securities on the European market.

⁴⁰ As devised between the three institutions’ legal services, some basic questions can guide in deciding whether RPS applies when no formal amendment to the basic act is provided for: does the implementing measure affect the scope of the rights and obligation created by the basic act? Does the measure set out additional criteria (e.g. to clarify a definition in the basic act and/or to enable the Commission to apply it)? Does the Commission enjoy a wide scope for discretion to add these new elements?

⁴¹ As underlined by G. Schusterschitz and S. Kotz, *op. cit.* footnote 33, p. 84: ‘[a]n opposition for political reasons, for instance in order to achieve compromises in other issues, is not possible’.

substance is still only *ex post* (veto right) and must be legally justified on the basis of the abovementioned grounds.

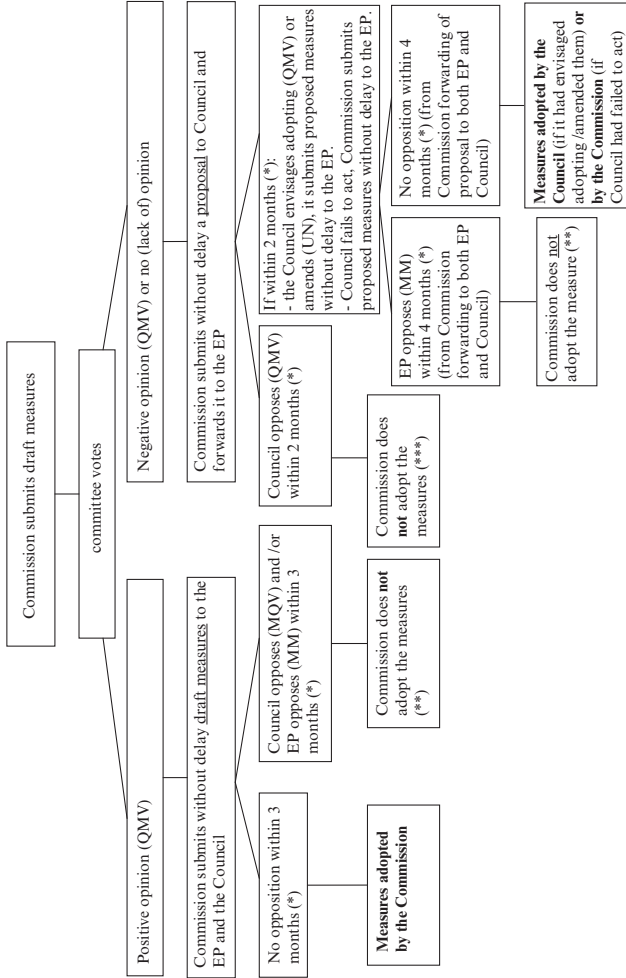
The *procedure* is reproduced in Figure 4.1 (normal procedure Article 5a para 1–5; no urgency).

As with the traditional regulatory procedure, the RPS draws a distinction between:

1. The committee's *positive (or favourable) opinion*: the EP and the Council have an equal control right as co-legislators. They have three months to object on the abovementioned grounds (by majority of the EP component members and by qualified majority in the Council). If at least one of them does so, the Commission is prevented from adopting the measure. It may then start the procedure all over again (submit an amended draft of the measures to the committee) or present a legislative proposal in accordance with the Treaty (co-decision).
2. The committee's *negative (unfavourable) opinion, or none*: the Council will, under its executive hat, have a first go at the proposal. Within a two-month period (normal time-limit) it is given the chance to amend the measure (by unanimity) before submitting the amended draft to the EP. Alternatively, the Council could object to the adoption of the measure by the Commission (but, as opposed to that applying to the EP, no justification is required). If it does so, the Commission will have to re-examine its text and may submit an amended proposal to the Council directly, or present a legislative proposal (co-decision). As long as the Council opposes, the EP is not consulted. Once the Council finally envisages adoption or fails to act, the EP will be given a right to object (within a period of four months from the original date of transmission to the Council and the EP). If the Parliament objects (by a majority of its component members), the Commission (or the Council if it had decided to adopt the proposed measure) is, again, prevented from adopting the measure. The Commission may either start the whole procedure again (submit an amended draft to committee) or present a legislative proposal in accordance with the Treaty (co-decision).

Deadlines

The general time limits for EP and Council consultation (three months in the case of positive opinion, four months otherwise) may be extended by a month 'when justified by the complexity of the measures' or curtailed by an unspecified period 'where justified on the grounds of efficiency'. The vague formula chosen and the need for justification will undoubtedly be



Notes:

QMV = Qualified Majority Voting; UN= Unanimity; MM = Majority of component Members (EP)

(*) Time limits may be curtailed, or extended (1 month max), in the basic act

(**) Commission may submit amended draft to *committee* or present legislative proposal

(***) Commission may submit amended proposal to *Council* or present legislative proposal

Figure 4.1 Regulatory procedure with scrutiny

the source of interinstitutional frictions when negotiating the co-decision act.⁴²

An urgent procedure is also provided for to allow the Commission to adopt and apply the measure before giving the EP and the Council the chance to oppose it. For this urgent procedure to apply, two important conditions must be met (in addition to those more generally provided for the RPS): (1) 'imperative grounds of urgency' should apply and (2) the comitology committee must have issued a positive opinion on the draft measures. Even if the EP and/or Council opposes, the Commission may provisionally maintain the measures in force until they are replaced by a definitive instrument (i.e. when no more opposition by the EP or the Council), if justified on health protection, safety or environmental grounds.

IV.4 Implementation

The new procedure is not of retroactive effect. It does not apply to acts adopted before the reform, unless adapted. Two political statements dealt with this issue:

1. In what was to be referred to as the 'cease-fire' statement, the three institutions committed to an urgent alignment of a list of 25 co-decision acts (EP request – notably in the financial services sector) in exchange for the abolition of sunset clauses on the delegation of implementing powers (Council and Commission request).⁴³ The corresponding alignment proposals were made by the Commission at the end of 2006. The Council Presidency chose to deal with these proposals as a package. A first reading agreement was finally formalized in March 2008. The time it took to have the three institutions agree on this fairly limited first package is mainly due to: (1) the political sensitivity of this priority alignment⁴⁴ and (2) the difficult horizontal coordination experienced at EP level, with a tendency of some of the

⁴² So far, the EP has indeed shown some reluctance to accept curtailment of these time-limits unless clearly (i.e. in most cases legally) unavoidable.

⁴³ The statement foresees the use of review clauses instead of sunset clauses. The review clauses reverse the mechanics of suspension by leaving it to the Commission to decide, after a defined time-limit, whether the delegation should be suspended.

⁴⁴ The priority alignment covered the most salient political acts, as identified by the EP.

competent sectoral fora (especially EP committees) to politicize the exercise.

2. In a unilateral statement, the Commission also committed to screening all other co-decision *acquis* so as to make relevant proposals for adaptation, whenever required. Two hundred and twenty-five such basic acts have been identified, the vast majority of which have been proposed for alignment via ‘omnibus regulations’, basically to avoid – on the basis of the experience learnt with the negotiating of the priority alignment – excessive dispersion in the EP sectoral instances.⁴⁵

Finally a new bilateral agreement was negotiated with the EP on the procedures for implementing the comitology Decision.⁴⁶ For the sake of efficiency, the EP has in particular agreed to ease the RPS language regime conditions⁴⁷ in case of shortened delays or to foresee category exemptions to the one month right of scrutiny/‘*droit de regard*’.

IV.5 Consequences of the 2006 Reform

EP reinforced

The EP has gained from both a process and an output perspective.

As regards output, thanks to its insistence and to the Commission support, the EP has acquired a veto right in a sphere where it was traditionally excluded. Via the comitology Decision ‘backdoor’,⁴⁸ the EP has succeeded, yet again, in expanding its ‘constitutional’ powers.⁴⁹

As regards process, formally speaking, the EP was only consulted on the

⁴⁵ At the time of writing, these proposals are going under accelerated and well coordinated examination by the EP (the JURI committee having been appointed the lead committee, with the sectoral committees concerned ‘*pour avis*’, i.e. consulted).

⁴⁶ Also taking into account the unilateral statement in which the Commission committed to improving the functions of the comitology register in order to help the Parliament follow the different stages and timetable of each comitology procedure and to distinguish between the various types of documents received: see the section above on transparency reform. OJ 2008 C 143/1.

⁴⁷ The Commission had made a further unilateral statement that the RPS deadline would start only once all EU official language versions had been sent to the legislator.

⁴⁸ K. Kortenbergh, ‘Comitologie: le retour’ (1998) 34 *Revue Trimestrielle de Droit Européen* 322.

⁴⁹ See the reference to the ability of the EP to expand its ‘constitutional powers’ given by T. Christiansen and B. Vaccari in ‘2006 Reform of Comitology: Problem Solved or Dispute Postponed’ (2006) 3 *EIPASCOPE* 13 and 17 (footnote 19).

reform of the Comitology Decision. Informally, however, it managed to position itself as the main protagonist. Negotiations in the Council structures were organized almost exclusively around what could be acceptable to the EP. In 2005–6, the focus of decision making quickly shifted from the Council Friends of the Presidency group to the informal trilogues organized in the European Parliament. The EP negotiators managed to have both their mandate and negotiations outcome rubberstamped directly by the Conference of Presidents. Plenary sitting proved, subsequently, a mere formality.

No genuine call-back right however for the EP

Is co-decision slowly penetrating into the implementing sphere? Has the EP finally achieved that ‘legislative co-decision should lead to a form of executive co-decision’?⁵⁰ At first glance one could argue that, as with the co-decision procedure, nothing can be adopted without consent from both the EP and the Council.

But the rights given to the legislator under the RPS are quite different in nature. First, the Parliament and the Council are not given the last say. If the legislator does object, the Commission has the choice between submitting an amended draft to the committee or a legislative proposal to the Parliament and the Council. There is no right of revocation, so to speak, as it is the Commission which, ultimately, decides whether the legislator should call back the measure and itself exercise delegated ‘quasi-legislative’ powers, on the basis of a Commission proposal. This decision remains in the hands of the Commission. Secondly, there is no formal parity between the two branches of the legislature in case of negative or no committee opinion. This derives from the fact that:

- (i) as opposed to the Council, the EP is given a right to oppose, not a right to decide (or amend).
- (ii) the Council may oppose without any restriction while the EP will need to provide justification on the basis of the abovementioned grounds (excluding political opportunity).
- (iii) the procedure is sequential and conditional: as long as the Council opposes, the EP is not formally consulted.

Efficiency gains?

One could assume that – with the safeguards of its reinforced control rights – the EP in particular will be inclined to delegate wider implementing

⁵⁰ See De Giovanni Report *supra*, footnote 20.

powers to the Commission. This should encourage the legislator to look solely at the essential elements of an act, thus improving the quality and readability of legislation.⁵¹ In addition, the democratic legitimacy of executive action at Community level is substantially improved via this reform. Finally, the good cooperation between the EP and the Commission has set promising bases for the present and future of their bilateral relations.

But this reform may come at a price. Compared to the current regulatory procedure, adoption periods will be considerably extended. Currently a limit of three months is provided for under the regulatory procedure for possible intervention by the Council. This means that some basic acts do provide a much shorter period (several weeks to two months) for the Council to exercise its possible call-back rights under the regulatory procedure. Furthermore, the EP is given only one month to exercise its '*droit de regard*', according to the bilateral agreement: By contrast, under the RPS, the consultation of the Council and the EP:

- (1) takes place in each and every case (whereas under the regulatory procedure, the Council is called upon only in the 1 per cent of cases of unfavourable or no opinion);
- (2) is normally⁵² of three months (in the case of favourable opinion from the committee) or four months (unfavourable or lack of opinion), provided neither the EP nor Council objects!;
- (3) in reality the periods will be much longer since – according to a unilateral statement by the Commission – the clock starts ticking only once the draft measures have been sent in all official languages to the legislator;
- (4) finally, measures could be blocked indefinitely in the case of repeated opposition by the legislator.⁵³ This could considerably delay the decision-making process.

⁵¹ In this context, the question of what constitutes an essential element could become particularly acute. In the same way, the inherent ambiguity in defining quasi-legislative measures will need to be clarified. The procedure is bound to come before the ECJ in the coming years.

⁵² The time-limit in the basic act can be shortened only if duly justified on grounds of efficiency (see above IV.3 section on Deadlines).

⁵³ As mentioned above (see Figure 4.1), if the Council does not succeed in amending the measure but opposes its adoption by qualified majority voting, the EP is deprived of its right of objection and the Commission will have to submit a revised proposal to the Council without delay. This could last forever until the Council envisages to adopt.

These factors risk depriving comitology of one of its main assets: the speed of decision making. It will also give considerable time for well structured lobbies to enter the fray and provide well targeted members of the European Parliament with the much needed expertise to oppose on specific issues. In any case, the screening of all quasi-legislative measures will require further resources and considerable restructuring/change of working methods on the part of the Parliament. These changes are underway.

But the risk of paralysis should remain limited. First, the current practice of regulatory committees suggests that almost all measures will obtain a positive opinion from the committee, thus rendering Council opposition highly unlikely. Secondly, the EP will need a high majority of members (majority of the EP component members) to adopt a blocking resolution, thus going beyond traditional political group cleavages. Thirdly, the system will prompt the Commission and the EP to embark on upstream informal information and coordination to avoid any unpleasant surprise at the end of the formal consultation stage.

Readability and accountability

Perhaps more importantly, the complexity of this new procedure will make it extremely difficult, if not impossible, for the general public to understand it. The chance given to the Council of amending by unanimity – not explicitly mentioned in the Decision – creates further blurring of responsibilities. Thus general communication to the public will not be rendered any easier.

And the winner is . . . the comitology committee! (for now)

As paradoxical as it may seem, under the RPS comitology committees made up of MS representatives are ultimately assigned the task of deciding not only on the procedural rights of the Council but also on those of the EP. If the committee delivers a positive opinion, the EP is given the same veto rights as those of the Council – they will both act in a legislative capacity. In the event of a negative or no opinion, the committee will make EP intervention conditional on the Council's prior intervention as executive. Furthermore, it will be up to the comitology committee to decide – via a positive opinion only – whether the urgent procedure (i.e. the ability of the Commission to adopt and implement the measures immediately, and to maintain them provisionally in force even if the EP or the Council opposes them) can apply. Comitology committees will remain at the centre of the political game. They are, more than ever, the sinews of war. It is unsurprising that, in this framework, the EP continues pressing for permanent member or observer status in these committees.

V. WHAT NEXT? THE LISBON TREATY (ARTICLES 290 AND 291)

Little more than a year after the entry into force of the 2006 reform, the Heads of State and Government reached a political agreement on the Lisbon Treaty, which – if ratified⁵⁴ – will alter the comitology system as we know it today. At the time of writing, many issues are still pending on the interpretation and implementation of the relevant new Treaty Articles (Articles 290 and 291). So as not to pre-empt the outcome, this contribution will be confined to conducting a preliminary analysis of these Articles and to flagging up some open questions. A full prospective analysis of Lisbon Treaty Articles 290 and 291 will merit further development in the course of 2009.

The 2006 reform paved the way to the Lisbon Treaty's distinction between quasi-legislative measures (referred to as 'delegated acts') and purely executive ones. In accordance with the Commission's proposal in the framework of the Convention, the Treaty of Lisbon thus recognizes that the institutional balance should take into account the nature of powers delegated to the Commission. To summarize: when measures are of a 'legislative' nature,⁵⁵ the Commission can receive delegation from and be directly controlled by the two branches of the legislative authority. When measures are of a purely executive nature, control over the Commission should be that of the national executives.

V.1. Article 290 (Delegated Acts)

1. A legislative act may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act.

The objectives, content, scope and duration of the delegation of power shall be explicitly defined in the legislative acts. The essential elements of an area shall be reserved for the legislative act and accordingly shall not be subject of a delegation of power.

⁵⁴ At the time of writing – 24 July 2008 – 23 MS had approved the Lisbon Treaty through their respective constitutional processes. One MS had voted against it. Three MS approvals were still pending. This section is based on the assumption that the Lisbon Treaty will eventually enter into force.

⁵⁵ This includes measures of general scope amending the non-essential elements of the basic acts. See A. Türk's definition of 'legislation in substance', footnote 37.

2. Legislative acts shall explicitly lay down the conditions to which the delegation is subject; these conditions may be as follows:

(a) the European Parliament or the Council may decide to revoke the delegation;

(b) the delegated act may enter into force only if no objection has been expressed by the European Parliament or the Council within a period set by the legislative act.

For the purposes of (a) and (b) the European Parliament shall act by a majority of its component members, and the Council by a qualified majority.

3. The adjective ‘delegated’ shall be inserted in the title of delegated acts.

Deconstructing this article

According to paragraph (1), the legislator can choose to (‘may’) delegate quasi-legislative measures to the Commission. This delegation is thus an option, not an obligation. Only the Commission can receive those delegated powers.

The definition of ‘delegated acts’ bears a striking resemblance to that of quasi-legislative measures covered by the RPS: measures of general scope which are designed to amend non-essential elements of the legislative act. *Et pour cause*: the Constitutional Treaty served as a clear orientation in the 2006 negotiations. The types of measures currently covered by the RPS will therefore fall under Article 290 of the Lisbon Treaty.

The conditions of application and procedure (paragraph 2) are, however, quite different from those of the RPS. First, Article 290 finally gives a positive response to the EP’s longstanding request for a call-back/revocation right. The legislator (EP or Council) can directly call back the competence if it so wishes. Secondly, while veto rights are maintained as an alternative, no more justification is needed for the legislator to exercise them.⁵⁶

In addition, the EP and Council are placed on a strict equal footing in exercising those rights.

⁵⁶ For further consideration of whether these two forms of control (revocation; objection) are exclusive, refer to H.C.H Hofmann, ‘Legislation, Delegation and Implementation under the Treaty of Lisbon: Typology meets Reality’ (forthcoming).

Preliminary analysis and questions

These provisions put the final touch to the reform process by placing the EP and the Council at parity in their control of ‘delegated acts’. This is a crowning achievement for the EP. In addition to veto rights, the legislator is given a revocation right, i.e. the right to retrieve the power to legislate. These additional procedural guarantees, combined with the extension of the co-decision procedure, will encourage delegation of wider powers to the one and only executive under Article 290 – that is the Commission⁵⁷ – so as to avoid submitting complex technical issues to the more time-consuming legislative procedure.

The Article however leaves much room for interpretation. The objectives, content, scope and duration of the delegation will have to be defined on a case-by-case basis, with no possible reference to a general framework. This, as we experienced before the adoption of the 1987 and 1999 Comitology Decisions, is a recipe for chaos. It could trigger a case-by-case inter-institutional guerrilla war, with at best uncoordinated/inconsistent outcomes and at worst a possible paralysis of the entire legislative process. Unless a common understanding emerges promptly on the interpretation and implementation of Article 290. Amongst the questions to be tackled, we could mention:

1. On the substance: what minimal/maximum duration should be provided for? (When) should the institutions provide unlimited duration for the delegation? Under which circumstances should a revocation right and opposition respectively be provided for? What procedure/time-limits should apply for the different steps of the procedure?
2. On the form: what form could this common approach take (inter-institutional agreement, joint statement, *modus vivendi*, etc.)? When should this common understanding emerge (as soon as the Lisbon Treaty enters into force or after some practice in applying Article 290)? How should inter-institutional discussions be organized (on the basis of a Communication from the Commission? In the framework of an inter-institutional working group? etc.)?
3. What about comitology committees? Will delegated acts toll the knell of existing comitology committees? Without pre-empting the results of current discussions, it is fair to say that, in one way or another, committees made up of MS representatives will have to continue bringing all relevant expertise to the Commission via their fruitful exchange of

⁵⁷ Within the realm of non-essential elements (see A. Türk *supra*, footnote 37).

views. Their pre-consultation will further limit Council opposition at a later stage. But what form will they take? Will it still be compulsory to consult them? Will they be like expert groups of the Commission or rather be set up/develop under the auspices of the Council? With this in mind, the declaration made by the IGC with respect to the application of Article 290 in the financial services sector may illustrate the Commission's future action in other policy areas:

The Conference takes note of the Commission's intention to continue to consult experts appointed by the Member States in the preparation of draft delegated acts in the financial services area, in accordance with its established practice.

4. What about the EP? Will it continue to insist on having members (or observers) of these groups? Will it ask to continue to be regularly provided with information on comitology committee meetings? Would an informal pre-consultation of the EP not be advisable to avoid opposition or revocation downstream?

All this remains to be seen.

Foreseeable application

Article 290 will be applicable only to acts adopted (or revised) after the entry into force of the Lisbon Treaty. Therefore, three regimes will probably coexist for quasi-legislative measures:

- any basic act adopted or revised after the entry into force of the Lisbon Treaty will delegate quasi-legislative powers in accordance with Article 290;
- any basic act adapted to the 2006 reform – as part of its revision, codification or priority/general alignment process – and not modified/abrogated since will continue to provide for RPS;⁵⁸
- any basic act adopted before the 2006 reform and that would not have been revised (or abrogated) since will continue to apply the 'old' procedures (mainly regulatory).⁵⁹

⁵⁸ The Lisbon Treaty does not provide for alignment of the *acquis* to Article 290. Some could even argue that the case-by-case approach explicitly mentioned in this Article would be anathema to a general alignment. This will however ultimately be a political judgement-call on the part of the institutions.

⁵⁹ At the time of writing, it remains to be seen whether all omnibus regulations (general alignment to 2006 reform) can be adopted before the entry into force of the Lisbon Treaty.

V.2. Article 291 (Implementing Measures)

1. Member States shall adopt all measures of national law necessary to implement legally binding Union acts.
2. Where uniform conditions for implementing legally binding acts are needed, those acts shall confer implementing powers on the Commission or, in duly justified specific cases, and in the cases provided for in Articles 24 and 26 of the Treaty on European Union, on the Council.
3. For the purpose of paragraph 2, the European parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall lay down in advance the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers.
4. The word 'implementing' shall be inserted in the title of implementing acts.

Deconstructing this article

Paragraph (1) MS responsibility for implementation of Union law is recognized at the outset.

Paragraph (2) says that when uniform conditions are necessary, the Commission is ('shall confer implementing powers on . . .') entrusted with implementation by a legally binding act. This covers both EP and Council acts, Council acts and the Commission's delegated acts.⁶⁰ The Council can also have implementing powers but in duly justified cases (and under the Common Foreign and Security Policy).

Paragraph (3) provides that when the Commission receives delegation of implementing powers, the MS (not the Council) are to control the exercise of these implementing powers. The rules and general principles for these control mechanisms are to be laid down jointly by the Council and the EP according to the ordinary legislative procedure. This framework regulation should be adopted in advance of the delegation of implementing powers.

Preliminary analysis and questions

What first attracts attention is that it is no longer the Council which delegates implementing powers to the Commission.⁶¹ Nor is it the

⁶⁰ For an analysis of Commission sub-delegation see H.C.H. Hofmann, *supra*, footnote 56.

⁶¹ K. Caunes, 'Et la fonction exécutive européenne créa l'administration à son image . . . retour vers le future de la comitologie' (2007) 43 *Revue Trimestrielle de Droit Européen*, 297–346.

Council – contrary to what its legal service has long argued – which controls the exercise, but the MS. In addition, the modalities for control by the MS are no longer adopted by the Council alone but by the co-legislators under the ordinary legislative procedure (with a qualified majority in the Council, instead of the currently applying unanimity).

A few questions arise in this context: does this mean that the Council has officially lost its status and role as Community principal executive? Is the reference to the control of the MS of an exclusive nature? Will the committees still intervene as a regulation mechanism between the Commission and the Council or will they be given direct decision-making (and/or veto) power, in accordance with the new emphasis on MS control? If so, what procedure will be provided (could we envisage a ‘super’ comitology committee at ambassador – or even ministerial⁶² – level)? Will different procedures apply if the implementing powers are delegated by the co-legislators, by the Council alone, or by the Commission (in delegated acts)?

What role is there for the EP in the reformed comitology procedures? While the EP is not mentioned as being part of the control system, it will co-adopt the framework regulation on the modalities for controlling the Commission’s exercise of implementing powers. One cannot rule out, therefore, that it will ask for a supervisory role in the process. The details of this supervision (*‘droit de regard’*? participation in comitology committees? etc.) will need to be defined in the framework regulation. If a supervisory role is given to the EP as legislator, strong grounds would militate for the equal treatment of the Council in its legislative capacity.

Foreseeable application of the comitology decision

The 1999 Decision continues to apply to acts adopted by the institutions before the entry into force of the Lisbon Treaty until they are modified or repealed. Even though the Commission may propose the framework regulation soon after the entry into force of the Lisbon Treaty, it may take a while for the co-legislator to adopt it (notably in view of the – at the time of writing – forthcoming 2009 EP elections). The question arises whether the 1999 comitology can continue to apply *ad interim* – with the RPS out for quasi-legislative measures (delegated acts under Article 290). This question has both a political and a legal dimension to it.

⁶² As suggested by J.C. Piris, Director General of the Council’s Legal Service, in the framework of the Convention (Simplification Working Group): working document 006, available at <http://european-convention.eu.int/docs/wd9/3860.pdf>.

VI. CONCLUSION

The implementing sphere is probably the one where the institutional balance will be most affected by Treaty revision. As far as delegated acts are concerned (Article 290), the Lisbon Treaty puts the final touch to this accelerated ‘constitutional’ expansion of parliamentary powers. It places the two legislators on a strictly equal footing in their control of the Commission’s exercise of delegated competence. As regards implementing measures (Article 291), MS have been given a clear and exclusive control function over the Commission. In both cases the Commission is recognized as the Community executive ‘*par attribution*’.

VI.1. Comitology Endangered?

As we have seen, comitology is bound to experience some quite substantial changes in the near future. Whereas RPS strengthened the role of committees, the impact of the Lisbon Treaty on comitology committees is less clear.

Article 290 recognizes the importance of the legislator and the Commission. The Council is considered only in its legislative function. As such, there would be no more ‘*raison d’être*’ for comitology committees to serve as watchdogs for the Council possibly to come back to the fore. It would be difficult, in this context, to envisage anything other than a consultative role for MS representatives gathering in the framework of a committee.

Under Article 291, however, the role of comitology committees seems to be strengthened with an explicit reference to MS control. But this also means an important alteration of the committees’ functions, shifting their role from arbitrator to potentially fully fledged decision-makers. This could ultimately have important direct consequences on their memberships, chairmanships and functioning.

VI.2. Towards a Parliamentary System?

In the Lisbon Treaty, EP rights have been clearly enhanced: not only has the EP obtained its long awaited call-back rights for delegated acts, but co-decision has been further extended finally to become the ordinary legislative procedure. In addition, the appointment of the Commission’s President is more explicitly related to the results of parliamentary elections.

Parliamentarization remains incomplete, however, notably due to preservation of the originality of the Community method (Commission keeping its monopoly of initiative), limited checks and balances (no EP dissolution

is possible), the traditionally limited role of European political parties and the persistent exclusion of the EP from important areas of responsibility in parliamentary democracies (for example, mere consultation of the EP on the Union's own resources system).

5. Agencies: the ‘dark hour’ of the executive?

Michelle Everson

I. INTRODUCTION

Long-term supporters of agencies within the European Communities and Union may have much to celebrate. The individual institutions of the European Union, together with the Member States, are now close to agreeing upon an integrated operating framework for regulatory agencies within the EU;¹ by the same token, and perhaps most importantly, agreement upon the future operation of agencies at EU level appears also to satisfy the primary demand of scholars concerned with the appropriate institutional design of ‘apolitical’ agencies, that ‘no one controls the agency, yet the agency is under control’ (Moe, 1990; Majone, 1994; Everson, 1995). On the one hand, the operating independence of European agencies has been further secured by the withdrawal of the European Parliament from earlier demands that it be represented on agency management boards. Equally, however, the European Commission has also signalled its willingness to loosen its own institutional apron strings, engaging in repeated rhetorical affirmation of its view that the ‘structural autonomy’, if not full decisional independence, of agencies should now be guaranteed.²

Following a recent constitutional impasse, the core of the ‘technocratic’ vision of the European integration *telos* would thus appear to have received an important degree of reinvigorating approbation. Rather than only concern itself with grand principles of joint and several government, the EU has now also paid renewed attention to its long-standing function of supplying efficient and appropriate technical administration. The agreed

¹ See Draft Institutional Agreement on the operating framework for the European regulatory agencies, COM(2005)59 final. However, in the meantime, the European Commission has recently announced that a further review will take place prior to entry into operation of an integrated operating framework (COM(2008)159 final).

² *Ibid*, p.5.

willingness to commit ever larger portions of regulatory activity to increasingly autonomous agencies is, at one and the same time, a momentous commitment to a clearly defined form of apolitical European governance and a self-effacing recognition of the necessary limits of EU regulatory action; arguably an affirmation that the appropriate character of the EU is one of a problem-solving technical nature, simply giving 'added value' to the Member States' regulatory regimes.

Or is it? Giandomenico Majone, one of the most notable proponents of agencies, has recently voiced potent (and surprising) concerns about the regulatory activities of the EU, bemoaning their inefficiency, inability to deliver stated aims, as well as their tendency to encourage a 'stealthy' process of spill-over and the accumulation of competences best left at national level (Majone, 2005). At one initial level, such a critique might be argued to be reflective of a deep-seated, if often overlooked, ambivalence between technocratic theories of the fourth branch of government and a functionalist methodology of integration, which is itself (arguably) less concerned with technical output legitimacy and more preoccupied with achievement of a long-term goal of 'deep' European unity. However, such potential discord between technocratic and functionalist integration methodologies – or a lingering suspicion that the Commission's White Paper on Governance of 2001 was not simply about constructive management of spill-over, but was, instead, *promoting* of managed spill-over³ – should similarly not distract from the generic fact that, whichever rationale underlies a renewed reliance upon agencies as a vehicle for European regulatory activities, the concomitant increase in EU executive capacity raises renewed doubts about the exact place of the executive within our modern scheme of government. More particularly, the rise and rise of agencies and the executive branch within Europe must be evaluated (even by its most ardent supporters) within a broader sweep of political scholarship, which has always taken serious note of the potential of executive governance to undermine representative democratic process (Ackerman, 2000; Pollak, 2006), and even to unravel the rule of law (at the level of 'high' theory: Milbank, 2007).

In short, European agencies may very well represent a considered and appropriate response to the technical demand for EU regulatory action in the twenty-first century. Equally, they may also go that one step further, promising a significant renewal in Monnetist integration methods, reinforcing, even as they engage in simple technical regulation, an intensity of

³ COM(2001)428 final, and especially so in relation to the Open Method of Co-ordination.

exchange within an emerging European polity which can form the basis for future European political community. However, rose-tinted appraisal of agency-led governance must always also be haunted by the darker side of the executive, or the latter's innate capacity to usurp politics and political community.

II. RE-INVENTING THE BALANCE OF POWERS: HOW DANGEROUS IS THE EXECUTIVE?

1. The Unity and Integrity of the European Executive Function?

Use of agencies must be in accordance with the basic principles on which the system of the Union is founded. This means respecting the balance of powers between the institutions under the Community method. *In particular, the unity and integrity of the executive function at European level must be preserved* as must the Commission's capacity to assume responsibility for the satisfactory general exercise of that function. This affects the scope of the responsibilities and powers which can be delegated to the regulatory agencies, and the relations between these agencies and the Commission.⁴

It has long been argued that the 'institutional balance of powers doctrine' laid down by the European Court of Justice in *Meroni*⁵ limits the development of autonomous agencies at EU level. In this cautious analysis, the ECJ's injunction to the named institutions of the then High Authority always to act within the competences delegated by the treaties to them amounts to a vital limitation upon the exercise of delegated 'discretionary' powers by agencies; or wide competences which might alienate the prerogatives of institutions other than the Commission (the delegating institution). More recently, commentators have suggested that the scope of the *Meroni* doctrine should not be 'exaggerated' (Geradin and Petit, 2004, p. 15), applying, within its historical context, only to the ECSC and, further, not taking note of modern regulatory demands, or, indeed, of the fact that the majority of (implementing) powers now at issue derive *de facto* not from EU institutions but from the Member States. In this analysis, undue emphasis upon *Meroni* must thus be construed as a simple political tool, argumentatively deployed by the Commission in order to preserve its own decisional predominance over autonomous agencies (Geradin and Petit 2004:14).

⁴ Communication from the Commission: The Operating Framework for the European Regulatory Agencies, COM(2002)718 final, point 3 (emphasis added).

⁵ Case 9/56, *Meroni v. High Authority*, [1957/1958] ECR (157).

Seen in this light, the Commission's conservative representation of the principle of institutional balance presented in its communicated operating framework for European regulatory agencies can also initially be construed as a further rhetorical justification for continued refusal to give full free institutional rein to the directors of regulatory agencies in their decisional competences. In other words, the relationship established between agencies and the Commission must necessarily be subordinate in nature, with the latter institution playing a major role in day-to-day agency management. Nonetheless, this assumption can likewise be doubted, and the vital importance of the Commission's definition of institutional balance may be argued to lie instead in its emphasis upon the 'unity and integrity' of the EU's executive function.

Alternatively, the general scheme of planned agency organization hints, by contrast, at a withdrawal of Commission influence; a cold institutional realisation that the 'effectiveness' and 'credibility' of European regulatory activity are now best assured by the 'autonomy of European regulatory agencies' acting, 'as far as possible, [free] from external influence'.⁶ Taken together with the further stipulation that 'members of the administrative board . . . shall act in the *public interest*', and an admonition to scientific committees 'to act independently of *any* external influence',⁷ the Commission would thus now appear to be establishing a direct and Commission by-passing relationship between European agencies and a European public, whereby accountability and control of agencies are best secured not by hierarchical edict, but by a transparency of executive action, which is monitored by a wider public audience (Everson, 2005). By this same token, the Commission's primary control responsibility now appears to lie in its *political-institutional* 'responsibility' and accountability for the overall evolution and exercise of the executive function, and not in day-to-day micro-management of agency activities.

At the same time, however, the stated aspiration of the Commission to assume overall responsibility for the unity and integrity of the executive function at EU level must also be recognised as entailing its own potential challenge to the institutional balance of powers in the EU. As Jean-Paul Jacqué reminds us, beyond all simple efforts to limit potentially abusive delegation of powers, the notion of institutional balance encompasses a deeper fundamental or 'constitutional' principle, governing both the current exercise of powers within the Union *and* the future integration *telos* (Jacqué, 1990): it is the 'static' higher legal principle which has

⁶ COM(2005)59 final, point 7.4.

⁷ COM(2005)59 final, point 15.

vouchsafed the strictly delineated exercise of intrinsic competences both to the Member States and to the Communities, and which has guaranteed an ordered and orderly process of integration in which law has disciplined and dissipated political conflict on the existing and the proposed nature of a 'dynamic' European polity. Alternatively, mirroring Monnetist integration methods, the formal application of an entrenched and intransigent legal map of apportioned powers is not only sensitive to the residual, yet integral national imperative for sovereignty, but also facilitative of supranational integrative impulses. *De facto* increases in and accrual of powers by individual institutions can never be tolerated. Instead, re-apportionment of power should always be subject to explicit, preferably treaty-based, agreement, thus oiling the wheels of an uncertain integration process as functional integration is also, importantly, founded in explicit political consent.

Taking such a reading of the principle of institutional balance into account, the Commission's current and repeated emphasis upon the unitary and integrity of the EU executive function⁸ cannot simply be accepted as a wholly necessary desire to establish coherence and efficiency within emerging networks of EU and national regulatory agencies (NRAs) in the matter of shared national–EU implementation (Geradin and Petit, 2004, p. 61), but must also be viewed as a potential, but constitutionally significant, redefinition of the principle of institutional balance, and its further colonization by the contrasting (competing) constitutional principle of the separation of powers. In other words, where the notion of institutional balance of powers once had little time for strict delineation between executive, legislative and judicial competences, concentrating its governing efforts upon staged and consensual integration instead, Commission pre-occupation with the establishment of a *unitary* EU executive function now dissects carefully sculptured and long-established spheres of functional competence, refashioning an emergent European polity along more conventional constitutional lines.

Such a re-drawing of the principle of institutional balance – a redrafting that places the Commission at the centre of a web of executive relations throughout Europe – may or may not pose a degree of challenge to functionalist visions of the integration *telos* which are founded in political consent: thus, for example, if notions of a unitary and integral executive function evolve in the same manner as the European legal order, establishing an 'organic' connection between the administrations of the Member

⁸ See also COM(2005)59 final, point 1, though without mention of the principle of institutional powers.

States (Shaw, 1996), will the 'Masters of the Treaty' find their powers of political decision-making increasingly pre-empted by an inexorable logic of executive integration and agenda-setting, which dictates the pace of European integration 'outside' the sphere of high politics? The answer to this question remains unclear. What is certain, however, is that constitutional colonization or the turn to a Europe of 'separated' rather than 'balanced' powers requires us to review, within a modern context, the age-old constitutional conundrum of inherent antagonism and destabilization between executive and (representative) legislative functions.

2. The Dark Hour of the Executive?

The 'regulatory' concept

A distinction must be made between 'regulatory' activities and the adoption of legal rules or binding legal norms which are applicable across the board. Regulatory activities do not necessarily involve the adoption of legal acts. They may also involve measures of a more incentive nature, such as co-regulation, self-regulation, recommendations, referral to the scientific authority, networking and pooling good practice, evaluating the application and implementation of rules etc. It therefore follows that a European 'regulatory agency' does not necessarily have the power to enact binding legal norms. (COM(2002)718 final (7.1)).

All talk about the dangers of executive governance notwithstanding, sight must never be lost of the simple fact that the Commission is operating within a modern regulatory environment, the complexity of which is only heightened by the supranational nature of the EU. Set against this rationalist background, the Commission's elaboration of a European 'regulatory concept' encompassing a far broader sweep of regulatory activity than simple administrative application of legal norms, distinguishes itself as an honest effort to qualify its own simplifying re-classification and division of existing and future European agencies into 'executive' and 'regulatory' bodies; the former largely collating and supplying the Commission with the information it needs in order to set out and review its policy programme (Human Rights Agency), and the latter mostly concerned with the direct implementation of regulatory licensing schemes (Community Plant Variety Office). Thus, even within a predominantly 'regulatory' environment, we must also concede that more casual and interactive modes of regulatory-stakeholder interaction may be required in order to deliver an optimal scheme of regulatory efficiency.

Nonetheless, and all rationalist honesty apart, the rhetoric and practices of stakeholder inclusion, networking, benchmarking, persuasion, learning

and self-regulation also entail a radical fanning out of the executive into a public sphere of opinion-gauging and opinion-making, which gives truth to the age-old constitutional adage that triadic schemes of constitutional governance create as many tensions as they purport to solve (Ackerman, 2000). In other words, the integration of stakeholders into regulatory regimes, as well as interactive executive implementation, may well be a valid manifestation of efficient modern regulatory techniques. At the same time, however, such movements also raise particular concerns about the increased powers of initiative thereby accumulated by an executive, which thus gains a unique platform from which to influence and be influenced by the public interests which revolve around any sphere of executive action.

For the purposes of our analysis, the efficiency driven intrusion of the executive into the public sphere, which cannot but entail direct executive engagement with a communicative sphere of information gathering, collation, interpretation and evaluation, both implicates the executive function in the process of policy formation and underlines inherent antagonism between legislative and executive branches of government. Government by the people and for the people necessarily entails a strong desire for efficient executive action: our will *should* be done; at the same time, however, efficient execution of our will can and does undermine the legislative prerogative of value formation, as functional logics of implementation override and ignore the very legislative processes which mandated them.

2.1. The executive challenge to representation and redistribution

Clearly, inherent triadic constitutional tension – more particularly, antagonism between executive and legislative functions – is most apparent within representative democracies. Where the major governing emphasis is placed upon the *unitary* will of the representative legislature, the direct intrusions of an expansionist, if efficient, executive into the public sphere necessarily release and reinvigorate the antagonistic plural aims and demands of groups once neutralized by a unitary and representative process of value formation (Pollak, 2006). With this, its raising of the spectre of pluralist dissolution, the executive function has thus always cast a dark shadow, threatening the coherence and stability of the democratic state.

Traditionally the darker character of the executive has always found its countervailing or correcting constitutional mechanism in the principle of a ‘transmission belt administration’ governed by a ‘policing’ or ‘conservatory’ notion of the rule of law (Stewart, 1975; Dashwood, 1998). This ancient tool of the western constitutional state – whereby the executive function is strictly confined to one of technical implementation and always subject to an aggressively applied *ultra vires* standard – is one well-known to Member States, and particularly so under the aegis of principles of parliamentary

sovereignty, where 'accountability' is not commensurate with the public transparency of administrative action, but is, instead, always a matter of 'democratic' accountability (Harlow, 2003). Within the institutional structures of the EU, however, and under conditions of modern regulatory complexity, strict technical transmission of legislative competences remains an unattainable ideal, a tool impossible to adapt to an ever-changing and supranational regulatory environment (Everson, 1995). Does this mean that the EU is necessarily destined to experience its own dark hour of pluralist dissolution and executive dominance? 'No', famously intone the proponents of the EU as the technocratic fourth branch of government (Majone, 1994) – or, at least, no, in so far as agency-led governance within the EU is not contaminated by functionalist visions of the establishment of true European political community (Majone, 2005).

Paradoxically, the very technocratic forces which instigated and promoted recent startling increases in the regulatory capacities of the EU are exactly those selfsame forces which would warn most strongly against wholesale belief in the redemptive powers of the executive function (Everson, 2006). Large-scale technocratic delegation of regulatory tasks to independent agencies, for all that it also entails the alienation of a wide range of discretionary powers, should never encroach upon the core functions addressed within the representative democratic processes of the Member States (Majone, 1994; Majone, 2005): agencies should play no part in the governance of redistributive issues. Paring the antagonism between executive and legislative functions down to its primary manifestation, technocratic theory combats the dangers of pluralist dissolution by means of a restriction of the scope of its regulatory state to issues which do not entail the income redistribution which is deemed to be the most divisive of policy issues, and thus the most in need of treatment within the neutralizing framework of unitary and representative democratic process. By this same token, technocratic theory is thus not a radical departure from the transmission model, but, rather, its most modern and socially responsive manifestation, whereby the challenge of regulatory complexity is met through the notion of a *wholly depoliticized* administration. Certainly, agencies should be deployed at EU level. However, their role should be a solely technical one and be further shielded by their insulation both from institutional political interference and from disruptive public interests.

The modern reinvention of the transmission-belt model within the technocratic paradigm might be argued to place too great a faith in liberal economic theories, which, through technical mechanisms such as cost-benefit analysis, arguably draw too simplistic a distinction between redistributive and simple 'distributive' issues, such as the apportionment of the social and economic costs of risk regulation (see below). Equally, with its emphasis

upon the re-delegation of issues of redistribution back down to national democratic process (Majone, 2005), technocratic theory only underlines its deep-seated disagreement with any functionalist theory of European integration, which is happy to see redistributive spill-over effects within a European polity contribute ‘stealthily’ to the need for the establishment of European political community. However, at the same time, technocratic theory furnishes us with handy yardsticks to evaluate European agencies as they have evolved, rather than as it has preached.

If we are anxious to circumnavigate the darker side of the integral and unitary European executive function, we must accordingly ask how a unitary and integral European executive might combat inherent threats of pluralist dissolution. More particularly, we must ask how the overall operating framework for European agencies treats issues of plural representation and (re)distribution.

2.2. The executive challenge to the rule and role of law

At the level of high theory, the executive challenge to the rule of law is an age-old and existential issue deriving directly from the Enlightenment endeavour to rid human schemes of government of all notions of God-given order and natural law and to re-root its post-revolutionary government and its positive law within an objective sphere of human organisation. Drawing upon the existence of innate ‘humanity’, which is given material legal recognition through notions of citizenship, the government of modernity is thus anchored within a conception of human sovereignty, within which the unitary sovereign comprises the body of citizens and is reciprocally shaped by and shaping of its own sovereign and positive law. At the same time, however, modernity is forever haunted by the spectre of its own dissolution. To give effect to the objective government and positive law of humanity, a single and *despotic* sovereign must be created through which the (self-establishing) will of the citizenry may be channelled. A paradox is thus at once created: objective human organisation and positive law are necessarily undermined by their own sovereign, and more particularly so by the institutional execution of sovereign power by an executive tyrant, which is conditioned by its own necessarily despotic nature to disregard the very human wellspring from which it sprang. Translating in the modern hands of a Carl Schmitt into a notion of ‘technicity’, which gives monstrous (Behemoth) form to Max Weber’s vaguely stated concerns about the ‘inhumanity’ of rational bureaucratic process, the paradox of sovereignty versus humanity thus presents us with a *fait accompli* vision of the darkest hour of the executive, whereby not only objective government and positive law, but humanity itself is undermined by its own struggle to identify an appropriate channel of executive expression (Milbank, 2007).

Such high theoretical concerns are apocalyptic in nature, as are the more radical modes of their possible correction, in particular Schmitt's consequent denial and destruction of Enlightenment ideals. Nonetheless, they remain eternally current both in theory and constitutional practice, and although we may doubt and decry any connection between the establishment of a unitary European executive function and the emergence of a de-humanizing European executive, as well as a totalitarian backlash against that executive, the dark hour of the executive nevertheless poses a fundamental challenge to both the rule and role of modern law in two particular and interrelated ways.

First, and staying firmly within technocratic parameters of regulation, the dedication of executive governance to wholly technical models of implementation and oversight has as its potential corollary the 'scientification' of large areas of human activity (Everson and Joerges, 2007). Alternatively, be the efficiency criteria against which appropriate technical executive governance must be measured economic or scientific in nature, agency-led governance bears with it its own dehumanising potential as the citizenry and its tangible environment are logically reduced to units of economic production, or, possibly far worse, scientifically distilled down to their genetic components in, say, GMO or genetic technology regulatory regimes, which now give immediate corporeal form to Michel Foucault's once very esoteric theoretical concerns about the spread of 'bio-power' – or the innate tendency of the executive to assert its sovereign power over the very definition of the notion of humanity (threat to the *rule* of law).

More immediately, however, the dark shadows of technicity and bio-power necessarily prompt corrective and evasive action within a public sphere, which in turn raise questions about the *role* of modern law. Alternatively, just as surely as technocratic governance weaves its efficient web across the whole of a regulatory regime, it gives rise to demands for the re-assertion of humanity over the executive, with, for example, renewed calls for the consumer to be re-defined as an ethical being concerned with the maintenance of a socially just and ethical sphere of consumption (Everson and Joerges, 2007). This low-level humanization and re-politicization of the executive realm, however, necessarily returns us, and more particularly the law, full circle back to the problem of construction and control of post-legislative processes of plural representation. Where once the law was dedicated to a policing function founded within a notion of *ultra vires* that privileged the unifying powers of a representative legislature, it is now propelled far beyond the simple and clarifying strictures of a transmission belt model of administration and must likewise identify the scheme of law, which may aid in combating dangers of pluralist political dissolution within an ever-expanding sphere of executive influence.

III. AGENCIES IN THE EMBEDDED EUROPEAN 'ECONOMIC' POLITY

The agency shall be invested with a public service role. It shall help to improve the way in which Community legislation is implemented and applied throughout the European Union. (COM(2005)59 final (3)).

The social theorist Karl Polanyi reminds us that it is futile to conceive of market economies in abstract social isolation. Functioning economies demand institutional structures which dictate and secure the modes of exchange in which they are founded. In turn, institutional structures of economic exchange governance necessarily embody their own, even if only organizational, values and mores, which determine that each and every economy or economic system is 'embedded' in a wider societal context (Polanyi, 1944). To this exact degree then, even the most seemingly disembodied of economic regimes, such as the WTO, must be viewed as 'polities' the governing characteristics of which are determined by the values embodied within and promulgated by their own institutional structures of exchange governance. Seen in this light, European agencies, still (and even in their executive rather than regulatory manifestation) overwhelmingly concerned with the regulation of a European economy,⁹ play a very distinct public service role, extending far beyond the mere implementation of technical European regulation. Alternatively, European regulatory agencies and, to a lesser degree, executive agencies are also vital elements within the emergent and embedded European economic polity giving material (societal) structure to the values of a European market.

This latter point is pivotal in any subsequent study of existing and proposed structures of agency governance in Europe. At first glance, the public service role envisaged by the Commission for European agencies appears to confirm that, even within the *sui generis* conditions pertaining within Europe and the European market, every effort is being made to bring the integrating operating framework for European agencies into line with the broad agency template envisaged within a technocratic rationale.

The core guiding principles are laid down in the draft institutional agreement:¹⁰

⁹ A point tangentially confirmed by the continuing availability of Article 308 EC Treaty as a catch-all legislative basis for the establishment of new agencies: COM(2005)59 final, point 8.

¹⁰ COM(2005)59 final.

Agency Creation: agencies will be established only where the 'added' value of Community regulation can be demonstrated through cost-benefit analysis (para. 7) and where the agency can be supplied with a clear executive mandate (para. 9);

Agency Structure (paras 11–14): the operational independence of agencies from the Commission is further secured by virtue of their threefold division into a Director, administrative boards (executive boards) and scientific committees, whereby administrative boards will be made up of representatives of the Commission, Council, Member States (where necessary (9.1.)) and stakeholders (non-voting), and where members of scientific committees will be appointed in open public competition on the sole basis of their expertise;

Agency Operation (paras 15–26): the (modern) transmission principle of administration is likewise further assured and secured by the imposition of a high degree of transparency upon the agency and the requirement that its proposed activities always be laid down in an openly accessible annual work programme, which may likewise be subject to close *ex post* scrutiny in the light of the annual activity report.

Agency Evaluation and Control (paras 27–31): finally, and vitally, agencies are also subject to a further fourfold scheme of *ex post* financial, political, administrative (control by the European Ombudsman) and judicial control, whereby the most significant control mechanism is to be found in the powers of the Court of Auditors, Council and European Parliament to review and evaluate agency budgets.

In sum total: the presence of Commission representatives within management boards notwithstanding, and particularly so given the presence of so many different interests within management boards, the structure appears to satisfy the underlying technocratic demand that *no one* party controls the agency, yet the agency is under control (independence and accountability).

Yet, *sui generis* conditions – best demonstrated by the composition of Management Boards and their mission to provide *ex ante* agency oversight – do continue to pertain and it is here, within the anomalies in European agency structures, that we can perhaps identify a *telos* for the development of an embedded European economic polity, which not only reflects underlying tensions between technocratic and functionalist theories of integration, but also highlights the particular areas of concern which must be addressed in relation to the integrity and unity of the executive function within Europe.

1. Redistribution and the 'Single Public Interest'

In view of considerations in connection with both the purely technical nature of the agencies and, more generally, the principles on which the Community legal order is based, the White paper on European Governance placed further restrictions on the decision-making agencies' scope for action, authorising them to intervene only in areas where a *single public interest* predominates and in areas where the agencies are not called upon to arbitrate on conflicting public interests, exercise any powers of political appraisal or conduct any complex economic assessments. (COM(2002)718 final).

Europe's awareness of the dangers of pluralist dissolution is amply demonstrated by the Commission's concern to restrict agency activities to areas which entail no significant redistributive consequences (or complex economic assessments). Nonetheless, the euphemistic nature of the language deployed reflects the underlying complexities of integration processes, as issues of spill-over of economic regulation into social spheres are obscured and repressed in a rhetoric of 'the single public interest', which distracts from processes of distribution long underway at European level and for which a political competence is ultimately required.

At one level, the necessity for rhetorical illusion is a simple result of the failings within a technocratic theory which has failed to investigate fully the significance of the distributive consequences of regulation (Everson, 1998). Much of agency activity centres upon 'risk'; and, more particularly upon its identification, evaluation and management. The legacy of the BSE crisis is a European Food Standards Agency (EFSA), expressly constituted to restore 'consumer confidence and the confidence of trading partners' within the internal market (preamble (para. 22)) with, in its founding statute,¹¹ a guarantee for the excellence and independence of European scientific advice and the rationality of European risk management structures, together with a further assurance that final (political) decision making at named EU institutional level will engage in full consideration of the non-technical issues such as 'societal, economic, traditional, ethical and environmental factors' (preamble (para. 19)) which impact upon our perception of risk. The inference is clear: all provision of technical expertise apart, risk does involve issues of distribution, as the social, economic and ethical costs of the existence of risk must be weighed up and balanced against the social, economic and ethical costs of risk avoidance or regulation.

¹¹ Article 37(1) of Regulation 178/2002 of the European Parliament and of the Council, establishing the general principles and requirements of food law and a European Food Safety Authority (EFSA), OJ (2002) L31/16.

More tellingly, however, the founding statute of EFSA also concedes, just as it makes a clear distinction between processes of risk communication, assessment and management, that all such processes are inexorably 'interconnected' (preamble (para. 17)). With this, its necessary, though all-to-often avoided, concession that it is very difficult, if not impossible, to draw a final distinction between technical processes of assessing and informing the public about risk (EFSA-led) and value-based judgement on the acceptability of risk – after all, public perceptions of risk will inevitably impact upon the decisions that inform final political decision making on risk – the statute also undermines the core principle underlying the operating framework for agencies within the EU, that the agencies' work will solely entail technical assessments/decisions, while 'political' organs at EU (and even Member State) level will be responsible for policy-making. By stark contrast, the die is inexorably cast: agencies will inevitably play their influential part in the distribution of resources and values throughout Europe.

To reiterate, the implication of European regulatory agencies within issues of distribution is also a simple *fait accompli*; a spill-over effect of the endeavour to ensure the safety of an integrated internal market. And, as a consequence, the Commission must also be commended for its further efforts to extricate agencies from the distribution conundrum and to relocate the locus of potential and destabilising political discord within the 'single public interest' *outside* agency structures; more particularly, by means of application of cost–benefit analysis within a unitary scheme of European budgetary control.¹² In other words, if the European economic polity is an emerging polity, an accidental creation of integration logics (functionalist or otherwise), the appropriate character of its embedding mores and values is also evolutionary in nature, to be carefully nurtured in the vital effort to sustain the overall stability of the integration *telos*. However, couched in the selfsame language of economic rationality that marks so much of the European governing framework, it may likewise be doubted whether the 'roadmap to the integrated control framework' will ever fulfil the role ascribed to the US Office and Management of Budget (OMB) by technocratic theory (Majone, 2005); one of prompting *public political* debate on the appropriate nature of regulatory regimes administered by the Fourth Branch of Government. Indeed, by the same token, it might also be suggested that the language of economic rationality and liberalism associated with

¹² Communication from the Commission to the Council, the European Parliament and the European Court of Auditors, COM(2005)252 final.

the notion of cost–benefit analysis would only distract attention from the true conundrum posed by the fourth branch of government, the often obscured distributive consequences of governance through supposedly economically neutral regulatory agencies.

2. Plural Public Interests

The independence of their technical and/or scientific assessments is, in fact, their real *raison d'être*. The main advantage of using the agencies is that their decisions are based on purely technical evaluations of very high quality and are not influenced by political or contingent considerations [COM(2002)718 final].

The lie is accordingly given to the notion that agencies are legitimated by their technical and scientific isolation – or, at least, is given to the exact degree to which redistributive consequences may flow from agency activities. This presents us with an inversion of technocratic theory and a conundrum: to the degree that the technical and scientific experts gathered within agencies are inexorably drawn into the creation of the values and mores which shape the embedded European polity, can we continue to invest the whole of our agency legitimating faith in the dictum that ‘the director . . . [and] the members of the scientific committees . . . shall also undertake to act independently of any *external* influence’?¹³ The problem is double-sided: anxious to avoid the spread of executive bio-power, we must surely require science and economics to be embedded within the (external) values and mores of humanity; at the same time, however, the socialization of science requires its own politicized (external) input into the technical regulatory process.

Seen in this light, then, the equally firm injunction that ‘the members of the administrative board, the director [and] . . . scientific committees . . . shall undertake to act *in the public interest*’¹⁴ just as surely takes on a vital significance, not only as a mechanism whereby agencies by-pass the Commission to establish their own relations with a wider European public, but also, as an invitation, if not admonition, to agencies to include wider public interests directly within their own institutional structures. In an emerging polity without a clear locus for the political establishment of a single public interest, agencies likewise become their own sponge for the plural interests that clamour and compete to determine the values and mores which will shape the embedded economic polity within Europe. Although they continue to pose many dangers, the

¹³ COM(2005)59 final, point 15.

¹⁴ *Ibid.*

plural compositions of agency management boards (including stakeholders) and the fanning out of the executive to draw upon and influence an external sphere of public communication are also necessary, if highly uncomfortable, components within the European executive function – a bulwark against bio-power and a potential means to legitimate executive acts of (re-)distribution.

3. 'Delegalisation' and the Political Administration

In summary European regulatory agencies are an interesting hybrid. Certainly, great care has been taken to approximate, as closely as is possible, the technocratic agency blueprint at European level. Nonetheless, and particularly with regard to the processes of the interweaving of executive and public spheres which they promote, they also present us with challenging anomalies. Further, although when seen from the viewpoint of 'pure' technocratic theory such anomalies might be decried as a dangerous treason, an affront to transmission (in its modern form) and an open invitation to plural political interests to usurp and distort the clearly defined political goals which mandate the fourth 'executive' branch (Majone, 2005), when evaluated from a more pragmatic stance, which is likewise more accepting of the incremental efforts that must be expanded in the endeavour to supply an emerging European (economic) polity with appropriate *loci* of political contestation, such anomalies might also be argued to be a simple necessity – not an expression of wholesale subjugation of the European *telos* to the dark hour of the executive, but, by contrast, an effort directly to confront the dangers of bio-power, and to unveil and address otherwise obscured issues of distribution and/or redistribution.

Europe appears now to be in possession of its own greatly expanded 'unitary and integral' executive function. However, its executive function is also a highly politicized one; a political administration made up of loose and plural ties of interaction and communication between executive and public spheres. Hierarchy is confounded as the executive engages with the public sphere, not within the strict confines of a (one-way) legislative mandate, but in an open-ended, indistinct and interactive discourse between scientists, Member States' representatives, EU institutions, stakeholders and plural public interests. Likewise, the corollary of Europe's political administration is, finally and crucially, 'delegalization': Europe's plural interests have sprung the confines of polity consolidating unitary legislative process to engage in informal and disjointed discourse that can no longer be overseen within simple legal policing terms such as *ultra vires action*.

IV. CONCLUSION: EXECUTIVE CAUTION IS PARAMOUNT

[T]he Commission shall present, where necessary, a proposal for the revision of the provisions of the basic act. If the Commission feels that the very existence of the agency is no longer justified with regard to the objectives assigned to it, it may propose that the act in question is repealed. (COM(2005)59 final (27.2.)).

As noted, European agencies were born out of a technocratic model and theory of European governance which, in postulating that Europe should be regarded as a fourth branch of government, is not necessarily congruent with functionalist visions of the incremental growth of European political community. Instead, technocratic theory is currently averse to the ‘stealthy’ deepening of European integration, and is openly hostile to the accumulation of competences at EU level, which might be better exercised within integrative (national) political communities. It is therefore perhaps a paradox that real-world EU agencies might now be argued to be contributing to the inexorable deepening of the integration *telos*, playing their own part in the establishment of an emergent European polity, which increasingly dissects, if not undermines, national polities.

Realists, however, might convincingly argue that such a development is simply inevitable. The Commission and its agencies are certainly not to be blamed: complex modern government requires the creation of complex institutional structures, which do not fit comfortably within our inherited schemes of ‘human’ government, executive action and the control of executive action. Nonetheless, the underlying concern that an emergent European polity, shaped by processes of market integration, should never be haunted by demons of polity collapse or, indeed, dissolve into an ungovernable and conflictual *mêlée* of Weimarian proportions now requires urgent attention.

At one level, the mechanisms of polity construction and control which need now to be established at EU level cannot be identified within a legal analysis. Instead, the core issue is one of the ability of political theory to evolve new models of representative and plural (direct) democracy – as well as the nature of relations between the two – which, importantly, also find a measure of approbation amongst a general public (Pollak, 2006). Nonetheless, European political integration has always advanced itself hand-in-hand with European law and, to this small degree, a few pragmatic (and less pragmatic) suggestions may be made to aid in the maintenance of unitary executive function within the EU, which is less prone to dual accusations of undue ‘scientification’ or pluralist dissolution.

The ‘dynamic’ European polity and its executive function can no longer be overseen by a ‘static’ European law. Simple formal application of the

map of powers laid down in the European Treaty is tangential to true European integration processes, within which an emergent European polity is inexorably springing the confines of European and Member States' institutions of political representation and executive governance. Instead, European law must now be conceived of as a procedural law, ever sensitive to emergent political, social and technical interests and ever prepared to subject such interests to civilizing control (Everson, 2006). At one level, such a procedurally responsive law can be achieved through such internal alteration to the doctrines and dictums of European law as: (1) the adaptation of the legal yardstick of *state of the art decision making* in order to enable and promote notions of 'good science', which demand that scientific evaluation be re-rooted in and reinforced by ethical and social concerns, which are given immediate expression at the time of problem ('risk') definition (Kuiper, 2008); and (2), the long overdue reform of rules of standing under Article 230 EC Treaty in line with current national practice to allow for high profile and *politically reintegrating* public interest challenges to regulation.¹⁵ At yet another level, however, it may also require a firm restatement of the supranational 'interest' to which the spider at the centre of the executive function web, the Commission, is, or should be, dedicated.

In other words, the European polity is emergent and complex and now increasingly bears with it its own self-destructive potential. Seen in this light the supranational interest surely cannot lie in (functionalist) processes of integration *per se*, but rather in the sustainability of achieved and emergent integration. As Jacqu e reminds us, the consolidating power of the principle of institutional balance was to be found precisely within its ability to ensure that the deepening of integration was to be achieved through consent rather than stealth. Lessons must also be learned from our recent constitutional debacle: the foundations for European political community are being laid but the institutions of European governance cannot simply force the pace of its creation. Instead, where tensions remain between unitary national democratic process and an emergent pluralist political interchange at European level, *governance must be limited and self-limiting* and be prepared to check or even reverse institutional expressions of integration, which have evolved a destructive life of their own. Pluralist dissolution within the emergent European polity is a very present threat: Commission powers to redirect and restrict its own executive function do exist and should be read expansively. If and where

¹⁵ A process of reform which has seemingly received important support from the Lisbon Treaty, which has reformulated Article 230 to ease (vitality necessary) private challenges against EU executive action (Ward, 2004).

it is necessary, the Commission should also be prepared to dissolve portions of its own executive function. Certainly, such a self-limiting role and duty of the Commission will create tensions within the 'unitary' European executive function as a sword of Damocles is dangled over agency heads. Nonetheless, such tension may also prove to be a legitimating one, where, closely overseen by European law, it lessens the ever-present threat of the dark hour of the European executive.

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6. Composite decision making procedures in EU administrative law

Herwig C.H. Hofmann

I. INTRODUCTION AND BACKGROUND

Administrative procedures in the sphere of EU law are increasingly integrated. In many cases, both Member States' authorities and EU institutions and bodies contribute to a single procedure, irrespective of whether the final decision is taken on the national or the European level.¹ Such procedures are referred to here as composite procedures. This chapter is about the legal problems resulting from such procedural administrative integration.

Composite procedures are multiple-step procedures with input from administrative actors from different jurisdictions, cooperating either vertically between EU institutions and bodies and Member States' institutions and bodies, or horizontally between various Member State institutions and bodies or in triangular procedures with different Member State and EU institutions and bodies involved. The final acts or decisions will then be issued by a Member State² or an EU institution or body but are

¹ This reality conflicts with a more traditional model of EU administration, often referred to as 'executive federalism', under which administration in the EU had traditionally been understood as a two-level system. In a simplified version of this model, the European level legislates and the Member States implement European policies by national legislative and administrative means. Central to this conception was the distinction between procedures undertaken on the European level on one hand and those by EU Member States on the other hand. See for the description of the classic model of executive federalism e.g. K. Lenaerts, 'Some Reflections on the Separation of Powers in the European Community', 28 *CMLRev* (1991) 11 at 11 ff.; B. Dubey, 'Administration indirecte et fédéralisme d'exécution en Europe', *CDE* (2003) 87, at 133. For a view which emphasises the cooperative nature of executive federalism see e.g. P. Dann, 'European Parliament and Executive Federalism: Approaching a Parliament in a Semi-Parliament Democracy', 11 *European Law Journal* (2003) 549, at 574.

² Member States' decisions, under EU law, will often be given effect beyond the territory of the issuing state (referred to in what follows as trans-territorial

based on procedures with more or less formalized input from different levels.³ Procedural integration of administrations in the EU creates a network structure. These networks jointly generate and share information. Such joint generation and exchange of information⁴ is the backbone of cooperation within integrated administration.⁵

These constellations of decision-making raise specific problems for supervision of administrative activity, especially for maintaining the rule of law through judicial review. The composite nature of many procedures and the often informal nature of information exchange make supervision and enforcement of standards difficult. This holds all the more true in the EU legal system, in which harmonization of procedural law is undertaken not systematically but in bits and pieces throughout the regulation of various substantive law provisions. The legal problems arising from these rules and principles on composite procedures are important for understanding the development of EU administrative law, especially with respect to single-case decision making.⁶ This chapter addresses the legal challenges arising from composite procedures by,

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

³ See for a detailed debate of these distinctions e.g. Kerstin Reinacher, *Die Vergemeinschaftung von Verwaltungsverfahren am Beispiel der Freisetzungsrichtlinie*, Tenea Verlag (Berlin, 2005).

⁴ This indicates the existence of a dichotomy of separation and cooperation. The organizational separation of administrations on the European and on the Member State level is balanced by intensive functional cooperation between the administrations on all levels. See also Eberhard Schmidt-Assmann, 'Der Europäische Verwaltungsverbund und die Rolle des Verwaltungsrechts' in Eberhard Schmidt-Assmann and Bettina Schöndorf-Haubold (eds), *Der Europäische Verwaltungsverbund*, Mohr Siebeck (Tübingen, 2005) 1, at page 2.

⁵ See with further references and explanations Herwig C.H. Hofmann and Alexander Türk (eds), *EU Administrative Governance*, Edward Elgar Publishing (Cheltenham, UK, 2006).

⁶ Single-case decision making has not been on the agenda of European administrative law research. The reason may be that in recent decades the majority of legal scholars understood the EU in a schematic way as a two-level structure, in which the European level legislates and the Member States implement, a model often referred to as executive federalism. This model has always been a simplification. This simplification has however become increasingly distant from the reality of integrated administrative procedures in the EU.

first, looking at joint generation and sharing of information as the substance of administrative cooperation procedures (section II), secondly, understanding the outcome of composite procedures (section III), before, thirdly, discussing challenges of supervision of administrative networks in the EU (section IV) and proposing some possible approaches for solutions (section V).

II. SUBSTANCE OF COMPOSITE PROCEDURES: JOINT GATHERING AND SHARING INFORMATION

In EU administrative law there are many examples of policy areas with procedures in which decisions and acts are taken on the basis of a procedure with composite elements.⁷ The forms of cooperation between Member States' and EU agencies leading to a final decision differ considerably from one policy area to another. They are usually some form of cooperation of establishment, generation and sharing of information. Generally, one might observe, that the more the need for legitimacy and the more complex the matter, the more composite procedural elements are included in the procedure. Composite procedural elements exist for example in the area of technical safety, product safety,⁸ and standardization and technical norms,⁹ the procedures leading to the admission of medical products¹⁰ and genetically modified organisms,¹¹ regulation of telecommunication,¹²

⁷ EU administrative law is understood as the body of law governing administration by EU institutions and bodies as well as Member States' administrations acting within the sphere of EU law, i.e. when either they act to implement EU law or they are bound in their activity by general principles of EU law.

⁸ See Article 7 of Council Directive 92/59/EEC of 29 June 1992 on general product safety, OJ 1992 L 228/24.

⁹ Directive 98/34/EC of 22 June 1998, OJ 1998 L 204/37 as amended.

¹⁰ Council Regulation No 2309/93 of 22 July 1993 laying down Community procedures for the authorization of medicinal products for human and veterinary use and establishing a European Agency for the Evaluation of Medicinal Products, OJ 1993 L 214/1.

¹¹ Articles 11, 15 and 18 of Directive 2001/18/EC of 12 March 2001 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC, OJ 2001 L 106/1.

¹² Art. 13 Directive 97/13/EC of 10 April 1997 on a common framework for general authorizations and individual licences in the field of telecommunications services, OJ 1997 L 117/15.

public procurement,¹³ asylum procedures,¹⁴ and the fight against money laundering,¹⁵ to name just a few.

The procedural provisions for the various policies differ in detail. In EU administrative law, rules and principles on the creation and distribution of information exist in several policy areas with differing degrees of detail.¹⁶ These rules establishing composite procedures govern 'who' has to generate information by 'which means' and in 'which quality' from 'which source' and 'how' this information will be used prior to taking normative or single-case decisions. Several basic constellations exist. In some policy areas the procedures are straightforward, in so far as they provide for an administrative procedure to take place basically within one Member State, supported by information transferred to it from other Member States and European institutions and bodies. Other policy area provisions provide for a multiple-step composite procedure. An example is to require one Member State's authority to act as reference authority, taking the decision for the admission of certain hazardous products to the entire single market of the EU.¹⁷ In some policy areas, the composite nature of a procedure links different authorities. A procedure may begin in a Member State, and then continue with input from an EU agency or other Member States'

¹³ Directive 2004/18/EC of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ 2004 L 134/114; Directive 2004/17/EC of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, OJ 2004 L 134/1; Regulation 1564/2005 of 7 September 2005 establishing standard forms for the publication of notices in the framework of public procurement procedures pursuant to Directives 2004/17/EC and 2004/18/EC of the European Parliament and of the Council, OJ 2005 L 257/1.

¹⁴ Council Regulation No 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac', for the comparison of fingerprints for the effective application of the Dublin Convention, OJ 2000 L 316/1.

¹⁵ Council decision of 17 October 2000 concerning arrangements for cooperation between financial intelligence units of the Member States in respect of exchanging information, OJ 2000 L 271/4.

¹⁶ The legal basis of administrative obligations to establish, gather and distribute information arises from general principles of EU law, sometimes expressly established in EU/EC Treaty provisions, as well as, occasionally, in EU/EC legislative acts. The latter are, with few exceptions, policy specific. However, certain standard structures to handle information gathering and exchange have been developed, for example by cross-policy provisions on access to documents and data protection.

¹⁷ See e.g. Article 18 of Directive 98/8/EC of the European Parliament and of the Council of 16 February 1998 concerning the placing of biocidal products on the market (with amendments), OJ 1998 L 123/1.

agencies before the European Commission. Such is for example the case in the procedure for the admission of novel foods to the single market.¹⁸ Other procedures are continuously undertaken on the European level with the possibility of Member State procedural input, for example in the area of admission of medicines to the market.¹⁹

Irrespective of the details of these different constellations, the various procedures have one thing in common. The composite nature of the procedure always consists of one form or another of cooperation, either vertically between Member States and the European authorities or horizontally between different Member State authorities. Also the mix between vertical and horizontal cooperation is possible. However, forms of cooperation are essentially based on procedures to obtain and assess jointly information necessary for a final decision. Information cooperation is therefore at the heart of rules and procedures governing EU administrative law. Understanding the legal challenges arising from composite procedures thus requires an understanding of vertical and horizontal cooperation for obtaining and computing information leading to final administrative decisions and acts.²⁰

¹⁸ See Regulation (EC) No 258/97 of the European Parliament and of the Council of 27 January 1997 concerning novel foods and novel food ingredients, OJ 1997 L 43/1.

¹⁹ See e.g. Commission Regulation 1085/2003 of 3 June 2003 concerning the examination of variations to the terms of a marketing authorization for medicinal products for human use and veterinary medicinal products falling within the scope of Council Regulation (EEC) No 2309/93, OJ 2003 L 159/24.

²⁰ Rules and principles on the substance of information exist. They either are specified in specific policy area-related legislation, or exist as general principles of law, applicable throughout the EU by EU institutions and bodies as well as by Member States acting within the sphere of EU law. For example, general principles of EU law such as the duty of care or the duty of diligent and impartial examination require that all relevant information be collected and assessed as to its potential influence on a final decision prior to a final administrative decision or act being taken (see, in particular, Cases T-13/99, *Pfizer Animal Health SA v. Council* [2002] ECR II-3305, paras 170-172; T-211/02, *Tieland Signal Ltd v. Commission* [2002] ECR II-3781, para. 37; T-54/99, *max.mobil Telekommunikation Service GmbH v. Commission* [2002] ECR II-313, paras 48-51; C-449/98 P, *IECC v. Commission* [2001] ECR I-3875, para. 45; T-24/90, *Automec v. Commission* [1992] ECR II-2223, para. 79; T-95/96, *Gestevisión Telecinco v. Commission* [1998] ECR II-3407, para. 53; Joined Cases 142/84, and 156/84, *BAT and Reynolds v. Commission* [1987] ECR 4487, para. 20. See with further detail also Paul Craig, *EU Administrative Law*, OUP (Oxford, 2006), 374, at page 375). In the case law of the ECJ and the CFI the duty of care is closely linked to the *audi alteram partem* rule and is now regarded as part of the general principles protected within the framework of the right to good administration. Article 41(1) of the EU Charter of Fundamental Rights proclaimed at Nice on 7 December 2000, OJ 2000 C 364/1 (see e.g. Case T-7/92,

The substance of composite procedures is thus rules and principles of EU administrative law establishing the legal framework for the generation and sharing of information within the administrative networks. In a very brief and therefore necessarily limited overview, the procedures for generation and sharing information are the following.

Generation of information takes place either through private parties requesting an authorization or filing a complaint with a national or European body or institution. Both are capable of starting a composite procedure. Depending on the procedures, authorizations need to be requested either directly from a Community body or from Member State authorities.²¹ An example of many procedures is the composite procedure applicable to the placing on the market of genetically modified foodstuffs referred to as 'novel foods' and food ingredients.²² Under this procedure, an applicant wishing to introduce a genetically modified organism or products containing these into circulation in the single market needs to request an authorization with a competent national authority. This request triggers a complex procedure with horizontal and vertical cooperation of European and diverse national actors. The example of novel foods is not unique. Similar procedures in which composite procedures govern authorizations to be required by Member States' authorities which then set in motion a joint procedure exist, for example with respect to the admission of certain medical products and the rules on production of environmentally dangerous products.²³ The procedures are designed to provide the administrative actors in charge with the relevant information to enable them to make an informed decision.

Generation of information also takes place through information sharing. Obligations to provide information to administrative actors within the EU arise, first, through the obligation to grant mutual assistance, secondly,

Asia Motor France SA v. Commission [1993] ECR II-669, para. 34). The principle of loyal cooperation between the EU institutions and the Member States arising from Article 10 EC also requires both Member States and the EU institutions and bodies to contribute to the achievement of Community tasks.

²¹ With the request for authorization and the subsequent administrative decisions, the party requesting the authorization – an individual or a public body – will be required to provide more or less substantive information on the planned project. A second step is often the coordination with other Member States or the continuation of the procedure by an EU agency or institution.

²² See e.g. Regulation (EC) No 258/97 of the European Parliament and of the Council of 27 January 1997 concerning novel foods and novel food ingredients, OJ 1997 L 43/1.

²³ See e.g. Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control, OJ 1996 L 257/26.

through *ad hoc* or reoccurring reporting duties and, thirdly, through the establishment of formalized information networks, for example in the context of European agencies. All three forms exist in parallel within different policy areas. Often these structures have resulted in the development of joint planning structures.

Mutual assistance will generally be granted either to provide information or to enforce a decision taken by another administrative body. Obligations to assist other administrations exist in the 'vertical' relation between Community bodies and the Member State authorities as well as in the 'horizontal' relation between Member States. They may be single-case exchanges of information or continuous provision of information.²⁴ Mutual assistance generally is based on the concept of the territorial reach of public authority. Therefore, the exercise of information gathering in a Member State is generally the prerogative of the local authorities, acting under their home procedural rules.²⁵

²⁴ The main provision in primary law establishing the obligations for mutual assistance in the vertical relationship between Member States and Community bodies is Article 10 EC, which includes the obligation to assist in administrative procedures by the provision of existing information (but since most obligations on information sharing are established in specific secondary law, the possible obligations of the Community institutions *vis-à-vis* the Member States under Article 10 EC remain largely unexplored. See also Alberto Gil Ibañez, *The Administrative Supervision and Enforcement of EC Law*, Hart Publishing (Oxford, Portland 1999) 69–70). Additionally, Article 284 EC gives the Commission, within the limits of primary and secondary law, the right to 'collect any information and carry out any checks required for the performance of tasks entrusted to it'. See the directive on information about technical standards and regulations (now Directive 98/48/EC of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations, OJ 1998 L 217/18 and others). Member States and their standardization bodies are under the obligation to inform the Commission about any draft standardization or technical regulation in areas which are not subject to harmonization legislation (Articles 2 and 8 of Directive 98/34/EC of 22 June 1998, OJ 1998 L 204/37 as amended). Infringements of Member States' obligation to report to the Commission any draft of technical standards and regulations can lead to its inapplicability (Cases C–194/94, *CIA Security International* [1996] ECR I–2201, paras 45–54; C–443/98, *Unilever Italia* [2000] ECR I–7535, paras 31–52; C–159/00, *Sapod Audic* [2002] ECR I–5031, paras 48–52). Specific rules developed in secondary law for mutual assistance in different policy areas differ considerably. Competition law, for example, is a policy area with very specific obligations of information exchange between the Commission and Member State agencies (Articles 11, 20(5) and (6), 22 of Regulation 1/2003; Article 19 Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ 2004 L 24/1).

²⁵ Member States are, where there is no harmonization of law, in some policy areas encouraged to regulate the specifics of horizontal mutual assistance in

The rules on administrative mutual assistance have increasingly evolved towards rules establishing administrative networks with specific roles being given to the different players therein.²⁶ There the single-case aspect of mutual assistance is less and less prevalent in many areas, having been replaced by continuous information requirements. Also, in many policy areas the difference between rules on mutual assistance, on one hand, and the participation of administrations in composite procedures, on the other hand, is fluid. Both have in common that the administrations act upon an obligation under EU law or Europeanized national law to support another administration by providing information.

Additionally, the rules on mutual assistance in collecting data have been developed in many policy areas towards networks of information gathering, exchange and composition.²⁷ The transfer from mutual

agreements or 'common accords' amongst themselves. This is explicitly established e.g. in the rules on customs law in Article 47 of Council Regulation (EC) No 515/97 of 13 March 1997 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters, OJ 1997 L 82/1, stating that 'Member States may decide by common accord whether procedures are needed to ensure the smooth operation of the mutual-assistance arrangements provided for in this Regulation . . .'. In the area of tax law a similar provision exists in Article 38 of Council Regulation (EC) No 1798/2003 of 7 October 2003 on administrative cooperation in the field of value added tax and repealing Regulation (EEC) No 218/92, OJ 2003 L 264/1 according to which the competent authorities can agree on the language to be used for requests and acts of mutual assistance. See further F. Wettner, 'Das allgemeine Verfahrensrecht der gemeinschaftlichen Amtshilfe', in Eberhard Schmidt-Assmann and Bettina Schöndorf-Haubold (eds), *Der Europäische Verwaltungsverbund* Mohr Siebeck (Tübingen, 2005) 181–212.

²⁶ The rules on mutual assistance have developed 'in sync.' with the general development of the EU legal system. Originally, the vertical relation was stressed with the obligations laid down in what is now Article 10 EC, the duty of loyal cooperation. Then, in the phase of the development of single market-related case law by the ECJ in the 1970s the focus also turned to horizontal cooperation between administrations for exchange of information on the admission of certain products on the market (see e.g. Case 35/76, *Simmenthal I* [1976] ECR 1871 and Case 251/78, *Denkavit I* [1979] ECR 3369). Finally, after cautious beginnings in the late 1970s with certain directives on mutual assistance obligations these obligations of mutual assistance in the network of administrations have been regulated to great detail in legal acts in different policy areas.

²⁷ An example is the provisions in tax law. The Council Directive 77/799/EEC concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation (OJ 1977 L 336/15) had provided for vertical and horizontal mutual assistance but had also begun to develop the notion of mutual assistance without a prior request by the administration of another Member State and the sharing of information directly on the level of the agencies involved. Council

assistance to information networks is gradual and evolutionary. The strongest development towards establishing information networks specifically designed for exchange of information can be identified in the area of risk regulation. Often information networks will be established or supported by European agencies.²⁸ The information within these networks will generally be provided by participants in the networks – both public and private from the European and the Member State levels. Generally, the supplier of information within a network neither has control over the information nor any unilateral possibility to withhold it.²⁹ The latter characteristic poses specific problems with respect to rights of individuals whose information is supplied to a network.³⁰

Regulation 1798/2003 on administrative cooperation in the field of value added tax (OJ 2003 L 264/1), for example still contains rules on individual cases of information sharing through mutual assistance. Generally however, a network structure for information sharing is established in its Articles 5 and 17 of Reg. 1798/2003.

²⁸ However, the existence and maintenance of information networks between different levels of administration are not entirely dependent on a European agency. Examples of such networks based directly on horizontal cooperation between Member States on the basis of EU legal provisions are for example prominent in the areas in which Member States are highly protective of their rights such as tax law (in tax law, for example, the area of the joint administration of the so-called ‘value added tax’ is subject to regulation. The relevant regulation creates a ‘common communication network (CCN) and common system interface (CSI)’ to ensure all transmissions by electronic means between competent authorities in the area of customs and taxation. Article 39 Council Regulation 1798/2003 on administrative cooperation in the field of value added tax, OJ 2003 L 264/1) and asylum and immigration provisions. The Schengen Information System (SIS), the main purpose of which is to centralize and supply information on non-EU citizens to EU Member States’ authorities is supplemented by the ‘SIRENE’ database, which permits the exchange of additional information, such as fingerprints and photographs. The SIS II database is designed to be capable of working with an enlarged EU. See also Council Decision 512/2004/EC establishing the Visa Information System (VIS) [2004] OJ L 213/5.

²⁹ Generally, secondary legislation establishing information networks also contains rules on mutual assistance for supply of information upon specific request. See for example Articles 5–8 of Council Regulation (EC) No 1798/2003 of 7 October 2003 on administrative cooperation in the field of value added tax and repealing Regulation (EEC) No 218/92, OJ 2003 L 264/1.

³⁰ Information networks are either established as centralized databases administered on the Community level, e.g. by an agency or they can also be organized as networks of networks, i.e. structures on the European level, linking pre-existing or newly established databases on the Member State level (e.g. the CCN/CSI network in the area of tax law, linking national databases under Article 39 Council Regulation 1798/2003 of 7 October 2003 on administrative cooperation in the field of value added tax and repealing Regulation (EEC) No 218/92, OJ 2003 L 264/1). In many policy areas, information networks are established and coordinated

The latter can be accessed by any agency participating in the network. Examples of information networks include the newer rules relating to ozone in ambient air.³¹ Also, in the area of veterinary and food safety law the 'Rapid Alert System' is aimed at fast exchange of information on foodstuffs which do not comply with Community food safety standards between the national authorities, the European Food Safety Authority (EFSA) and the Commission.³²

Information gathering and sharing also takes place through investigation procedures in the form of controls, inspections and auditing procedures.³³ Powers to request such investigations are conferred by EU law on the Commission or other EU institutions and bodies for investigative

by a European agency. Some of the most typical examples of these information networks arise in the area of European environmental law. The European Environment Information and Observation Network (Eionet) (based on 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), for example, is a partnership network between the European Environment Agency and its national partner agencies (of EU and non-EU states) as well as private actors in participating countries.

³¹ Directive 2002/3/EC of the European Parliament and of the Council of 12 February 2002 relating to ozone in ambient air, OJ 2002 L 67/14 which in Article 8 contains an information obligation both in the vertical and the horizontal direction for joint planning networks for cases of trans-boundary ozone pollution.

³² Articles 150–152 of the Council Directive 89/608/EEC on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of legislation on veterinary and zootechnical matters, OJ 1989 L 351/34. See also with respect to rules on mutual assistance both horizontally and vertically Regulation 882/2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules, OJ 2004 L 165/1 corrected in OJ 2004 L 191/1. The EFSA has the ability to add scientific expertise helping the Member States assess the risk and the necessary measures to counter that risk. Other risk regulation-related policy areas with information networks managed by European agencies include maritime safety (Directive 2002/59/EC establishing a Community vessel traffic monitoring and information system, OJ 2002 L 208/10). The network is maintained essentially with the help of an agency, the European Maritime Safety Agency. Information exchange within this network importantly is established directly between coastal authorities of the Member States. See also the information networks established and maintained on drugs and drug addiction as well as xenophobia and racism (Article 4 of Regulation 1035/97 establishing a European Monitoring Centre on Racism and Xenophobia, OJ 1997 L 151/1).

³³ Such powers differ from the obligation to provide for mutual assistance by the fact that mutual assistance is generally on an *ad hoc* basis and is undertaken under the rules of procedure of the administrations 'giving' the information.

activities in Member States as well as on Member States to request an investigation in another EU Member State.³⁴ Cooperation procedures for joint investigations include rights to request information and documentation from public or private bodies, the right to review documentation such as books and electronic databases of the subjects of the investigations, the right to access premises in on-the-spot investigations, the right to request on-the-spot information and explanations by employees, the confiscation of goods and documentation, the taking of samples, the sealing of premises and, finally, the use of enforcement measures such as fines and the use of force to enforce the rights of inspection. Far-reaching powers of investigation are for example granted to the European anti-fraud unit of the Commission, OLAF.³⁵ On the Community level, some of the most detailed rules on investigations are probably to be found in the area of competition law.³⁶ Investigations can however also be pursued by private parties on the basis of an authorization by a public body. Such authorization can be given either by an administrative decision or by means of entering into contractual relations. In the area of environmental law, private partners take on roles within the 'European Information Observation Network' (Eionet).³⁷ In this, the European Environment Agency coordinates a network of public and private actors by allocating specific tasks,

³⁴ This is an exceptional arrangement for example in the area of supervision of banking and financial institutions: see Article 43 (1) of Directive 2006/48/EC relating to the taking up and pursuit of the business of credit institutions, OJ 2006 L 177/1 (which replaced Directive 2000/12/EC).

³⁵ It may conduct internal investigations in Community institutions and bodies as well as 'external' investigations in Member States or, under certain circumstances, in non-EU states. Its powers are established in a regulation, detailing the procedural rights and obligations of European and Member State institutions in relation to OLAF investigations (see Regulation 1073/1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF), OJ 1999 L 136/1). These rules include the obligation to exchange relevant information and the ability of OLAF to forward information or requests for action to Member States' authorities.

³⁶ In anti-trust proceedings, for example, these can be as far-reaching as those conferred under Article 17 of Regulation 1/2003, which allows the Commission to enter into investigations as to the market situation in entire sectors of the economy and into categories of agreements between private parties: Article 17 of Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003 L 1/1.

³⁷ Based on Council Regulation 1210/90, OJ 1990 L 120/1 and Council Regulation 933/99, 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.

including investigations into certain topics, to public and private members of the network.³⁸

A special form of investigation is inspections in which EU bodies and Member State agencies ensure individuals' compliance with obligations under EU law, or the Commission and European agencies inspect Member States' compliance with EU law.³⁹ The Commission or European agencies may,⁴⁰ in certain cases, also undertake an inspection in the Member States *vis-à-vis* individuals.⁴¹ Also, horizontal requests from one Member State agency for inspections to be undertaken by another Member State are possible in certain policy areas where secondary legislation so permits.⁴²

Many of these powers are exercised in the framework of cooperative administration in the form of composite procedures. Generally, the law applicable to such investigation measures as well as to the protection of rights of the subjects of investigations is a mix of EU law and the law of the Member States. Where Member States' authorities establish information, it will often be subject to specific procedural and institutional obligations on the form and procedure of such activity based in EU law.⁴³

³⁸ Article 8 (4) of Council Regulation 1210/90, OJ 1990 L 120/1 and Council Regulation 933/99, OJ 1999 L 117/1, amending Regulation 1210/90.

³⁹ Control of compliance with EU law by individuals and Member States may also be investigated jointly as e.g. the Commission's 'on-site monitoring' shows. See for the area of state aid control Article 22 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ 1999 L 83/1.

⁴⁰ For the competence of an agency to undertake investigations itself in the Member States see e.g. Article 2(b)(i) of Regulation (EC) No 1406/2002 of the European Parliament and of the Council of 27 June 2002 establishing a European Maritime Safety Agency, OJ 2002 L 208/1, under which the Agency shall 'monitor the overall functioning of the Community port State control regime, which may include visits to the Member States, and suggest to the Commission any possible improvements in that field'.

⁴¹ Generally, they will have to inform the relevant Member States' authorities about their intention, and these in turn have the duty loyally to cooperate. See for many, e.g., Article 20(2) of Regulation (EC) No 2037/2000 of the European Parliament and of the Council of 29 June 2000 on substances which deplete the ozone layer, OJ 2000 L 244/1 as amended: '2. When requesting information from an undertaking the Commission shall at the same time forward a copy of the request to the competent authority of the Member State within the territory of which the undertaking's seat is situated, together with a statement of the reasons why that information is required'.

⁴² See e.g. in the area of agricultural law, Article 7(2), (3) and (4) of Commission Regulation (EC) No 2729/2000 of 14 December 2000 laying down detailed implementing rules on controls in the wine sector, OJ 2000 L 316/16.

⁴³ The secondary legislation in the area of food safety, also in reaction to the BSE crisis, is probably the most detailed in nature, frequency and standard as well

Procedurally, investigation powers are often enhanced by the power to request information through an ‘injunction’.⁴⁴

Information generation and sharing within administrative networks sourcing also takes place in joint planning procedures between Member State and European institutions. Plans are aimed at coordinating different actors and establishing a framework for later decisions by either Community or Member States’ institutions. Planning procedures are often general but highly detailed information collection and assessment procedures designed to create a base for later individual decisions. In the area of emissions trading, for example, the relevant directive establishes a scheme for greenhouse gas emission allowance trading within the Community. Each Member State is periodically obliged to develop a national plan for the allocation of greenhouse gas emission allowances in accordance with criteria set out by the Directive. These plans are public and have to be subject to a comments procedure, thus linking public and private information-gathering procedures.

III. DECISIONS AND ACTS AS OUTCOME OF COMPOSITE PROCEDURES

Horizontal and vertical cooperation procedures allow the establishing and generating of the necessary information for final decision making. These

as financing of controls by national authorities to ensure Community-wide safety standards (Regulation (EC) No 882/2004 of the European Parliament and of the Council of 29 April 2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules, OJ 2004 L 165/1).

⁴⁴ An example is Article 10(3) of Regulation 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ 1999 L 83/1. Injunctions are permitted only where a specific legal basis for their use exists. Sanctioning of violations of rights of inspection within this system is generally undertaken under the law of the Member States (Article 9 of Regulation 2185/96 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities’ financial interests, OJ 1996 L 292/2), which are obliged to provide for effective and equivalent protection of EU law through their national legal systems. Important exceptions exist in competition law enforcement: for anti-trust under Regulation 1/2003 (OJ 2004 L 1/1), the Commission has extensive rights to sanction violations under EC law and in the area of state aid control, the Commission has ‘fast track access’ to the infringement procedure under Article 23 of Regulation 659/1999 combined with the right to use best available information (e.g. Article 18(1) of Regulation 384/96 on protection against dumped imports, OJ 1996 L 56/1, as amended by Regulation 2117/2005, OJ 2005 L 340/17).

procedures also allow for participation of interests touched by a final decision in other Member States and are designed to enhance mutual acceptability and applicability of decisions created in the European administrative network applicable throughout the EU. Integrated procedures lead to basically two results: the first are decisions and acts of the Member States. These can, due to EU law, have effect beyond the territory of the issuing state (trans-territorial acts). Acts by Member States with trans-territorial effect are often acts and decisions as the result of a composite procedure with input from other Member States and/or EU institutions and bodies. The second type of outcome of integrated procedures are decisions of EU institutions and bodies. Input to decision making on the EU level through administrative actors of Member States in composite procedures can either be through acts which are preparatory in nature or through forms of formalized cooperation. Also, in certain cases, forms of joint bodies such as Comitology committees are created, which not only play a role in administrative rule-making but may also be authorized to participate in individual decision making.

The legal framework for composite procedures arises from EU law. However, very few provisions exist in EU law which are applicable throughout various policy areas. Most are policy-specific. Among the few general provisions are the Comitology decision,⁴⁵ directives on data protection⁴⁶ as well as directives on access to information.⁴⁷ Additional sources of general EU administrative law arise from general principles⁴⁸

⁴⁵ 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 (Oxford; 2005). For a discussion of the post-2006 development see Manuel Szapiro in this volume.

⁴⁶ Regulation 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, OJ 2001 L 8/1.

⁴⁷ See for the EC Regulation 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ 2001 L 145/43.

⁴⁸ General principles of EU law such as the 'duty of care' are uniformly applicable to Member States acting within the sphere of EU law and EU institutions and bodies themselves. The duty to care for example addresses the question of necessary detail of information prior to decision-making. In many policy areas it will not be sufficient for administrations to rely on using pre-existing knowledge or relying on information provided by the parties. Instead, decisions will have

and fundamental rights.⁴⁹ They apply within the sphere of EU law irrespective of the law applicable to the procedure, which can be national or European.

But this general EU administrative law, except for the Comitology Decision, generally does not establish any specific procedural rules on supervision and review. Policy-specific law generally leaves it to the Member States to establish the procedure as well as the conditions for supervision and judicial control of their administrations and to EU law with respect to EU institutions and bodies. The result is a developing integrated administration with a lack of procedural rules governing the interaction and accountability of joint procedures.

to be based on scientific expertise, created in compliance with specific standards inherent in the scientific method and 'founded on the principles of excellence, transparency and independence' in order to ensure the scientific objectivity of the measures and preclude any arbitrary measures'. For a background to the discussion see the contributions to Christian Joerges, Karl-Heinz Ladeur and Ellen Vos (eds), *Integrating Scientific Expertise into Regulatory Decision-Making*, Nomos (Baden-Baden, 1997). The resulting judicial review of scientific expertise itself is then limited. It is restricted to a review of reasoning. Its review takes place in the context of composite procedures in a multiple-step procedure. See e.g. Joined cases T-74/00, T-76/00, T-83 - 85/00, T-132/00, T-137/00 and T-141/00, *Artogodan and Others v. Commission* [2002] ECR II-4945, paras 199, 200; Cases T-27/98, *Nardone v. Commission* [1999] ECR-SC I-A-267; ECR-SC II-1293, paras 30 and 88; T-70/99 *Alpharma v. Council* [2002] ECR II-3495, para. 183.

⁴⁹ All provisions which regulate activity within the scope of Community law need to be interpreted in the light of fundamental rights guaranteed by the Community legal order. Generally see Case C-159/90 *The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others* [1991] ECR I-4685, para. 31; Case C-299/95, *Friedrich Kremzow v. Austria* [1997] ECR I-2629, para. 15; Case C-276/01, *Joachim Steffensen* [2003] ECR I-3735, para. 70. The definition of the scope of Community law is widely defined in Case C-260/89, *ERT-AE v. DEP* [1991] ECR I-2925, paras 42, 43: '[a]s the Court has held (see Joined Cases C-60 and C-61/84 *Cinéthèque v Fédération Nationale des Cinémas Français*, para 25) . . ., it has no power to examine the compatibility with the European Convention on Human Rights of national rules which do not fall within the scope of Community law.' 'On the other hand, where such rules do fall within the scope of Community law, [the ECJ] must provide all the criteria of interpretation needed by the national court to determine whether those rules are compatible with the fundamental rights the observance of which the Court ensures.' This is well illustrated in Case C-260/89, *ERT* [1991] ECR I-2925, Case 5/88, *Wachauf v. Bundesamt für Ernährung und Forstwirtschaft* [1989] ECR 2609 and Case C-276/01, *Steffensen* [2003] ECR I-3735, paras 71-77.

IV. SUPERVISION AND REMEDIES – THE SITUATION AND POSSIBILITIES OF IMPROVEMENT

The emergence of composite procedures with forms of vertical and horizontal administrative cooperation thus gives rise to many legal problems, especially for the protection of rights and supervision of administrative action.⁵⁰ Supervision of administrative action takes place in forms of administrative, parliamentary and judicial supervision, necessary to holding public actors to account and ensuring the observance of the legality of administrative action within the European administrative networks.

One of the central difficulties in the EU system of integrated administration is adapting supervision of administrative action to the integrated nature of composite administrative procedures. Difficulties arise from the multitude of administrative actors from different jurisdictions. By integrating their actions, composite procedures result in a mix of legal systems being applicable to a single administrative procedure. The mixed composition of applicable laws differs from one policy area to another. The possibility and in some areas of the requirement of trans-territorial application of national administrative acts exacerbates these problems. EU law prescribes the procedure for and the conditions of trans-territorial reach of a national decision. General principles of EU law and EU fundamental rights are applicable to Member States' administrative activity within composite procedures. Member State law defines most of the elements of the Member State authorities' contribution to a composite procedure. This includes the consequences of errors during the Member State element of the procedure, the applicable language regime of the administrative procedure,⁵¹ and, last but not least, the criteria and conditions for judicial review of an act adopted by a Member State authority. In this system, despite the trans-territorial effect of an act, judicial review will generally be possible only in the jurisdiction which issued the act. These issues are central to the problems of effective accountability and supervision of

⁵⁰ Deidre Curtin, 'Holding (Quasi-)Autonomous EU Administrative Actors to Public Account' (2007) 13 *European Law Journal* 523, at 540: '[o]ne of the main problems regarding the checks and balances under construction in the "undergrowth" of legal and institutional practice is the chronic lack of transparency of the overall system. It is not that there is no public accountability . . . it is rather that it is not visible and often not structured very clearly'.

⁵¹ For further discussion see e.g. Kerstin Reinacher, *Die Vergemeinschaftung von Verwaltungsverfahren am Beispiel der Freisetzungsrichtlinie*, Tenea Verlag (Berlin, 2005), 96–98.

administrative activity in the EU's administration network. It is possible that individuals who have had no real chance to know about a Member State's involvement in and its contribution to an administrative procedure will be subject to the effects of its outcome and will have to attempt to remedy potential flaws in an act which is in force unless withdrawn or declared void by a court, in a language and a legal system which they are unaccustomed to.⁵²

A Judicial Supervision of Composite Procedures

Judicial control is in practice one of the most important modes of supervision of administrative activity, although from the outset this mode is limited to *ex post* control. It also has effect in respect of the future conduct of administrative activity. Given the integrated nature of administrative procedures, judicial control of Europe's integrated administration faces several problems: the dilution of responsibilities and the multitude of different forms of administrative cooperation complicate the allocation of responsibility and the application of general principles of law. In composite administrative procedures for the single-case implementation of EU law, the European courts face the challenge of how to address integration of administrations by means of procedure. Due to a lack of abstract procedural provisions in European law, a certain amount of confusion over the different roles of administrative actors in composite and cooperative procedures is as inevitable as it is problematic.⁵³ Judicial supervision is difficult in cases where Member State and EU authorities cooperate. Effective judicial control therefore relies on the courts' ability to allocate

⁵² The language regime is only one of the aspects of the structure. One of the essential rights of citizens in the EU is to communicate with institutions and bodies of the EU in their language and to obtain a copy of all rules and single-case decisions affecting them directly or indirectly in their language. With a decentralized administration in the EU which takes decisions and issues acts with trans-territorial effect, this general right is limited to the language of the issuing country. Given that for example a decision of the Latvian administration will be able to take effect *vis-à-vis* individuals in Greece and the number of Latvian speakers in Greece will most likely be very limited, the dimension of the problem should become very clear. Responsibility for an act is also difficult to establish from outside a legal system, especially in countries with a different legal system. Federally organized states like, for example, Belgium and Germany have complex rules of responsibility internally; a structure like the Swedish model of agencies might be different from that in countries with a more hierarchic internal organization.

⁵³ For further detailed analysis see the excellent analysis by S. Cassese, 'European Administrative Proceedings' (2004) 68 *Law and Contemporary Problems* 21.

responsibility and to reduce the inherent complexity of EU administrative governance arrangements. Judicial control must allocate responsibility for decision making and safeguarding rights despite the fact that a decision was taken in an integrated fashion.⁵⁴ In essence, the problems consist of linking administrative procedures into complex composite structures without establishing supervision adequately developed to address the conditions of the networks.

1. Case law examples

The following two cases are used here to illustrate the kind of difficulties of judicial review with respect to composite procedures.⁵⁵

(a) *Borelli* The first example is *Borelli*, which arose in the early 1990s as an action for annulment of a Commission decision. *Borelli* was an olive oil producer who had applied for a subsidy under the European agricultural funds to construct an oil mill in Italy. The procedure provided for in the Community legislation on the distribution of the funds requires the potential beneficiary of a subsidy to apply to the regional authorities, in the case of *Borelli*, the region of Liguria in Italy. The local authorities review the request and forward the application with an opinion via the national government to the European Commission which takes the final decision.⁵⁶ In *Borelli's* case, the region of Liguria gave an unfavourable opinion on the application. This opinion was the basis for the Commission decision in which *Borelli's* demand was declined. *Borelli* contested the legality of the Commission decision on the basis that the region of Liguria's decision was unlawful on various procedural and substantive grounds. The European Court of Justice (ECJ) declared the action for annulment against the final Commission decision inadmissible. It claimed to have no jurisdiction to decide about the legality of a national authority's contribution, even when

⁵⁴ See Case T-188/97 *Rothmans v. Commission* [1999] ECR II-2463. The Community judge here faces similar problems to those of a judge of a Member State court when reviewing administrative procedures with several agencies involved and complex structures of internal interaction.

⁵⁵ When looking at these examples, it has to be noted that their existence as leading case law deters many cases from being brought to the ECJ and CFI and they thus remain buried in the national case law, if they get litigated at all.

⁵⁶ A similar case with the same constellation of cooperation between national authorities and the Commission in the meat market was decided by the CFI in the same vein. Preparatory decisions by national authorities for a final marketing authorization of beef by the Commission could be reviewed only in national courts. See Joined Cases C-106/90, C-317/90 and C-129/91, *Emerald Meats v. Commission* [1993] ECR I-209.

the latter was part of a Community decision-making procedure and was decisive for the outcome of the final Commission decision.⁵⁷ Since under the Community procedure the Commission was bound by the unfavourable opinion of the national authorities, no ‘irregularity that might affect the opinion can affect the validity of the decision by which the Commission refused the aid applied for’.⁵⁸ The ECJ ruled that under general principles of EC law the Member States are obliged to provide for an effective right to a legal remedy. Thus despite national procedural rules preventing the national courts from hearing the case, they were obliged under EC law to set aside these rules if they led to a violation of the Community principle of the right to a legal remedy.⁵⁹ The illegality of Community institutions’ contributions to the procedure, whether final acts or not, could be addressed through a preliminary reference procedure under Article 234 EC by the national court.⁶⁰

The ECJ and the European Court of First Instance (CFI) interpret standing rights of individuals under Article 230(4) EC for actions for annulment in a narrow way by limiting the concept of a reviewable act.⁶¹ The case law shows a tendency to refer cases to Member States’ courts and oblige them to offer legal protection under much more lenient conditions than it itself is ready to give. In *Borelli*, for example, the Italian courts were applying standing rules for procedures for annulment similar to the ECJ’s interpretation of Article 230 EC. The case law however is not always consistent. In Türk’s analysis,⁶² the ECJ in its early case law has found

⁵⁷ The Court found that it was irrelevant to the question of admissibility of an action for annulment that under Italian law *Borelli* had no remedy against the negative opinion expressed by the region of Liguria, since that opinion was regarded under Italian law to be only a preparatory measure for the later final Commission decision, and thus under Italian law, there was no judicial review of Liguria’s opinion in Italian courts: Case C-97/91, *Oleificio Borelli v. Commission* [1992] ECR I-6313, para. 9, 10.

⁵⁸ *Ibid*, para. 12.

⁵⁹ Case C-97/91, *Oleificio Borelli v. Commission* [1992] ECR I-6313, para. 14 with reference to Case 222/84, *Johnston v. Chief Constable* [1986] ECR 1651, para. 18 and Case 222/86, *UNCTEF v. Heylens* [1987] ECR 4097, para. 14.

⁶⁰ See also Case C-6/99, *Association Greenpeace France v. Ministère de l’Agriculture et de la Pêche* [2000] ECR I-1651, para. 106.

⁶¹ The standard formula was established by the ECJ in Case 60/81, *IBM v. Commission* [1981] ECR 2639, para. 10, stating that ‘only if it is a measure definitely laying down the position of the Commission or the Council in the conclusion of that procedure, and not a provisional measure intended to pave the way for the final decision’ can an act be considered as reviewable under the annulment procedure.

⁶² See Türk in this volume.

cases where the Commission *ex post* authorizes or dismisses a national protective action as cases in which such Commission decisions ‘not merely approve such measures, but render them valid’.⁶³ This however changed over time to a much stricter approach.⁶⁴

(b) *Tillack* The second example used to illustrate some problems of integrated administration and exchange of information is the case in the *Tillack* affair. The situation in *Tillack* was the inverse of the situation in *Borelli*, where a composite procedure which began on the Member State level ended with a Commission decision.⁶⁵ In *Tillack*, a procedure began on the European level and ended with an act by a national authority.⁶⁶ Hans-Martin Tillack was a journalist who investigated cases of alleged fraud in the Commission in Brussels and published articles about his findings in the news magazine *Stern*. The European Commission’s internal anti-fraud office (OLAF) publicly claimed that Tillack had obtained his information through bribery by paying a source within the Commission. Tillack complained of the public allegations of bribery to the European Ombudsman (EO). The EO submitted a recommendation to OLAF in June 2003 in which he concluded that OLAF’s accusations of bribery were

⁶³ Joined Cases 106–107/63, *Toepfer v. Commission* [1965] ECR 405.

⁶⁴ See e.g. Cases T–69/99 *DSTV v. Commission* [2000] ECR II–4039, paras 27–29; T–33/01 *Infront v. Commission* [2005] ECR II–5897, para. 135.

⁶⁵ A similar constellation was decided by the CFI in *van Parys*, where the CFI held that a measure adopted by the Commission in a procedure which provided for a final decision by a Member State authority was ‘no more than an intermediary measure forming part of the preparatory work leading to the determination by the national authorities’ of a situation in a final administrative decision: see Case T–160/98 *Van Parys and Another v. Commission* [2002] ECR II–233, para. 64.

⁶⁶ These constellations are no less frequent than the inverse, with Member State participation in a final Commission decision. In Case T–160/98 *Van Parys v. Commission* [2002] ECR II–233, for example, the Community rules on the common organization of the market in bananas in force at the time (OJ 1993 L 47/1), provided for a procedure in which import licences for bananas were granted by the national authorities on the basis of an allocation, company by company, from the European Commission. The Commission in turn established these allocation lists on the basis of information received by the Member States’ customs authorities. When the Belgian authorities refused to grant import licences to fruit traders on the basis of the Commission’s list of recipients of import licences, the CFI held that review of the refusal to grant import licences was for the national authorities and courts to undertake (para. 71). The Belgian court subsequently submitted to the ECJ a request for a preliminary reference of the Commission’s decision not to provide the Belgian authorities with the right to grant an import licence to Van Parys (Case C–377/02 *Van Parys v. Belgisch Interventie- en Resitutiebureau (BIRB)* [2005] ECR I–1465).

made in the absence of a reliable factual basis and constituted a case of maladministration.⁶⁷ Despite these findings, OLAF lodged a complaint with the Belgian and German prosecutorial authorities informing them of the original accusations relating to bribery and explicitly adding that these findings were liable to result in criminal proceedings.⁶⁸ In response to this request by OLAF, the Belgian authorities in March 2004 raided Tillack's home and offices and confiscated his documents and computers. Tillack brought proceedings in the Belgian courts which rejected his application on the basis of the understanding that the Belgian authorities were obliged to investigate the case on the basis of information obtained from OLAF under the principle of loyal cooperation (Article 10). Thus Belgian courts were not authorized to review the correctness of information provided by European institutions and bodies. The CFI rejected Tillack's action for annulment of the measure by which OLAF forwarded certain information to the Belgian and German prosecuting authorities. The European Courts held that the forwarding of information was not a reviewable act under EC law, since the final decision whether to open investigations remained with the national authorities.⁶⁹ Also, the Courts rejected the application for interim measures to order OLAF to refrain from reviewing the documents seized by the Belgian authorities and forwarded to it. In their view, there was no causal link between potential damages arising from OLAF reviewing and using the Belgian authorities' documents, on one hand, and OLAF's forwarding of allegations against Tillack to the national authorities, on the other. The reason given was that the final decision whether or not to investigate the case and seize the documents had rested with the Belgian authorities, despite the fact that OLAF would not have obtained access to the documents unless it had sent the information to the authorities.⁷⁰ The principle of effective judicial protection, a general

⁶⁷ In 2005 the European Ombudsman submitted a special report to the European Parliament with the recommendation that OLAF should acknowledge that it had made incorrect and misleading statements in its submissions to the Ombudsman.

⁶⁸ This took place on the basis of Article 10(2) of Regulation 1073/1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF), OJ 1999 L 136/1.

⁶⁹ Order of the President of the Court of First Instance in Case T-193/04 *Tillack v. Commission* [2004] ECR II-3575, paras 38-46; Order of the President of the Court in Case C-521/04 P(R) *Tillack v. Commission* [2005] ECR I-3103, para. 32; Case T-193/04 *Tillack v. Commission* [2006] II-3995.

⁷⁰ Order of the President of the Court of First Instance in Case T-193/04 *Tillack v. Commission* [2004] ECR II-3575, para. 53; Order of the President of the Court in Case C-521/04 P(R) *Tillack v. Commission* [2005] ECR I-3103, para. 46; Case T-193/04 *Tillack v. Commission* [2006] II-3995.

principle of Community law, the presidents of the CFI and ECJ held was also not breached by the decline of judicial review in the European Courts. Despite the fact that national courts could not review the correctness of the information forwarded by OLAF to national authorities, it is for the national courts to provide judicial review of the measures potentially infringing individuals' rights in application of the general principles of Community law.⁷¹ Having unsuccessfully sought judicial protection from the seizure of his material both in the Belgian courts and before the CFI and ECJ, Tillack then turned to the European Court of Human Rights (ECtHR), which found unanimously that Belgium had violated the freedom of expression, protected under Article 10 of the European Convention on Human Rights.⁷² In its judgment, the ECtHR, due to a lack of jurisdiction, did not directly review the legality of the European Commission's or OLAF's activities. However, it relied on the fact that the European Ombudsman's reports were proof of maladministration by OLAF, on which the Belgian measures were based. In so far, it was only the ECtHR which indirectly acknowledged the close relationship between the European and the national levels' activities and the need to grant judicial protection in the light of the results of this composite, multiple step procedure between OLAF and the Belgian authorities.

2 Lessons and potential solutions for judicial supervision of composite procedures

Given that the trend towards integrating administrations seems rather strong in an increasingly integrated European Union and in the absence of a real central administration, the real challenge to the EU legal system is therefore to find ways to adapt the means of judicial supervision to the emerging reality of an integrated administration. This requires identifying problems in the structure of judicial review and discussing potential solutions. In what follows I would like to restrict this discussion to two major themes: one is adapting the judicial review procedure to multi-level integrated procedures; the other is adapting judicial review to the fact that much of the administrative cooperation is information exchange, and thus traditionally does not qualify for judicial review on the European and national levels.

The first notion of a lack of network structures of courts in the EU might surprise at first sight. After all, one of the central innovations which was used for constitutionalizing the Community legal order (and thereby

⁷¹ Order of the President of the Court in Case C-521/04 P(R) *Tillack v. Commission* [2005] ECR I-3103, paras 36-39.

⁷² App. No. 20477/05 *Tillack v. Belgium*, judgment of 27 November 2007.

taking EC and EU law out of the realm of public international law) was the creation of the preliminary reference procedure under Article 234 EC. In *Costa v. ENEL* and *Simmenthal II* the ECJ had, for example, famously stressed the importance and role of a network of courts established by Article 234 EC (ex Article 177) with the goal of holding both European and national actors accountable. It was thus ensured that the relations between the courts were non-hierarchical 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 a preliminary ruling by the ECJ. The result was a system in which the national judge is also a Community judge and supremacy of Community law does not imply the inferiority of national courts.

The weakness of this structure developed in Article 234 EC and the case law interpreting it is that it merely established a two-level network of courts. Only national courts have the right and obligation to request a preliminary ruling from the ECJ. This cooperation of courts thus takes place in the vertical dimension in the form of a one-way relationship. Administrative forms of cooperation on the other hand have, as was shown above, developed much more complex forms of cooperation through procedures often combining various forms of vertical and horizontal cooperation. To that extent, the relationship between the courts is much more conservatively organized according to a strict separation of a two-level hierarchical system than the administrative structures in many policy areas which have evolved from a two-level structure to a network.⁷³ The problems arising from such a two-level vertical relationship have become evident in the two cases of *Borelli* and *Tillack*. In these and other cases, final review of composite administrative action is supposed to include an incident review of the legality of action by other authorities acting under procedural law and often in languages unknown to the reviewing court. This has in reality led to gaps in judicial supervision of administrative action which, given the expansion of administrative cooperation in matters highly sensitive to fundamental rights, such as, for example, police and customs cooperation, environmental and immigration cooperation, can no longer be tolerated.

A potential solution to these problems could be to broaden the possibilities of cooperation between courts. The preliminary reference procedure

⁷³ This old-fashioned conceptual approach has been heavily criticized in the literature: see e.g. Jens Hofmann, *Rechtsschutz und Haftung im Europäischen Verwaltungsverbund*, Duncker & Humblot (Berlin, 2004), 163–182; Eberhard Schmidt-Assmann, *Das Allgemeine Verwaltungsrecht als Ordnungsidee*, 2nd edition, Springer (Berlin, 2004), 336–338.

under Article 234 EC was probably one of the most important and influential procedural innovations which made possible European integration as we know it. This exceptional success can be used as an example of how to proceed in other than the vertical relation but needs to be updated to the current stage of integration in order to ensure judicial protection in the face of integrated procedures.

Such update should include, first, expanding the relationship between courts to allow the ECJ also to refer questions to national courts as to the application of national law in composite procedures. This would expand the vertical relationship to a two-way one. Additionally, courts of Member States should also be authorized to obtain a preliminary ruling from courts of other Member States to review the input of other Member State administrations into a procedure the final act of which was taken by a national administration. Expanding the judicial network would allow for effective supervision of administrative cooperation in multiple-step procedures and increase considerably the legal certainty in the system. Judicial review could be undertaken by one court, but with the supervision of all participants in the administrative network. Gaps in legal protection such as those apparent in *Borelli* and *Tillack* could be effectively excluded. In *Borelli*, the ECJ could have assumed jurisdiction and referred to the Italian courts for the review of legality of the region of Liguria's negative opinion, which was decisive for the final Commission decision declining the demand for the subsidy. In *Tillack*, the Belgian courts could have requested review of the legality of OLAF's demand for information. In other composite procedures, both national and European input can be reviewed in one judicial procedure.

The second element of the legal structure of a system of integrated administration which poses difficulties for judicial supervision is the nature of cooperation. As was shown earlier in this chapter, most forms of cooperation are in the form of exchange of information and joint procedures for generation and exchange of information. The nature of this activity is in many cases not regarded as a reviewable final administrative decision but a preparatory act for a final decision taken by another authority. This is generally no problem if the information is established and finally used for an administrative decision in one single jurisdiction. In composite procedures in which administrations from several jurisdictions are involved, the problem is different. Here, there is generally a lack of legal knowledge and a real chance to disentangle the legality of every kind of input into the overall information being used for the final decision. This becomes especially important with respect to European databases which are maintained and supplied by administrations from all Member States and the European level and where the information is accumulated according to topics and not sources.

A potential solution to this problem could, next to the expansion of the preliminary ruling procedures, consist of re-considering the definition of reviewable acts for annulment under Article 230 EC. These are, under the current case law, limited to final acts.⁷⁴ Information exchange and joint gathering and storage in information networks have the tendency to escape this definition. A solution might arise from the concept of factual conduct, which does not amount to a final administrative decision.

Administrative action through factual conduct is frequent and has in reality become increasingly important. Factual conduct is often linked to processing and computing data in administrative networks.⁷⁵ The distribution of data is generally an activity which can have a far-reaching and serious impact on the rights of individuals.⁷⁶ Factual conduct can arise in the above-discussed cases of preparatory acts. They are thus acts which are not aimed to produce a final change in a legal position. Instead they are aimed at adding elements to an ongoing administrative procedure through statements of fact or the transfer of preliminary information. This is often the case where the act is but one step in a multiple-phase administrative procedure on the European level or the act makes for a non-final contribution in a composite administrative procedure spanning different levels. Factual conduct will however also arise where an institution publishes information or issues public statements which do not amount to a decision.⁷⁷ At the moment, the only way to review the legality of such type of factual conduct will be in the framework of a claim

⁷⁴ The leading case is Case C-60/81 *IBM* [1981] ECR 2639, para. 9 which stated that 'any measure the legal effects of which are binding on, and capable of affecting the legal interests of, the applicant by bringing about a distinct change in his legal position is an act or decision which may be the subject of an action under Article 173 for a declaration that it is void'.

⁷⁵ The decision to distribute information on the other hand can be subject to a procedure under Article 230 EC: see Joined Cases C-317/04 and C-318/04 *European Parliament v. Council and Commission* [2006] ECR I-4721.

⁷⁶ An example is the listing of an individual in the Schengen Information System by a Member State administration, which may lead to him or her being refused to travel into or within the Schengen area. On this with references in German and French case law see Jens Hofmann, *Rechtsschutz und Haftung im Europäischen Verwaltungsverbund*, Duncker & Humblot (Berlin, 2004), 283, 284.

⁷⁷ Such cases for example arise when the Commission or an agency releases a press release alleging a journalist to have bribed a Commission official to obtain information: see Case C-521/04 P(R) *Tillack v. Commission*, Order of the President of 19 April 2005, [2005] ECR I-3103, para. 6. Another example would be the publishing of damaging warnings or confidential business information on a website or in a similar publication which could damage the economic standing of a company.

for damages under Article 288 EC.⁷⁸ The problem here is the standard for a ‘sufficiently serious’ breach of Community law, leading to a positive decision by the ECJ and the award of damages.⁷⁹ Finally, a problematic type of factual conduct arises primarily in the framework of information networks in Europe’s integrated administration. Once a piece of information is circulating in the network, an individual can effect the correction of that information – be it factually correct or not – only if a special legal provision allows for its review. Generally, however, there is no remedy against the use and computation of information once it has entered administrative networks, as long as this information does not lead to a final decision either on the European or the Member State level. Given the expanding use of information networks in European administrative law, this appears to be a dangerous development for the legal protection of citizens in EU law, especially in view of the inclusion of sensitive matters for fundamental rights such as criminal investigations and police cooperation.⁸⁰

Two approaches seem possible to address this problem arising from integrated administration. One could be to adapt the approach to judicial

⁷⁸ T-193/04 R *Tillack v. Commission*, Order of the President of the CFI of 15 October 2004, [2004] ECR II-3575, para. 53: ‘the decisive test for finding that a breach of Community law is sufficiently serious is whether the Community institution concerned manifestly and gravely disregarded the limits on its discretion. Where that institution has only considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach (judgments in Case C-5/94 *Hedley Lomas* [1996] ECR I-2553, para. 28, Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 *Dillenkofer and Others* [1996] ECR I-4845, para. 25, Case C-127/95 *Norbork Laboratories* [1998] ECR I-1531, para. 109, Case C-424/97 *Haim* [2000] ECR I-5123, para. 38).’

⁷⁹ Often the publication of damaging information can constitute a serious breach of an individual’s rights independently of the serious nature of the breach of a duty by the simple fact that the information is wrong. It is thus not inconceivable that such a situation will leave an individual without legal protection. This situation may easily amount to a violation of the principle of effective legal protection.

⁸⁰ This proposal adopted here for the problems of composite procedures was developed in detail for cases of legislative failure by Nicholas Forwood, prior to his becoming Judge at the CFI. Judge Forwood wishes to stress that his comments were made in his function as a practising lawyer many years ago and cannot be regarded as the comments of a judge speaking extra-judicially: see Nicholas Forwood, ‘Judicial Protection of the Individual – 10 Years of the Court of First Instance’, in *Cour de Justice des Communautés européennes* (ed.), *Le Tribunal de Première Instance des Communautés Européennes 1989–1999*, Office for Official Publications (Luxembourg, 2000) 56–66.

protection to the realities of integrated administration and the growing role of information networks therein. This would imply that the ECJ's jurisprudence redefines the meaning of the legal effect of a decision. In an important case on the protection of legal privilege, the CFI has shown what such a solution could look like. It developed the notion of a 'tacit decision', in other words an understanding that a physical act could be considered to entail an implicit administrative decision. In the case, the CFI held that when the Commission during an on-the-spot investigation seizes a document and places it in the investigation file, 'that physical act necessarily entails a tacit decision by the Commission to reject the protection claimed by the undertaking That tacit decision should therefore be open to challenge by an action for annulment.'⁸¹ The CFI thus seems to favour the solution of expanding the categories of reviewable acts under an action for annulment.

An alternative solution to allowing for review of factual conduct through the construct of a 'tacit decision' under the action for annulment (Article 230 EC) could be to allow for a declaratory action alleging the illegality of factual conduct. A declaratory decision by the ECJ and CFI would enable the review of situations which so far could only be addressed in the framework of an action for damages under Article 288 EC.⁸² The problem of the declaratory action however could be rather elegantly addressed by the ECJ and CFI if they were prepared to develop their case law on damages actions under Article 288 EC. To date, three conditions need to be fulfilled before granting damages:

It is settled case-law that the non-contractual liability of the Community for the unlawful acts of its bodies, for the purposes of the second paragraph of Article 288 EC, depends on fulfilment of a set of conditions, namely: the unlawfulness of the conduct alleged against the institutions, the fact of damage and the existence of a causal link between that conduct and the damaged complained of.⁸³

⁸¹ Joined cases T-125/03 and T-253/03, *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v. Commission* [2007] ECR II-3523 para. 49.

⁸² The standard for awarding damages to date however is stricter than simple illegality of an executive action. The ECJ consistently requires not just illegality but a 'sufficiently serious' breach of Community law in order to award damages. Where an administration enjoys a margin of discretion, simple illegality of information exchange can however breach an individual's rights to a considerable degree and merit declaration without the award of damages. Expanding the right to damages claims would allow for review of non-final acts and ensure a higher level of supervision and protection of rights in a network administration.

⁸³ Case T-193/04, *Tillack v. Commission* [2006] ECR II-3995, para. 116 referring to Case 26/81, *Oleifici Mediterranei v. EEC* [1982] ECR 3057, para. 16; Case

It is imaginable that the Courts would change this order of conditions for granting damages by first finding the illegality of an action, irrespective of whether the administration enjoyed discretion or not. The Court could then take into account material and immaterial damages. The latter could be found to exist where a right of an individual had been breached. The damages sought or awarded could in most cases of illegality be a declaration of illegality. This approach would follow the principle of *qui peut le plus, peut le moins*. If the Court has the right to award financial damages, it could also give satisfaction by declaring the illegality and thereby contributing to the future lawful conduct of administrations. The development of such an approach to a declaratory damages action, as we might call it, would be a significant contribution to judicial review in composite administrative procedures.

B Parliamentary and Administrative Supervision

Next to judicial supervision, forms of parliamentary and administrative supervision of composite procedures are important to assure the legality of administrative action.

Parliamentary control of network administration is exercised by regional and national parliaments as well as the EP. Each however has control options only over its own administration. Administrations linked in networks exchanging information and being integrated into composite procedures easily escape the control mechanisms established through parliamentary inquiry structures and ombudsmen. The problem is essentially the same as with judicial review in courts: parliamentary supervision is separated according to levels; administrative procedures are integrated.

One of the main forms of parliamentary supervision, next to investigative inquiries and the budgetary powers, is the institution of a parliamentary ombudsman. The European Ombudsman's (EO) powers are limited to investigating maladministration in institutions and bodies of the Union. However, a large number of practical administrative problems with European law arise from authorities of the Member States implementing European law.⁸⁴ The definition of admissibility of the EO's

T-175/94 *International Procurement Services v. Commission* [1996] ECR II-729, para. 44; Case T-336/94 *Efisol v. Commission* [1996] ECR II-1343, para. 30; and Case T-267/94 *Oleifici Italiani v. Commission* [1997] ECR II-1239, para. 20.

⁸⁴ The *Tillack* case showed the shortcomings of the ombudsman system for effective control. Given the non-binding nature of the EO's recommendations (see also Order of the CFI in Case T-103/99 *Associazione delle cantine sociali venete v. European Ombudsman and European Parliament (ACSV)* [2000] ECR II-4165,

review is thus a definition based on an organic definition of administrative actors, as opposed to a functional definition of administrative activity.⁸⁵ Such an organic definition leaves lacunae within the grey zone of the often highly integrated European and Member State administrative activity.

In order to address these potential lacunae in ombudsman supervision of administrative activity, the European, national and regional ombudsmen have created the European Network of Ombudsmen.⁸⁶ The idea is to be able to transfer complaints between the European and the relevant national and regional ombudsmen, so that complaints are automatically handled by the ombudsman in charge of the administration which is the source of alleged maladministration.⁸⁷ However, the strict organic division 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 from the EO to queries about EU law, its interpretation and its application to special cases. The EO either provides the answer directly or, if appropriate, channels the query to another EU institution.⁸⁸

paras 47–50) OLAF could simply ignore the proposals. What is more, only the ECtHR cited the ombudsman's findings. The ECJ hardly bothered to mention the ombudsman's reports and did not take them into account in its decision making. This reality is to a certain degree at odds with the EO's mandate under Article 195 EC, under which he has the duty 'to receive complaints from any citizen of the Union or any natural or legal person residing or having its registered office in a Member State concerning instances of maladministration in the activities of the Community institutions or bodies'.

⁸⁵ The latter functional definition has for example been chosen for defining the reach of European fundamental rights. Article 51(1) of the Charter of Fundamental Rights, for example, explicitly includes obligations to observe EU fundamental rights by Member States' agencies when they are 'implementing Union law'.

⁸⁶ For a detailed description see Carol Harlow and Richard Rawlings, 'Promoting Accountability in Multi-Level Governance: A Network Approach', *European Governance Papers* No. C-06-02, 19-27, available at www.connex-network.org/eurogov/pdf/egp-connex-C-06-02.pdf.

⁸⁷ According to the EO annual report for 2006, 127, '[t]he European Network of Ombudsmen consists of almost 90 offices in 31 European countries. Within the Union, it covers the ombudsmen and similar bodies at the European, national, and regional levels, while at the national level, it also includes Norway, Iceland, and the applicant countries for EU membership. Each of the national ombudsmen and similar bodies in the EU Member States, as well as in Norway and Iceland, has appointed a liaison officer to act as a point of contact for other members of the Network.'

⁸⁸ *Ibid*, 129.

The same problem of maintenance of a two-level supervision structure holds true for most forms of administrative supervision of composite procedures. In the area of data protection, for example, the European Data Protection Supervisor (EDPS) is a quasi-agency which can issue decisions binding on the institutions and bodies of the EU requiring a change or rectification of an administrative practice relating to data collection and use.⁸⁹ Despite these powerful competences of supervision the reach of the EDPS is limited to European institutions and bodies. A network of data protection supervisors⁹⁰ has been created to follow up on data protection cases within the European administrative network. This approach addresses the difficulties of jurisdictional limitations.

A possibly more effective solution to these problems of parliamentary and administrative supervision, however, could be the creation of an independent agency in charge of handling complaints by individuals even during an ongoing procedure. Like the EDPS, this agency could investigate cases of maladministration by national or European agencies in integrated procedures and take decisions before even a final decision was taken in order to prevent the need for judicial review. Such an agency, or integrated network of agencies, would be a potential network solution for a network problem. If this review procedure were structured to allow for one single review procedure of the contributions to a composite procedure from administrations of different jurisdictions by the supervisory agencies of these jurisdictions, a real step towards developing supervisory procedures to fit the reality of integrated administrative procedures would be achieved. It would thus be a potentially appropriate approach in the face of integrated administration and create a kind of internal administrative police force, reviewing procedures before the mistakes could take effect through final acts. It would mirror by its construction and approach the integrated nature of decision making by allowing for composite real-time review. Rights of intervention of the agency would have to be granted *vis-à-vis* Member State as well as EU institutions and bodies.

⁸⁹ Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, OJ 2001 L 8/1.

⁹⁰ This network includes data protection authorities in charge of matters of the second and third pillars of the EU as well as different Member States' data protection authorities.

V. SUMMARY AND OUTLOOK FOR EU ADMINISTRATIVE LAW

This contribution has addressed specific legal problems arising from the development of composite administrative procedures in the EU. Composite procedures are a specific form of highly integrated administrative procedural cooperation for the implementation of EU policies. The development of composite procedures in a multitude of policy areas creates problems especially with respect to supervision and accountability. Problems arise from the gap between forms of organization: Administrative procedures are increasingly organized according to concepts of network structures. On the other hand, 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. Such traditionally organized supervisory structures have difficulties in allocating responsibility for errors during the procedures and finding adequate remedies for maladministration within a network. They also have difficulties coping with the fact that the substance of administrative cooperation in composite procedures is the joint gathering and subsequent sharing of information. Therefore, overcoming notions of judicial review on the basis of a final act has proven to be insufficient to ensure effective legal protection.

The developments discussed in this contribution show that ‘Europe’s governance laboratory remains radical and experimental’.⁹¹ Solutions to the new challenges of a changed landscape of administrative action in the EU need to be as innovative as the developments linking administrative procedures into networks. So far, forms of supervision and structures to hold administrations accountable have not followed this tendency of creative development.

Solutions discussed so far in this chapter are oriented to reconstructing a network structure of accountability and supervision as well as control of legality appropriate for the network of actors. Coordinating the approaches for control, supervision and accountability to the same degree as the composite procedures are integrated seems to be developing as the most sensible and viable approach. But next to the above-discussed approaches for creating judicial and administrative supervision networks,

⁹¹ Christian Joerges and Michelle Everson, ‘Re-conceptualising Europeanisation as a Public Law of Collisions: Comitology, Agencies and an Interactive Public Adjudication’, in Herwig C.H. Hofmann and Alexander Türk (eds), *EU Administrative Governance*, Edward Elgar Publishing (Cheltenham, 2006), 512.

there are also more far-reaching, systematic and thus to a certain degree more radical approaches possible and probably necessary.

The questions of judicial as well as administrative and political control seem linked. Judicial control is either possible at each level of involvement where it takes place (MS or EU) if the illegality of one procedural participatory act could have influenced the legality of a subsequent act in a composite procedure, or at the level of the final act. There, however, it would be best if it were for the court dealing with the final act to review the legality of all previous composite procedural steps. In order to do that effectively, in the absence of harmonized administrative procedural rules, it would be necessary to provide for preliminary reference procedures in the vertical relationship not only from national courts to the ECJ but also from the ECJ to national courts. Additionally, a form of horizontal preliminary reference procedure between different national courts would be necessary. This judicial network through procedures of preliminary references would be able to follow the emerging administrative networks and allow for effective judicial supervision of a network administration.

In summary, this contribution has led to the following understandings: maintaining legality and effective supervision is a challenging task in the face of this ever-evolving network structure. This task is only slowly being acknowledged in academic legal thinking. It is however a real and important challenge. The result of the necessarily limited considerations on a topic as vast as this, undertaken in this chapter, is, first, that integrated administration and composite administrative procedures are the outcome of the approach to European integration in which administrative tasks are undertaken de-centrally with only very limited European administration. To that extent, the EU is different from many federal states where both parallel federal and state administrations exist. The consequence of this specificity of European integration is that forms of supervision of administrative action need to be adapted to the specific nature of the administrative network. So far there have been only very timid first steps towards doing so. The essential problem is to move beyond a simplistic two-level understanding of European integration with the EU and the Member States as distinct entities.

7. The emergence of transatlantic regulation

George A. Bermann

Among the greatest challenges of a scholar is to identify and deal with emerging developments, even when it is not yet possible to state with confidence what their exact dimensions and significance may be. Often they may not yet have brought about anything so dramatic as to be termed ‘paradigm-shifting’, but they may be putting substantial pressure on our received wisdom and understandings and cast doubt on the conventional categories through which we understand the legal world around us. Such, I think, are the features of the topic I treat here, namely, the emergence of transatlantic regulatory dialogue.

The development of a transatlantic dimension to public regulation is particularly striking from an American perspective. Regulation, both in its general understanding and as mainly practised in the United States, is a phenomenon firmly anchored at the national, and more particularly at the national *federal*, level. The individual American states and international organizations both play what can only be considered a subsidiary role in our understandings of regulation. A student of general American administrative law will, accordingly, focus his or her attention on the famous Administrative Procedure Act – the federal statute governing general administrative procedure in the US. He or she will also consider the important federal legislation on regulatory sectors, as well as the voluminous federal regulations issued by one or another federal regulatory agency, be it an agency organized within one of the cabinet departments within the executive branch or an independent regulatory agency, as the case may be.

The situation is clearly somewhat different in Europe. Obviously, regulation of a monumentally important character is taking place – and has for many years – at the European Community level. This is so, even if the regulation which is achieved through the form of Community directives must be followed by legislative or administrative transposition by the Member States. Europe has thus long been acquainted with the notion that important and highly pertinent regulatory activity may take place

beyond national borders. Europe is also more accustomed – and receptive – to the idea of international organizations playing an important normative role on regulatory matters which are otherwise governed at the national level.

But even judging by the rather more cosmopolitan habits and practices in Europe as compared to the US in this regard, something quite remarkable is afoot. We are observing a phenomenon which, for want of a better name, I call transatlantic regulatory dialogue. Clearly, the transatlantic ‘exchange’ to which I refer does not represent in itself a legal obligation, and it results directly in few if any instruments which are themselves legally binding. Nor is the phenomenon I shall describe a highly formal or even a heavily structured one. And, as will be seen, it is not one carried on in a centralized fashion at some high level of government on either side. Still, it is a real activity, even if neither the procedures through which it occurs nor the precise regulatory results that may be traced to it are very well understood.

My remarks are divided in three parts. First, I offer a brief, and necessarily general, description of the phenomenon. Then I set out what I think, based on practice to date, can and cannot safely be said about it, even provisionally. Finally, I offer some reflections on those aspects of the phenomenon that render it potentially politically problematic.

THE TRANSATLANTIC REGULATORY PHENOMENON

First, then, what exactly is transatlantic regulatory dialogue? It is certainly not ‘regulation’, as such. Rather, it is what I would call a ‘bundle’ of quite varied activities which we can try, though only with some difficulty, to place within a typology. In fact, what I mean by transatlantic regulatory dialogue is a range of cooperative modalities spanning a wide spectrum in terms of their intensity and stakes. We may first envisage the simple exchange of information between regulatory authorities on both sides of the Atlantic. Such exchanges may further mature into what might be called ‘consultations’. Practices become more ambitious when regulators turn their attention to discussing and possibly developing a common ‘regulatory agenda’, that is, a mutual understanding as to the problems worthy of being addressed through regulatory activity in the near or medium term. Sometimes, more rarely of course, it is decided to launch common or joint research and study designed to help inform the regulations which may eventually emerge; there may even be a commitment to conduct a joint analysis of the results of such research or study.

By this time, more than mere dialogue is afoot; joint or coordinated action is underway. It is even possible that regulators on both sides will, perhaps on the basis of the joint research just described but not necessarily, develop common proposed regulations. Those proposed regulations may even have identical texts, although it is understood that, since these instruments are destined to become at most domestic legal norms and not international agreements, they must ultimately be placed into the domestic channels by which domestic regulations are produced. Irrespective of whether joint or common texts have been developed, it is possible that the regulatory authorities of one side will themselves directly participate in the rulemaking procedures, such as they are, on the other side. This may entail nothing more than the making of public comments within the comment period provided for by domestic administrative procedure, but it may entail a more formal intervention.

We are also beginning to see formal accords by which the US and EU commit themselves to cooperation in the administrative sphere. The first generation of 'mutual recognition agreements' did not actually entail a mutual recognition of regulatory standards, but rather what is known as the mutual recognition of technical conformity assessment.¹ Under this model, which has been inspired by principles of equivalence under Community law, the authorities of the exporting jurisdiction undertake to determine the conformity of their products with the regulatory standards of the importing jurisdiction. In doing so, the former do not enforce their own standards or some bilaterally or internationally agreed upon standard, but rather the standards of the other side, and there is no guarantee, either in theory or practice, that common standards will result from this practice. However, we see more recently the beginnings of a bolder move whereby the US and EU undertake not merely to recognize the results of the other's certifications, but rather to regard each other's domestic standards as substantially equivalent to their own. The result is that, where such recognition applies, products which meet one side's regulatory standards will be deemed to meet the other side's as well, even if the two sets of standards are not in fact the same or even necessarily very much alike. This has recently occurred in a most unlikely area, namely, mutual recognition of the other's approved wine production methods.²

¹ Kalypso Nicolaidis and Gregory Shaffer, *The Emergence of Global Administrative Law: Governance without Global Government*, 68 *Law & Contemp. Probs.* 263 (2005).

² Agreement between the European Community and the United States of America on Trade in Wine, March 24 2006, OJ 2006 L 89/2.

WHAT HAVE WE LEARNED?

Admittedly, the dialogue and other cooperative practices I have described are still in their infancy. Nevertheless, it is already possible to draw some important conclusions as well as to identify important matters as to which no conclusions can yet be drawn.

First, these initiatives are clearly underway, and in a highly concrete way. The websites of the US and EU authorities reveal the forms of dialogue and cooperation which are taking place in various regulatory sectors. These websites provide veritable inventories – periodically updated – of what exactly is being undertaken, on what subject and between which authorities.³ The authorities which oversee these activities (and which I identify below) have also jointly produced what they term a ‘roadmap’ of initiatives.⁴ (The term ‘road-map’ is, however, somewhat misleading, as it implies an overall coherent and comprehensive strategy, whereas what it represents is essentially a composite inventory. It consists of a multiplicity of distinct, separate and wholly decentralized initiatives at the regulatory ‘grass-roots’ level. It would be false to superimpose upon them a systematic character that simply does not exist.)

This brings me to a second observation, which is that these forms of activity are evidently capable of being conducted without any very close coordination, much less hierarchical control. What we observe is a manifestation of that which a current school of political science and international relations theory characterizes as a ‘network’. According to this theory, law on the international plane is not produced exclusively by accords or other formal relations between states as such, but rather through a series of separate, disaggregated interactions directly between the more or less specialized regulatory and other administrative services on one side and their counterparts on the other.

If the phenomena I describe here are not the creation of the highest echelons of government on the two sides, from where does the impetus for them come? It is not obvious that ‘transatlanticizing’ the functions of American or European regulators simplifies or facilitates their tasks or that, occasional foreign travel notwithstanding, it makes their personal or professional lives more pleasant. Of course, one can imagine that the

³ European Commission Directorate General for Enterprise & Industry, *available at* http://ec.europa.eu/enterprise/index_en.htm; Office of the United States Trade Representative, *at* www.ustr.gov.

⁴ See 2005 Roadmap for EU–US Regulatory Cooperation and Transparency (June 20, 2005), *available at* www.ustr.gov/World_Regions/Europe_Middle_East/Europe/US_EU_Regulatory_Cooperation/Section_Index.html.

dialogue and cooperation might result in certain economies, as when American and European authorities ‘pool’ their resources, technological and otherwise. The fact remains, however, that the real impulse came from the private sector. Industry on both sides, considering it useful to have a more consistent regulatory playing field across national borders, favored and indeed strenuously encouraged the kind of regulatory dialogue and cooperation that I am describing. The Transatlantic Business Dialogue – a partnership among leading business enterprises on both sides of the Atlantic – has played a pivotal role in this regard.⁵

Although transatlantic regulatory dialogue thus came about largely through the influence of the private sector on specialized regulatory actors, we are nevertheless witnessing an effort on both sides to establish some kind of overall framework within which these very many otherwise isolated initiatives might take place. Political leaders at the highest level have announced the establishment of a successive series of institutional umbrellas for all of this activity. We have seen a ‘transatlantic economic partnership’,⁶ a ‘transatlantic agenda’,⁷ a ‘transatlantic declaration’,⁸ and a ‘new transatlantic marketplace’.⁹ At one time, in the early 1990s there was talk of an actual Transatlantic Free Trade Area (TAFTA).¹⁰ That idea did not prosper at the time, but it has very recently been revived, with one of its hallmarks being a commitment to harmonization and mutual recognition of standards.¹¹

It is understandable that the executive branch in the United States and

⁵ Maria Green Cowles, *The Transatlantic Business Dialogue: Transforming the New Transatlantic Dialogue*, *Transatlantic Governance* 213–33 (2001).

⁶ See Transatlantic Economic Action Plan (Nov. 9, 1998), available at <http://ec.europa.eu/trade/issues/bilateral/countries/usa/1109tep.htm>.

⁷ The New Transatlantic Agenda (Dec. 3, 1995), available at http://ec.europa.eu/comm/external_relations/us/new_transatlantic_agenda/text.htm. See also, Brian Hindley, ‘New Institutions for Transatlantic Trade?’, 75 *Int’l Aff.* 45–60 (1999).

⁸ The Transatlantic Declaration (Nov. 22, 1990), available at <http://www.eurunion.org/partner/transatldec.htm>. See also, George A. Bermann, *Regulatory Cooperation between the European Commission and US Administrative Agencies*, 9 *Ad. L.J. Am. U.* 933, 956–61 (1996).

⁹ See Michael Smith, *The United States, the European Union and the New Transatlantic Marketplace*, in *Ever Closer Partnership* 267–82 (Philippart & Winand eds., 2001).

¹⁰ Caroline Southey, *EU Foreign Ministers Back Closer Ties with US*, *Fin. Times*, Nov. 21, 1995, *World News*, at 6.

¹¹ Bertrand Benoit, *Chancellor Merkel Ponders Atlantic Free Trade Zone*, *Fin. Times*, Sept. 16, 2006. See also, ‘Merkel Promotes TAFTA with Bush’, *United Press Int’l*, Jan. 4, 2007, available at <http://www.upi.com/NewsTrack/Business/20070104-071920-9895r/>.

Europe would take steps at a high level to ‘normalize’ this activity and gather it into view. Simple curiosity alone might explain this. So too might a logical desire to encourage the sharing of regulatory dialogue and cooperation experiences across sectors. Most likely, though, political leadership sees value in reminding sectoral regulatory authorities that they are ultimately bound by domestic law to conduct their regulation in the light of certain legal, economic and even cultural disciplines which might easily be lost sight of in the conduct of transatlantic regulatory dialogue and cooperation.

Assuming that some overall coordination and supervision is called for, where are these functions to be lodged? It is possible already to detect a shift in the locus of this activity on both sides. Initially, this coordinating and supervisory role was played for the Commission principally by its Directorate General for External Relations, while for the US it was played by the Department of State (i.e., foreign affairs ministry).¹² But the center of gravity has discernibly shifted to the Directorate General for Trade and Industry for the Commission and to the Office of United States Trade Representative (USTR) for the US.¹³ This represents a sure sign that much of the transatlantic dialogue and cooperation is taking place in the shadow of World Trade Organization dispute resolution.

Fourth, even if one is genuinely supportive of transatlantic regulatory dialogue, one must acknowledge its tension, and possibly even its contradiction, with the regulatory multilateralism in which both the US and EU are at least nominally engaged. Clearly, the two jurisdictions constitute something of a ‘club’ in this regard. The least we can say is that American and European participants in the processes of transatlantic dialogue and cooperation recognize that the regulatory results are required in principle to conform with the fundamental international norms that bind both jurisdictions, such as the ‘most-favored-nation’ principle and the various other regulatory disciplines imposed by the World Trade Organization regime.

Fifth, while it may be too soon and too difficult to determine the exact threat that transatlantic exchange poses to regulatory multilateralism, it

¹² *See generally* Transatlantic Regulatory Cooperation: Legal Problems and Political Prospects (George A. Bermann et al. eds, 2001, Oxford: Oxford University Press).

¹³ The Office of the United States Trade Representative, or USTR, is an arm of the executive branch of the United States government which falls within the Executive Office of the President. It is responsible for the United States’ international trade policy at bilateral and multilateral levels. *See* Office of the United States Trade Representative, *available at* www.ustr.gov.

is practically impossible to gauge the threat that it poses to the benefits of 'regulatory competition'. According to regulatory competition theory, welfare is enhanced by making available to business enterprise alternative regulatory regimes, thereby enabling enterprise to choose from among competing regulatory models the one that suits it best, while at the same time stimulating regulatory reform.¹⁴

I acknowledge that the bilateral exchanges that typify the phenomenon I describe here are by definition not conducive to regulatory competition. However, I am also dubious about the advantages of regulatory competition when it comes to the international marketplace for goods and services. International economic actors are not so much selecting their markets (as a function, among other things, of regulatory regimes) as seeking to expand their markets. To the extent that that is so, businesses would readily settle for a less than optimal regulatory regime if that were to result in a regulatory level playing field across a much larger marketplace. I accordingly remain unconvinced that transatlantic regulatory dialogue and cooperation exact too high a price in terms of regulatory competition, and I doubt that we should seek to rein in these transatlantic practices with a view to capturing putative regulatory competition gains.

Leaving aside these normative questions, I turn, sixth, to a more diagnostic inquiry, namely an inquiry into contemporary obstacles to the effectiveness of transatlantic dialogue. Currently underway is a very large-scale study by the American Bar Association (Administrative Law Section) of EU administrative processes, including EU rulemaking.¹⁵ The study concludes that – notwithstanding major institutional and procedural differences¹⁶ – the processes and institutions of neither the EU nor the US are so inaccessible or unintelligible to the other as to raise barriers to effective dialogue and cooperation. It is striking how relatively readily US regulators can come to an understanding of EU regulation, and vice versa. The same may be said for international lawyers and for lobbyists; both have

¹⁴ Jonathan R. Macey, *US and EU Structures of Governance as Barriers to Transatlantic Regulatory Cooperation*, in *Transatlantic Regulatory Co-operation* 357–71 (2000).

¹⁵ American Bar Association (Section of Administrative Law and Regulatory Practice), *Administrative Law of the European Union* (Bermann, Koch & O'Reilly eds, 2008, ABA Publishing, six volumes: Introduction, Adjudication, Rulemaking, Judicial Review, Transparency and Data Protection, Oversight).

¹⁶ US regulators encounter difficulties, for example, in understanding the EU comitology system. Peter L. Strauss, *Rulemaking in the Ages of Globalization and Information: What America can Learn From Europe, and Vice-Versa*, 12 *Tul. Eur. & Civ. L.F.* 645 (2006).

learned how to enable their clients to participate in regulatory processes on the other side and thereby influence regulatory results.

The main obstacles to effective regulatory rapprochement, I find, lie elsewhere, notably in differences of substantive view, regulatory philosophy, and attitude toward such issues as risk (and levels of tolerable risk), the role of science, the impact assessment methodology to be used, and the weight to be assigned to cost–benefit analysis.¹⁷ Thus, differences over the ‘precautionary principle’ loom larger in transatlantic dialogue and cooperation than formal institutional differences between the US and EU.

THE CHALLENGES

I come finally to the most serious sets of challenges to transatlantic regulatory dialogue and cooperation.

A first question to ask is whether and, if so, to what extent these processes exacerbate basic problems of contemporary regulation relating to democracy, transparency and accountability – problems which of course preexist the rise of transatlantic regulatory dialogue. Surely, these transatlantic processes do little to diminish these problems or to contribute to their solution, but to what extent do they render the problems more severe or the solution less attainable?

The main difficulty does not lie with transparency. Transparency is chronically a problem in modern regulation. Moreover, both the US and EU have shown a commitment to publicizing the forms of dialogue and cooperation that exist, with an indication of their subjects, objectives, methods and participants. But democracy and accountability raise less tractable issues.

In order to measure the democracy and accountability stakes, one would need information that we sorely lack. It would be highly instructive, for example, to know – if only we could – whether and in what respects the regulatory outcomes that actually result from the play of dialogue and cooperation between the US and EU differ from those which would have resulted if the regulatory processes on both sides had remained resolutely

¹⁷ See EU–US High Level Regulatory Cooperation Forum – Brussels (Jan. 26, 2006), available at http://ec.europa.eu/enterprise/enterprise_policy/gov_relations/internatl_regul_coop_eu_us/report_forum_26012006.pdf; and *White House Touts Approaches on Cost, Risk Analyses in Talks with EU Officials*, Daily Env’t, Feb. 3, 2005, at A-3, available at <http://pubs.bna.com/ip/BNA/den.nsf/is/a0b0j4r3p2> (discussing how the EC-OMB Regulatory Dialogue Working Group seeks to export the OIRA regulatory cost–benefit analyses from the OMB to the Commission).

‘national’. The latter scenario, however, is by definition counter-factual. One can only imagine the extreme difficulty of organizing a controlled experiment which would yield this kind of information with any degree of accuracy. Having gauged the differential, we would then need to determine at what point that differential becomes so great as to call into question the notion that US and EU regulators remain democratically accountable to their constituencies, and then to consider whether the resulting regulatory norms accordingly still enjoy a basic legitimacy. Performance of this analysis may not be an achievable objective. But, even so, it would be useful if those who lead and participate in transatlantic dialogue and cooperation remained mindful of the impact of those processes on such fundamental and profoundly important political principles.

PART III

Supervision and accountability

8. Administrative supervision of administrative action in the European Union

Gerard C. Rowe¹

A. INTRODUCTION

Generally considered, the legal and institutional supervision of administrative action is mandated by at least the principles of the rule of law and of good administration. As to the first, a key purpose of such supervision lies in giving specific substance to the rule of law.² As the EU is a community under law (see further below), administrative supervision there can generally be credited with this function. The principles of the separation of powers (derived from the rule of law) and of the sovereignty of parliament (derived from both the rule of law and the democracy principle) also point clearly in the direction of a need for supervisory control over the public administration. Though these two elements are not fully developed in the EU, they still have a substantial foothold in the more or less balanced distribution of powers among a number of organs (thus avoiding a dangerous concentration of powers in the hands of any single institution) and in the basic sovereignty of the legislative machinery (thus ensuring the ultimate subordination of administrative actors and the elemental role of the courts subject to legislative precept).

If only indirectly, supervision of the administration can also be seen as consequent upon the principle of democracy not only as regards the completion and implementation of democratically established decisions and policies but also as regards the legitimation of action taken by the public administration. Supervision specifically enhances the democratic legitimacy of administrative action by extending not only legal but also democratic accountability to each level of the public administration. In the context of

¹ The author thanks Dr Annette Prehn, Petra Schulze, Anna-Maria Pawliczek and Daniel Rosentreter (Frankfurt (Oder)) for valuable research assistance during the preparation of this chapter.

² Case C-294/83, *Les Verts* v. *European Parliament* [1986] ECR 1339, at p.1365.

the EU (whether taken as a whole or considering just central administrative authorities) such an understanding and expectation must, however, be set against the background of deficits in the realisation of the democracy principle on the legislative level. One might, therefore, be justified in asking whether administrative supervision can provide convincing support for the fulfilment of a principle the achievement of which – on the level from which administrative action derives its own primary legitimacy, *viz.* the legislative – is itself incomplete.³ Indeed, in the extreme case of legislative measures which arguably had no democratic legitimacy at all, supervisory control over administrative implementation might in fact be properly regarded as perverse. It would, though, despite all claims concerning the democratic deficiencies of the EU, be plainly exaggerated to make a claim such as this. Weaknesses exist but these cannot, I think, be used to provide conclusive arguments against the usefulness and functionality of supervision in the EU, even from the perspective of the democracy principle.

It was noted above that supervision of the administration can be seen to be mandated also by the principle of good administration. This is not the place to go into the detail of that principle, now embodied extensively – but arguably not completely – in the European Charter of Fundamental Rights and Freedoms Article 41.⁴ Nevertheless it is clear that the various aspects of the principle expressed in the Charter (the obligation to provide impartial and fair treatment within a reasonable period of time; the right to be heard; the right of access to one's own file; the obligation to give reasons; the right to receive compensation for harm caused by the Community; and the right to write and receive a reply from Community institutions in a selected Treaty language) can scarcely be guaranteed unless in the first instance measures of control exist within the administration itself. Apart from anything else, in the light of this principle it must be in the interest of the administration itself to exercise supervisory control in order to ensure that avoidable claims for compensation do not emerge. To the extent that the principle of good administration in its current normative expression could also be said to reflect even broader concepts of

³ Just how the principle of democracy should be fully realised in the context of the EU is a major topic in its own right and cannot be further discussed here. I would note, however, that it may be neither appropriate nor possible for its realisation in the EU simply to emulate a national system (even a federal one). The nature of the EU is special and thus requires a special response here.

⁴ Aspects of the principle in fact already exist in the EC Treaty: the obligation to give reasons (EC Art. 253), the right to compensation for harm caused by the Community (EC Art. 288) and the right to write to Community institutions and receive a reply in any chosen Treaty language (EC Art. 21(3)); in addition there is an existing provision on the right to be heard in the field of state aids (EC Art. 88(2)).

institutional rationality, coherence and consistency, effective systems and techniques of control through different levels of the administration are essential. Institutional coherence and rationality demand accountability, and effective supervision is the key to ensuring this.

From the perspective of institutional economics, principal–agent theory also necessarily implies the need for sufficient structures and means of supervision and control within administrative systems so as to ensure that administrative agents fulfil the tasks given to them and that they act within the constraints upon them.⁵ The key issue for lawyers and others concerned with institutional design is how such supervision and control are to be achieved in normative, institutional and practical terms. As well, an appropriate balance between supervisory needs (and the goals and values just mentioned which trigger them) and operational effectiveness must be achieved. Here again, the underlying idea of the principal–agent construction is informative: excessive control and supervision may imply (at the extreme) that the principal might as well itself perform the agent's functions (in the context of public institutions or any large organization, an absurd proposition). Nevertheless, the question must always be asked whether the level and nature of supervision are themselves efficient.

Classically, the supervision of public administration can be seen to fall into three broad types: administrative, political and judicial. This division reflects the accepted separation of powers in the modern democratic state under the rule of law. Although there would not seem to be a completely standardized European legal conception of these elements, one can certainly view *administrative* supervision of administrative action as serving a particular function within the system of separation of powers. Although it is a community operating under the rule of law, the classical separation of powers is, as already noted, not present in the EU in the form known in the individual Member States. For analytical purposes it is useful even in the EU context, nevertheless, to distinguish between different forms of supervision along such classical lines. In doing so, it is possible to identify an allocation of (supervisory) powers which is not far removed from the classical tripartite separation in a normal state. This chapter does not,

⁵ On the application of principal–agent theory in the public sector see G.C. Rowe, 'Comment: Servants of the People – Constitutions and States from a Principal–Agent Perspective', in S. Voigt and H.-J. Wagener (eds.), *Constitutions, Markets and Law – Recent Experiences in Transition Economies* (Edward Elgar, 2002) 287–316. As to the application of the principle in the EU context see G.C. Rowe, 'Tools for the Control of Political and Administrative Agents – Impact Assessment and Administrative Governance in the European Union', in H.C.H. Hofmann and Alexander H. Türk, *EU Administrative Governance* (Edward Elgar, 2006) 448–511.

however, address supervision of the administration through the courts or through political organs but focuses on what can be called ‘internal’ supervision. One can note in addition that some – possibly considerable – measure of supervision is achieved through certain actors outside public institutions, for example the press, lobby groups, NGOs and the like (including an informed public generally), but this also is not the focus of this chapter. (One should note, though, that public information or comment may sometimes be the trigger for internal and other institutionalized supervisory measures.) This chapter is concerned with ‘administrative’ supervision, that is, supervision and control of public administrative action within the EU public administration itself (as a whole) and will avoid as far as possible entering upon issues involving mainly judicial, political or non-institutionalized forms of control.

The boundaries between political, administrative and judicial supervision are themselves, though, not entirely crisp. There are various categorization problems. One is that internal appellate structures can in fact entail a mixture of both administrative and judicial elements. This is an issue familiar to US independent regulatory agencies which have their own administrative judges where appellate elements do not take the form of a separate administrative judiciary of the kind found in civil law systems. In the US such judges are within the respective agency administration itself (subject to certain institutional and procedural safeguards of independence and to avoid infringing principles derived from the separation of powers). The European Commission has proposed that the internal organization of decision-making regulatory agencies of the EU ‘should include boards of appeal to provide an initial control function while remaining independent of decisions’.⁶ Functionally this would appear to be little different from the American methodology – and is almost certainly borrowed from it – without, though, the well developed US constitutional framework within which exercise of judicial functions is constrained.⁷

Certain measures of administrative control are in effect preparatory to judicial measures, so that again one area runs into the other. As well, judicial remedies for administrative errors can themselves be implemented in effect only by the administration itself. Similarly, measures which can be characterized as being of a political nature, such as parliamentary questions or ombudsman’s investigations and reports, are also ultimately

⁶ European Commission, Communication: ‘The Operating Framework for the European Regulatory Agencies’, COM(2002)718 final (11.12.2002) 12.

⁷ The Commission has stated that ‘[t]hese appeal boards would act as an initial internal control, independent of the decisions taken by the agency director, prior to any referral to the Court of First Instance’, COM(2002)718, *supra* note 6, p.10.

ineffectual without consequential action within the public administration; the latter in particular, therefore, could arguably be relegated to the category of administrative supervision.⁸ In terms of procedures, such a categorisation is plausible but, as the European Ombudsman, like the Petitions Committee, derives its impact primarily through the parliamentary framework, it is equally plausible to categorize it as part of political supervision. Such a lack of absolutely clear boundaries as regards the categories of supervisory action is particularly acute in regard to bodies which enjoy a certain autonomy from the three classical loci of public power. These bodies may in certain – particularly formal – ways be attached to or have characteristics of one or other of the main legislative, judicial or administrative organs. Nevertheless, the level of their autonomy and separation in fact invites separate treatment, in particular because their powers and functions may even overlap with one another. Special purpose bodies within the framework of the EU which could be so regarded are:

- the hearing officers,
- the inspectors,
- the European Court of Auditors,
- OLAF,
- the Petitions Committee,
- the European Ombudsman, and
- the Data Protection Supervisor.

Such special purpose supervisory bodies, important though they are, also lie outside the scope of this present chapter, although passing reference will be made to them at some points.

B. LEGAL FOUNDATIONS OF ADMINISTRATIVE SUPERVISION IN THE EUROPEAN UNION

As indicated above, the EU – or certainly the EC – is a ‘community acting under law’.⁹ It follows from this that the exclusively available forms of

⁸ In that sense it is perhaps no linguistic accident that the Commission speaks of subjecting European regulatory agencies to the ‘administrative supervision of the European Ombudsman’, COM(2002)718, *supra* note 6, p.14.

⁹ See Case C-15/00, ‘EIB’ [2003] ECR I-7281, at para. 75: ‘une communauté de droit’; W. Hallstein, *Die Europäische Gemeinschaft* (Düsseldorf/Wien, Econ, 1979) 31 ff.; M. Zuleeg, *Die Europäische Gemeinschaft als Rechtsgemeinschaft*, *NJW* 1994, 545 f.; see also J. Schwarze, *Europäisches Verwaltungsrecht* (Baden-

administrative and other acts are those of, based upon or contained within the law.¹⁰ The organs of the Community and its actions are, therefore, subject to control as to whether they conform with the EC Treaty and other laws binding upon them.¹¹ It is only through effective control that not only their legitimacy and credibility but also their operational effectiveness, coherence, functionality, rationality, predictability and efficiency can be guaranteed.¹² The Community, though, is not merely a community under law but also an administrative community.¹³ The express goal of the EC Treaty of establishing ‘an area without internal frontiers [EC Article 14(2)], through the strengthening of economic and social cohesion and through the establishment of economic and monetary union’ (EU Article 2 (-1)), itself necessarily implies a community system of – supra- or at least transnational – administration.

The execution of Community law is basically the job of the Member States. In formal(istic) terms, the institutional system of the Community is of a dualist kind, the implementation of Community law being essentially entrusted to the Member States and Community organs being restricted mainly to legislative action.¹⁴ This itself results from the starting point of the ECT which embodies the principle of conferred powers. The Community may implement Community law ‘directly’¹⁵ through its own organs only in so far as the EC Treaty expressly so provides. Where this does occur, the Community not only passes the necessary laws but also implements them itself and supervises their enforcement.¹⁶ Whether

Baden: Nomos 2005 2nd edition) 6, who described the European Community as an ‘administrative law community’ (*Verwaltungsrechtsgemeinschaft*’).

¹⁰ E. Klein, ‘Der Einfluß des Europäischen Gemeinschaftsrechts auf das Verwaltungsrecht der Mitgliedstaaten’, in *Der Staat* 33 (1994) 39–57.

¹¹ Case C–294/83, ‘*Les Verts*’ v. *European Parliament* [1986] ECR 1339, at para. 23.

¹² As to the significance of the enforcement of the rule of law for European integration see S. Magiera, *DÖV* 1998, 173 ff.

¹³ See, e.g., A. David, *Inspektionen im Europäischen Verwaltungsrecht* (Duncker & Humblot, 2003) 22 with further references.

¹⁴ See, e.g., Schwarze, *supra* note 9, p.25; S. Kadelbach, ‘Verwaltungskontrollen im Mehrebenen-System der Europäischen Gemeinschaft’, in E. Schmidt-Aßmann and W. Hoffmann-Riem (eds), *Verwaltungskontrolle* (Baden-Baden: Nomos, 2001) 205 at p.206.

¹⁵ The concepts of ‘direct’ and ‘indirect’ administrative implementation derive from H.-W. Rengeling, *Rechtsgrundsätze beim Verwaltungsvollzug des europäischen Gemeinschaftsrechts* (Baden-Baden: Nomos, 1977) (*‘direkter’* and *‘indirekter Verwaltungsvollzug’*).

¹⁶ See, e.g., on the legislative and supervisory competence in competition law T. Oppermann, *Europarecht* (3rd edition, Beck, 2005), marginal note 925 ff.

central Community organs operate under this power or not (in the latter case leaving the implementation in principle to the Member States) their actions are subject to the generally accepted tenet of the procedural and organizational autonomy of the Member States, but even without this, the principle of subsidiarity found in primary Community law (EC Article 5) would lead to the same result. This principle was expressly emphasized in Declaration 43 relating to the Protocol on the Application of the Principles of Subsidiarity and Proportionality annexed to the Final Act of the Treaty of Amsterdam. However, very significantly for the present discussion, that declaration contained an important proviso that '[t]his shall not affect the supervisory, monitoring and implementing powers of the Community institutions as provided under [Articles 202¹⁷ and 211¹⁸ EC (Articles 16, 17 EU(L))]'.¹⁹

The provisions of Articles 202 and 211 EC clearly grant the Council (more narrowly) and the Commission (comprehensively) supervisory powers. Clearly then, the central Community administration – typically the Commission – has a power of supervision. Not only is there a general power, but specific supervisory powers are granted in individual legislative

¹⁷ EC Art. 202:

'To ensure that the objectives set out in this Treaty are attained the Council shall, in accordance with the provisions of this Treaty:

- ensure coordination of the general economic policies of the Member States;
- have power to take decisions;
- confer on the Commission, in the acts which the Council adopts, powers for the implementation of the rules which the Council lays down. The Council may impose certain requirements in respect of the exercise of these powers. The Council may also reserve the right, in specific cases, to exercise directly implementing powers itself. The procedures referred to above must be consonant with principles and rules to be laid down in advance by the Council, acting unanimously on a proposal from the Commission and after obtaining the Opinion of the European Parliament.'

¹⁸ EC Art. 211:

'In order to ensure the proper functioning and development of the common market, the Commission shall:

- ensure that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied;
- formulate recommendations or deliver opinions on matters dealt with in this Treaty, if it expressly so provides or if the Commission considers it necessary;
- have its own power of decision and participate in the shaping of measures taken by the Council and by the European Parliament in the manner provided for in this Treaty;
- exercise the powers conferred on it by the Council for the implementation of the rules laid down by the latter.'

¹⁹ OJ 1997 C 340. See also Kadelbach, *supra* note 14, p.207.

measures.²⁰ Such powers must, logically and functionally, extend both to all levels of the central Community administration itself and to the administration of Community law and policy in and through the Member States. Measures of administrative supervision can, in fact, be found in virtually every sector of Community law (and can perhaps best be characterized as being part of administrative procedural law).²¹ However, for the reason just mentioned there is no sole, overarching and centralised Community supervision. It is therefore necessary to establish the various and dispersed forms which supervision can take and, in particular, which Community organs and other institutions are entrusted with which elements of this task.

It must, however, be emphasised that the administrative supervision of Community administrative action does not consist just of control by central Community officials or institutions over both the central Community administration itself and the administrations of the Member States. The Member States invariably have within their own administrative arms systems of administrative supervision of administrative action undertaken by their own officials. These include, of course, the supervision of administrative action taken under Community law and for the achievement of Community policy, as well as administrative action taken wholly within and under national law. In other words there are at least two bundles of supervisory administrative actors and actions for Community purposes: that of the central Community administration over itself and over the Member States, and that within the administration of each Member State in regard to its own activity under EU law. Each Member State has its own rules and practices concerning supervision, even supervision in regard to EU-based decision-making, which cannot be encompassed within this chapter. In the present context, though, this should not be forgotten, especially since it is often the quality and effect of 'local' control which will affect the degree and form of intervention of Community supervision (whether administrative, judicial or political) in regard to Member State administrative action. If supervision within the Member States functions effectively there will generally be less need for central Community control; the more poorly it operates, the greater will be the need for central Community intervention.

²⁰ See, e.g., Council Regulation EC/58/2003 laying down the statute for executive agencies to be entrusted with certain tasks in the management of Community programmes [2003] OJ L 11/1-8 (19.12.2002) Art. 20 (grant of power to Commission to supervise the implementation of Community programmes by executive agencies).

²¹ David, *supra* note 13, p.20.

Even in cases where internal supervision within Member States operates well, though, certain forms of Community supervision will still be necessary and desirable. As will be seen below, not all methodologies and measures of supervision imply errors or deviations on the part of supervised authorities which require correction or even criticism. The function of supervision is much wider than this. It encompasses the structuring of decision-making processes in advance, the provision of information and interpretive assistance generally, and guidance and advice in specific cases. It may also involve measures which are in fact designed to ensure particular outcomes or at least outcomes within a particular range of possibilities.

As well, there is an important choice as to whether the supervision should address merely the strict conformity of supervised administrative action with legal rules or whether it should also encompass an examination of the (legal) policy reflected in the administrative action taken. Even where it might be claimed that decision-making has no discretionary component, every assessment of supposedly objective legal criteria and their fulfilment involves a certain range of judgement. The question here is whether administrative supervision should extend to the examination of the evaluative judgement operating in such cases and of the substance of discretionary decisions, as well as of the purely legal limits of discretionary action. It ought to be noted here that, in the context of judicial supervision of administrative action, the *courts* may well adopt a policy of judicial restraint and consequently not interfere with the substance of the exercise of official discretion. Such a policy, which restricts judicial supervision to the question whether the requirements of relevance and reasonableness have been met, may be completely unobjectionable in relation to their role in the supervision of administrative action. Arguably however, 'internal' administrative supervision of administrative action has a fundamentally different character and occupies a substantially different place in the overall scheme of supervision and control. In that sense, judicial supervision can be regarded as occurring 'outside', whereas administrative supervision occurs within the administration itself. Even as regards the latter, it may be asked whether there should be a distinction between, for example, the supervision exercised by the Commission over its own officials on the central level and the supervision it may exercise over Member States' administrations. In other words, one has to ask what exactly is the reach of the 'supervisory, monitoring and implementing powers of the Community institutions' *vis-à-vis* the Member States.

Within this overall scene-setting it is also important – and conceptually compelling and useful – to distinguish between the *internal* supervision of the administration itself (here taken as a whole including the

administrations of the Member States) and the *external* enforcement of (administrative) law *vis-à-vis* private subjects or actors. Within national legal systems this distinction is usually relatively clear, sometimes involving even quite distinct remedial structures, competences and legal bases. On the level of the EU, though, the two functions seem not (always) to be so clearly distinguished, and may sometimes share a common legal basis and have a common institutional mechanism. For example, OLAF conducts investigations for purposes both of internal supervision and of external enforcement. Sometimes these relate to the same subject matter (and therefore benefit functionally from being linked with one another), but not invariably. The reason for the lack of a sharp distinction in the EU may perhaps be attributed to the fact that the Union administration is not – or has not always been – understood in the terms of classical national systems of public administration (even though functionally it may now be appropriate to do so, at least in part). Whatever the explanation, in my view the distinction ought to be observed in the EU context as there is justifiably both a functional and conceptual difference between the administration itself (the ‘public sector’) on the one hand and those who are subject to or affected by administrative law and the regulatory measures carried out by administrative actors on the other hand (the ‘private sector’). This is indeed the very basis for the distinction between ‘vertical’ and ‘horizontal’ effect used in many contexts (for example, in fundamental rights protection) and should thus not be lightly neglected. In this discussion then, as far as possible, attention will be given only to ‘supervisory’ elements and not to ‘enforcement’ aspects, all the while admitting that sometimes the same authorities, legal norms, procedures, remedies and protections are applicable to both.

Thus one can adopt the terminological distinction between ‘direct control’ and ‘control over implementation’.²² This distinction is related to the functions being carried out. *Direct control* refers to the enforcement actions of the Community or Member State authorities *vis-à-vis* Union citizens directly. This has also been called ‘first-line-control’.²³ This arises typically in connection with economic regulatory measures, the question addressed being whether participants in the market are

²² See A. David, ‘Inspektionen als Instrument der Vollzugskontrolle im Europäischen Verwaltungsverbund’, in E. Schmidt-Abmann and B. Schöndorf-Haubold (eds.), *Der Europäische Verwaltungsverbund* (Mohr Siebeck, 2005) 237 at p.239 f, who distinguishes between *Direktkontrolle* and *Vollzugskontrolle*.

²³ See B. Schöndorf-Haubold, ‘Gemeinsame Europäische Verwaltung – die Strukturfonds der EG’, in Schmidt-Abmann and Schöndorf-Haubold, *supra* note 22, 25 at p.44.

acting in accordance with Community law. It may also refer to issues such as whether the recipient of a grant from the EU has applied money received for the purposes for which it was given. The Commission in such cases is, however, still ultimately responsible for the administration of Community finances (EC Article 274 (1)), and so must exercise a 'second-line control'.²⁴ This involves then the *control over implementation* which involves the supervision of the application of the law by public authorities – and foremost those of the Member States – but not directly over whether citizens as such obey it. In the latter context, local inspections by the Commission can, for example, be employed to establish whether the Member States satisfactorily perform the administrative tasks allocated to them through Community law. Where the specific task of the national administration is that of monitoring whether market actors behave in accordance with legal requirements, this latter form of supervision by the Commission amounts to a form of 'control of control' or 'enforcement of enforcement'. This is sometimes referred to as 'state supervision' or as 'compound' or 'composite supervision'.²⁵ 'Administrative supervision' as used in this chapter is thus the control or monitoring of a particular object, *viz.* the administration of the Member States (or elements and aspects of, or actions taken by, it) with the aim of securing the fulfilment of their legally laid down administrative tasks.²⁶ This also extends to ensuring that Member States erect a suitable supervisory apparatus within their own administration and is not restricted to the one-off check on Member State control in the individual case.²⁷

Lastly by way of introduction it is important to note here that administrative supervision of administrative action is merely one part of the control or supervisory activity of the Community as a whole. The administrative supervision of Member States, conducted by the Commission, in regard to the *legislative* implementation of Community law (above all, the implementation of directives) is supervision of a different kind, and not the subject of the present discussion. That said, it should be observed that, although the subject matter of such Commission activity is legislative action (or lack of it) by the Member States, the Commission's task itself

²⁴ *Ibid.*

²⁵ David, *supra* note 22, p.240.

²⁶ See E. Schmidt-Aßmann, 'Einleitung – Der Europäische Verwaltungsbund und die Rolle des Europäischen Verwaltungsrechts', in Schmidt-Aßmann and Schöndorf-Haubold, *supra* note 22, who distinguishes between, on the one hand, 'state supervision' (*Staatsaufsicht*) and 'administrative control' (*Verwaltungskontrolle*) and, on the other hand, 'economic oversight' (*Wirtschaftsaufsicht*).

²⁷ Schöndorf-Haubold, *supra* note 23.

should be characterized as administrative. Rather oddly perhaps, one can then speak of administrative supervision of legislative action, which as such is not treated here.

C. BASIC CHARACTERISTICS OF ADMINISTRATIVE SUPERVISION

Exactly what supervision is and just where the boundary between it and decision-making procedures generally is to be located is not absolutely clear. As used here, ‘supervision’ is conceived of as a range of measures and actions extending from the structuring and steering of decision-making in advance through to measures for correction of error after the event. As noted below, however, one should distinguish between purely normatively established frameworks of decision-making (whether as regards structure or decision-making criteria) as found typically in legislation and supervisory interventions by a competent control authority as such. As regards the latter – genuine supervision – there are both structural and methodological aspects to be noted. Supervision can display different *modes*, have diverse levels in the *intensity* of intervention, may be based on varying *standards* or criteria, and employ a range of legal and administrative *instruments*.

1. Structural Considerations

The key question to be answered here is how various actors within the administrative complex of a state or of an institution such as the EU are to be held to account. A central but not exclusive answer to this is the availability of some formal, systematic, binding and enforceable structures, procedures, measures and instruments for achieving accountability. Ensuring such accountability may be partly achievable or at least supported by structures and measures of an informal and/or non-binding kind (such as reliance on whistle-blowers). This alone, however, will never suffice. Network structures may under certain circumstances ensure accountability, but it is likely that there will always remain ‘network gaps’ (as Carol Harlow has called them). As well, network or matrix structures are in fact still composed of a system or collection of links along or through which supervision and control must take place, just as in hierarchical and similar, non-networked structures. Supervision, to be effective in *ensuring* accountability (rather than merely suggesting it), cannot, however, take place abstractly. It must involve specific steps and measures adopted by one organ or authority *vis-à-vis* another in order to hold the other to account

in accordance with certain principles, standards or goals. This does indeed imply some sort of hierarchy or authority.

Administrative supervision does in fact usually rely on a *hierarchical* structure or on some comparable structure of authority. In the usual context of state administration, even in classical federal systems, one can observe relatively clear hierarchies within which can be observed a *chain of command* and, usually, a parallel *chain of control*. A hierarchical chain of command is almost invariably apparent, certainly in a unitary system of government, but in federal systems it may be somewhat more obscure, or at least fragmentary. So, for example, in the German federal system – which has some similarities to the Community system – it is the *Länder* which are primarily responsible for the implementation even of federal law. This is not true in all federations (contrast the United States or Australia) but, where it is, the chain of command can be described as somewhat meandering or interrupted: the legislation may emerge from the central legislative body but most steps in its implementation will occur on a decentralised level, organised around or within the decentralised administrative framework. For practical purposes then – and somewhat paradoxically – the chain of command within the administrative implementation of the law begins only on the decentralised level. The concern here, though, is not with the chain of command as such or, if so, only to the extent that it might relate to the chain of control.

In the EU context the chain of command and the chain of control are, in the rarer cases of implementation wholly within the central administration – the Commission – not surprisingly more or less coterminous. In the more usual case of a separation between central legislative activity and Member State implementation, a separation of the chain of command and the chain of control may emerge. Certainly, where Community law takes the form of a directive, the chain of command will begin within the Member State simply because it is Member State legislation which provides the basis for the administrative action which follows, and it will only be the administrative officials of the respective Member State who put the ensuing national law into effect. Even in the case of Community regulations, the precept of Member State administrative implementation points usually to the chain of command having its origin within the administration of the Member State. Thus the chain of command commonly begins on and is practically confined to the Member State level. The chain of control, though, can be seen as extending through both levels. This is because of the legal framework referred to above: the Commission retains the power and obligation to ensure that Community law is implemented properly by the Member States' administrations. Whether it can reasonably be said, though, that the chain of control really 'begins' on the central level may be open to

question, given that (as already canvassed) central control is usually in the nature of the 'control of the control' or 'supervision of the supervision'. Perhaps in that light one should think more in terms of a double-layered system of supervision: that the Member States' administrations each have, as part of either unitary or federal states, their own internal system and hierarchy of administrative supervision. The supervision undertaken by the Commission could be seen on this view as, at best, a super-added element, over and above that of the Member States.

This is one possible perspective, but in my view it is inadequate. I would suggest that the chain of control is in fact more in the nature of an integrated or unbroken one. It is rather artificial to see it breaking or changing somewhere along its length, even though admittedly there is a change to a different level or a different organisational unit, and even to different mechanisms and degrees of control. Such a shift can occur even in unitary national systems, for example with regard to the supervision of municipal or semi-autonomous governmental authorities, and yet one can still speak of integrated systems of control and law. As well, as will be seen, some supervisory action by the Commission occurs jointly with officials from either the Member State being supervised or from (an)other Member State(s); and some supervisory action within Member States can involve the participation of the Commission or other Member States. If the view be accepted, then, that supervision in the EU is not dualistic, there is arguably, among other things, a somewhat curious result: Whereas the chain of command in relation to specific administrative decisions and action could be said to begin typically on the Member State level, the chain of control begins, so to speak, higher up. In some sense then, the chain of control might arguably be perceived as making a greater contribution to the establishment of an integrated system of administration than does the chain of command; certainly it makes no less such contribution.

The preceding discussion admittedly still largely reflects a view of supervision as being essentially related to hierarchical relations or structures. In the EU, however, such a hierarchical perception is inadequate. Many aspects of EU administration have cooperative, networked or shared elements, and sometimes what might normally be understood as a specific hierarchical relationship (for example, the Commission above the Member States) may in fact sometimes operate in the reverse direction, a little like the model of alternating current (AC) in electricity.²⁸ Controls upon or

²⁸ Schmidt-Abmann, *supra* note 26, refers here to the useful concept in German federal and municipal legalism, the so-called *Gegenstromprinzip* (p.21). It would be no doubt too flippant to translate this as 'what goes up, also comes down', but the idea is in fact not so very far removed from this, *viz.* that of a concept of reciprocity

special procedures applicable to the activity of the Commission relating to subsidiarity assessment might be seen as reflecting such a reversal of direction. It is in any case increasingly clear that a conventionally hierarchical view of supervision cannot be maintained in the EU.²⁹ On the other hand, a complete absence of hierarchical authority makes the idea of supervision – and certainly control – rather difficult to contemplate. One may instead need to distinguish in some way, then, between (conventional) ‘uni-vectorial’ hierarchies, which extend in a continuous line from ‘top’ to ‘bottom’, and (novel) ‘multi-vectorial’ and variable hierarchies – and in particular micro-hierarchies – which do not necessarily stretch across the whole ‘vertical’ range of an administrative system but which apply only at specific points for very specific purposes or in specific directions. Schmidt-Aßmann correctly refers to administrative controls in the EU as having a pluralistic composition.³⁰

In a related but somewhat different sense, Schöndorf-Haubold speaks of an interplay of *cooperative* and *supervisory* mechanisms³¹ which, understood literally, might be seen as a distinction between consensual and coercive means of achieving particular institutional goals. If so, ‘cooperative’ measures would be in effect voluntary and thus make it difficult to speak of real ‘control’ in the conventional sense. The boundaries, though, are fluid, partly because there may often be an interaction between coercive and negotiative measures.³² In any case, almost all action by public officials and arms of the administration, even as a result of court orders, has something of a consensual character where the real use of force almost never occurs. Indeed, were this regularly required, the system would almost invariably collapse. In that sense I do not wish to overstate the limits of cooperation as such (it is clearly not identical with self-regulation in the private sector), but the distinction made by Schöndorf-Haubold may suggest the need for caution when choosing methodologies of control. It should also be noted here that sometimes so-called ‘cooperative’ supervision in fact takes the form of the participation of officials from both the Commission and third Member States in the conduct of inspections in a particular Member State. In such a case the administrations of the third Member States are ‘cooperating’ to

or complementarity. In German legal thinking this functions as an underlying principle which finds its expression and realisation in specific mechanisms of a normative or procedural kind.

²⁹ See Schmidt-Aßmann, *supra* note 26, p.20.

³⁰ ‘*Pluralistisches Gefüge*’: *ibid.*

³¹ Schöndorf-Haubold, *supra* note 23, p.45.

³² Schmidt-Aßmann, *supra* note 26, p.21.

achieve the conduct of control measures which are in themselves essentially coercive *vis-à-vis* the particular Member State which is subject to the inspection at a given time. In that sense one needs to note that the meaning of ‘cooperative’ supervision or administration can imply rather different things. The inverse of the last-mentioned form of cooperative supervision is what may be called *accompanimental* control, where Commission officials participate in control measures undertaken within a Member State by administrative officials of that state; here, though, this relates almost exclusively to actions in the context of enforcement *vis-à-vis* third parties (in the field of agriculture, fisheries and food) and, as such, is not the subject of the present chapter.³³ It can, however, be noted that in the reverse situation where *Commission* officials conduct such enforcement action in their own right in a given Member State, administrative officials of that state can – sometimes must – for their part participate.³⁴

Having introduced the idea of a separation of the chain of command and control in relation to the same set or group of institutional actors, one needs to note here a further type of separation. In some contexts there will be a separation of the two chains, but one involving different (sets of) institutions. There are situations – also found in national systems of all kinds – where one set of institutions is concerned with command and, at least in part, another set concerned (solely) with control. This is most obvious where there are separate (usually independent) authorities exercising solely supervisory functions. These include, for example, public auditors (in the EU, the European Court of Auditors), prosecutorial investigative agencies (in the EU, OLAF) or public complaints authorities (in the EU, the EP Petitions Committee and the European Ombudsman). In these cases the supervisory institution may – usually will – have a competence to examine the whole chain of command itself from top to bottom. These are all examples of what I have described above as ‘special purpose’ supervisory authorities, that is, where supervision of the administration has to varying degrees been moved outside the administration itself. Community law sometimes requires Member States to establish their own autonomous or semi-autonomous bodies for supervisory purposes, a move described by Schmidt-Aßmann as the establishment of ‘reflexive control structures’.³⁵

³³ David, *supra* note 22, p.242.

³⁴ David, *supra* note 22, p.243.

³⁵ Schmidt-Aßmann, *supra* note 26, p.22. Schmidt-Aßmann also notes that one particular example of this is the use of public scrutiny to achieve supervisory goals, e.g. by ensuring the public’s right to information.

2. Methodological Considerations

(a) Generally

There are two – perhaps three – broadly different modes of supervision, depending upon when a control measure is applied to any given administrative act. Control measures can clearly be applied either before or after administrative action occurs. It might be argued that control also sometimes occurs *during* administrative action. This is certainly a plausible – even insightful – perception, but in my view one which runs into some analytical difficulties. Supervision of administrative action is, in essence, the control over *decisions* or *actions* (of various kinds). Every supervisory intervention, even if apparently in the midst of an ongoing process, can really only be in regard to a decision (or a group of decisions) or a specific action taken or about to be taken, and in that sense must occur either before or after the action subject to the control. An arguable exception to this can be found in supervision of an institutional/structural kind where control takes the form of the membership of or representation within the determining authority or the administrative process under scrutiny. On the other hand, the existence even of such a structural element is strictly speaking anterior in the sense that it necessarily occurs before the action itself, even if its effect seems to be apparent only during the event. For these reasons I still prefer to see supervisory methods as being either *anticipatory* or *subsequent* to the action concerned. If focussed upon potential or actual administrative error or illegality they can be seen then as either *preventive* or *corrective* (perhaps *repressive*), but anticipatory action in particular can (as noted above) be said to have a broader reach by providing contextual information and guidance (perhaps ultimately with a view to avoiding error or at least achieving conformity with given policies and precepts). I admit, however, that the idea of ongoing or parallel supervision ought not to be lightly dismissed and may be useful for some analytical purposes.

There is one further general point to be made about the distinction between anticipatory and subsequent supervisory measures. Whether supervision is seen as being of the one kind or the other may depend on whether the focus is on an individual measure adopted by the supervised authority or on the supervision of the authority as a whole. A measure taken to quash or reverse an individual decision seems clearly subsequent in the sense just mentioned. However, many further consequential measures – perhaps changing the powers of the supervised authority, imposing additional duties or issuing decisional guidelines – may be both an expression of *ex post* supervision (as a reaction to a measure already taken) and a form of *ex ante* control (because it will affect other decisions made in the future).

(b) Anticipatory supervision

Anticipatory measures of supervision and control display various forms having various intensities. Some measures are, paradoxically, in fact taken by the supervised authority itself. In order to characterise these as being ‘supervisory’ (as distinct from just internal and in effect ‘self-regulatory’), it is necessary for them to have some external component. Especially, they need to be taken with regard to an external supervisor and be the result of an obligation. Measures taken by a *supervised* authority itself can consist of, for example:

- the making, submission and/or publication of declarations, plans or programmes in advance of taking specific action, and include draft budgetary plans;³⁶ the Commission proposes to improve such processes by promoting the use of so-called ‘operational level management declarations’;³⁷
- the making of notifications that administrative action is (about) to be taken; or
- specifically meeting an obligation or legal duty to provide information in advance of action.

The characterisation of ‘own’ measures as supervisory perhaps becomes clearer when set against anticipatory supervisory or control measures available to or taken by a *supervisory* authority. These may include structural, organizational, procedural or normative determinants, such as:

- structural choices as to the organisation of administrative implementation generally, for example the allocation of responsibility to Member State administrations or to a central EU authority, and in the latter case, whether, for example, to create a specialised agency or other body; and where such an (independent) agency is established, further anticipatory supervision can be achieved through the establishment of specific internal institutional structures of the body;³⁸

³⁶ See, e.g., Council Regulation EC/58/2003, *supra* note 20, Art. 13(2) (annual submission of draft operating budget of executive agency by its Steering Committee to the Commission).

³⁷ European Commission, Action Plan Towards an Integrated Internal Control Framework, COM(2006) 9 (17.1.2006), Action 5.

³⁸ See, e.g., Council Regulation EC/58/2003, *supra* note 20, Art. 7 (executive agencies to be managed by a Steering Committee and a director).

- such structural choices may include establishing *internal* (hierarchical) control arrangements within sub-units or semi-autonomous authorities, including anticipatory forms of *internal* supervision;³⁹
- control over the resources and the number and type of personnel (staff positions) available to the supervised body;
- control over the appointment of personnel by the supervised body either by specifying qualifications, by requiring and providing representation on selection committees, by the (partial) conduct of the appointments process by a body independent of the supervised authority (e.g. in the EU, EPSO), or through the requirement of obtaining the approval of the supervisory body in respect of a given appointment;
- a statutory or at least formal, general (i.e. prior) allocation of internal supervisory responsibility to a specified official of the supervised authority;⁴⁰
- limits on the powers of delegation within the supervised authority;⁴¹
- requiring a particular composition of committees or decision-making units;
- establishing a general or particular disqualification of the supervised authority as such or of given officials from making a particular type or class of decisions;
- the separation of functions of specified officials;⁴²
- the requirement to follow certain procedures in the process leading up to a decision (e.g. the Commission's own impact assessment procedures, or the requirement of environmental impact assessment imposed on Member States under European law, admittedly in the latter case as a result of national legislative implementation of European directives);⁴³

³⁹ See, e.g., Council Regulation EC/58/2003, *supra* note 20, Art. 13(1) (submission annually of a draft operating budget of an executive agency by its director to its Steering Committee); Council Regulation EC/1605/2002 on the financial regulation applicable to the general budget of the European Communities (25.6.2002) Art. 60 (responsibilities of the authorising officer).

⁴⁰ See, e.g., Council Regulation EC/58/2003, *supra* note 20, Art. 20(2) (the function of the internal auditor of an executive agency to be performed by the internal auditor of the Commission).

⁴¹ See, e.g., Council Regulation EC/1605/2002, *supra* note 39, Art. 59(3) (limits on the delegation of the powers of the authorising officer).

⁴² See, e.g., Council Regulation EC/1605/2002, *supra* note 39, Art. 58 (segregation of the duties of the authorising officer and the accounting officer).

⁴³ European Commission, Communication on Impact Assessment COM(2002)276 final (5.6.2002). See also, Rowe (2006), *supra* note 6, pp.448–511.

- the requirement to consult the public, specifically affected parties or particular public authorities in advance of a decision;
- the establishment of implementing or interpretive rules – a type of general (and perhaps not binding) guidance – in regard to the legislative basis and framework of the supervised authority's actions;⁴⁴
- the setting of standards;⁴⁵
- the issue of other orders, directions, instructions, or (binding) guidance in relation to the exercise of a decision-making power either generally or in a particular case; the choice of such a methodology (and of any of those in the rest of this list below) depends on the extent to which the supervised authority is intended to exercise a certain independence or autonomy;⁴⁶
- the requirement – or at least possibility – of obtaining, and the issue of, an advance opinion from a superior official or authority in respect of individual matters awaiting decision (e.g. Commission opinions on state aids);⁴⁷
- an instruction to make a decision or class of decisions in a certain way (e.g., prior Commission determinations on border charges or

⁴⁴ See Kadelbach, *supra* note 14, p.224, who notes that there are many such measures of the Commission under various labels (communications, frameworks, etc.) which do not fall within the list of instruments set out in EC Art. 249 and the legality of which has therefore been called into question by some authors. Kadelbach rightly concludes that these measures are, however, fully covered by the powers given to the Commission under Art. 211 EC. Commission Regulation EC/2729/2000 of 14 December 2000, laying down detailed implementing rules on controls in the wine sector [2000] OJ L 316/16-29; Commission Decision C(2001) 476 of 2 March 2001: 'Guidelines on the principles, criteria and indicative scales to be applied by the Commission departments in determining financial corrections under Article 39(3) of Regulation (EC) No 1260/1999'.

⁴⁵ Council Regulation EC/1605/2002, *supra* note 39, Title II. (There may be a fuzzy boundary here with the Open Method of Coordination which might also be characterised, at least in part, as an anticipatory form of administrative supervision.)

⁴⁶ The Commission has said in respect of controls over European regulatory agencies that there is no question 'of giving the Commission powers of legal supervision, i.e. empowering it to issue instructions to regulatory agencies': COM(2002)718, *supra* note 6, p.12. This seems, at least as regards the expression 'legal supervision', clearly overstated, in particular because the document goes on to speak of the need to reconcile 'the agencies' autonomy with the Commission's ultimate responsibility' (*ibid.*). Nevertheless, one can assume that the sense is that the Commission does not see its role as intervening in the exercise of policy-based discretions within regulatory agencies.

⁴⁷ See Kadelbach, *supra* note 14, pp.224, 242.

exceptions under Community customs law to be applied in individual cases in the Member State administration);⁴⁸

- the requirement to obtain and the granting of agreement or approval (concurrence) of the supervisory body (or some other body or person) for a particular decision, in effect the making of a decision by the supervisory body itself in advance with binding effect on the supervised authority (e.g. the role of the ‘authorising officer’ in respect of financial control, or the requirement of notifying the Commission of an intended decision to permit the production of hydro fluorocarbons);⁴⁹ and
- even the removal of certain types of matters for decision (or of all matters under certain circumstances) completely from the supervised authority to the supervisory authority or (on its instruction) to some other authority.

(c) Subsequent supervision

Supervision occurring after a decision or action – even an intermediate or preliminary one – can be characterised as a corrective, and perhaps repressive, mode of control. This too can be of various forms with varying intensities. One of the major determinants regarding both form and intensity is whether the supervision is directed to *acts of commission or omission*. It ought to be observed that, strictly speaking, if directed to an act of omission, a control measure does not *follow* anything at all. While on one level this is no doubt correct, on another level – if one imports the idea of an act which ought to have been done (perhaps within a given time) – the control can notionally still be subsequent. Acts of both commission and omission can be subject to either *criticism* or *condemnation*. However, it is only an act of commission, that is, an administrative action, decision or other measure actually undertaken, which can be subject to *quashing* (that is, cancellation, annulment, avoidance or nullification). The legal and practical effect of criticism or condemnation upon a measure actually taken might in itself be rather open-ended, perhaps leaving open the possibility of self-correction or even of doing nothing.⁵⁰ Quashing on the other hand

⁴⁸ *Ibid*, p.226; cf. the figure in German administrative law, the *Weisung*, in effect an instruction to decide in a certain way.

⁴⁹ Council Regulation EC/1605/2002, *supra* note 39, Art. 59; Kadelbach, *supra* note 14, p.226; see also, e.g., Council Regulation EC/58/2003, *supra* note 20, Art. 9(4) (Steering Committee of an executive agency to obtain Commission agreement before accepting gifts, etc.).

⁵⁰ Whether this is so depends on many factors. For example the effect is likely to be more immediate and inescapable when the measure is taken as part of the control over personnel within a single level administration (e.g. the Commission)

would seem to nullify the measure without, however, necessarily filling its place with something else. Beyond merely quashing an act of commission, an *order or direction to reverse* a decision or to *substitute* another decision or measure for the one taken – or the reversal or substitution by the supervisory body itself, if it has that power – would involve a still more intense form of supervisory intervention. An equivalently intensive intervention concerning an act of omission might be a specific *order to act*, especially one directing an official to do so in a certain way. As noted above, this may also be regarded as a form of anticipatory supervision but, where it in effect leads to the removal or substitution of a measure already taken, it obviously can have the quality of being *ex post*.

An even more interventionist form of corrective control would be the *removal* of the matter concerned for determination or action elsewhere (usually to a higher level within the hierarchy) – also possibly an *ex ante* measure of control, but only if no administrative action has as yet taken place. Where action has already been taken, an act removing the power to take such action would be essentially of only prospective effect (and therefore amount only to anticipatory control). An even more intensive form of control or supervision would involve not just the removal of an individual matter into the hands of another administrative actor but rather the *comprehensive and possibly permanent cancellation, removal or transfer* of a field of competence to another actor or branch. Such forms of supervisory intervention could apply both to acts of commission (especially where self-correction, reversal or substitution had not taken place in consequence of criticism, condemnation or quashing) and acts of omission (especially where the criticism or condemnation of inaction had not borne fruit). To amount genuinely to subsequent supervision such intervention would, though, need to be accompanied by at least some form of annulment, if only by implication.

As in the case of anticipatory supervision, some measures can be undertaken just by the *supervised* authority itself, typically though as the result of some general or particular obligation, either of legislative origin or arising from a (usually anticipatory) internal administrative instruction:

- reporting to the supervisory authority either regularly and generally or in regard to matters of a particular kind on decisions and other administrative action already taken, typically under an obligation

than where it occurs in respect of a more distant level in a complex hierarchy or network arrangement.

to report, often to make an annual report;⁵¹ the Commission proposes to improve such processes by promoting the use of so-called ‘synthesis reports’;⁵²

- conducting an internal audit of measures taken, typically coupled with (the obligation of) making a report (raising additional questions as to, for example, who is to conduct such an audit, when and how, with what powers, etc.) (for example, the role of the ‘accounting officer’ within Community financial regulation);⁵³
- the provision of information of various kinds, even if not characterisable narrowly as reporting on specific actions or decisions; and
- the sufferance of inspections carried out by the supervisory authority or a body acting on its behalf.

Equally, subsequent supervisory measures will typically be taken by the *supervisory* authority:

- the control authority may (have a right to) demand information in connection with either specific matters or generally; it can be noted that this is not exactly the same thing as a general (statutory) obligation on the supervised body to provide information;
- the actual imposition of specific duties to inform, report or conduct an audit (for example in the field of Community subsidies);⁵⁴
- the conduct of inspections *in situ* – ‘on-the-spot checks’ – or other forms of direct intervention in local administrative action;⁵⁵
- the exercise of other ‘observational’ or monitoring competences;⁵⁶
- the conduct by the supervisory authority itself of an audit or other *ex post* check of financial accounts and dealings; such checks are a standard part of Community agricultural law (so-called

⁵¹ See, e.g., Council Regulation EC/58/2003, *supra* note 20, Art. 9(7) (annual report by the Steering Committee of an executive agency to the Commission).

⁵² COM(2006) 9, *supra* note 37, Action 5.

⁵³ Council Regulation EC/1605/2002, *supra* note 39, Art. 61.

⁵⁴ See Kadelbach, *supra* note 14, p.241.

⁵⁵ Kadelbach, *supra* note 14, pp.225–226; such inspections may be associated with either matters of enforcement against third parties or the supervision of Member State administrative action; see generally David, *supra* note 13. E.g., Council Regulation EC/1290/2005 of 21 June 2005 on the financing of the common agricultural policy [2005] OJ L 209/1-15 Art. 37(1), but one should note the limits imposed upon the Commission, specifically where national legislation reserves certain acts for nationally specified agents.

⁵⁶ Kadelbach, *supra* note 14, p.227.

‘clearance of accounts’ procedure for expenditure under the Guarantee Section; under the Guidance Section such control takes place in the context of multi-annual programmes);⁵⁷

- the imposition of post-audit penalties or financial adjustments (for example, in Community agricultural law, where the clearance of accounts reveals deficiencies in the functioning of the national system, the Commission initiates a so-called ‘conformity clearance’ procedure which can result in the *ad hoc* imposition of a financial correction on a Member State);⁵⁸
- the exercise of co-decisional or consent powers (even if this strictly occurs after the supervised authority has made its decision, such control may still be seen as anticipatory where the decision in question becomes effective only following the supervisory authority’s co-decision or consent);
- the issue of a confirmatory decision or declaration following the decision of the supervised authority;
- the conducting of a review of a decision within internal appellate structures (typically in regulatory agencies), usually as the result of either a claim from a party affected (which itself may be able to be pursued further through, for example, judicial review procedures) or as the result of an inquiry or finding of another supervisory body (e.g. the ombudsman);⁵⁹
- the issue of (negative or positive) orders, instructions or directions – or, more weakly, guidance or recommendations – to suspend, quash or modify a decision or other action taken or to substitute another decision (for example, in regard to unlawful state aids);⁶⁰ it should be noted here that there is a tension between such supervisory control

⁵⁷ E.g., Council Regulation EC/1290/2005, *supra* note 55, Art 30; R. Mögele, *Die Behandlung fehlerhafter Ausgaben im Finanzierungssystem der gemeinsamen Agrarpolitik* (Beck, 1997), pp.209 ff. See also Regulation EC/882/2004 of the Council and the European Parliament of 29 April 2004 on official controls to ensure the verification of compliance with feed and food law [2004] OJ L 191/1 Art. 45.

⁵⁸ E.g., Council Regulation EC/1290/2005, *supra* note 55, Art. 31.

⁵⁹ COM(2002)718, *supra* note 6, p.10: ‘Provision should be made in decision-making agencies’ internal organisation for boards of appeal to deal with any complaints by third parties arising from decisions they adopt’. Note the observation above comparing this with the role of administrative judges in US independent regulatory agencies.

⁶⁰ Kadelbach, *supra* note 14, p.224. See, e.g., Council Regulation EC/58/2003, *supra* note 20, Art. 22(3) (suspension, confirmation or order to modify decisions of executive agencies).

and the desire to achieve a certain regulatory independence for specialised agencies;⁶¹

- an action to modify the powers of or even close or abolish a supervised authority or agency; and
- initial (administrative) steps towards certain actions for annulment before the Community courts, criminal prosecutions or actions for damages under civil liability.

The last point in this list serves only to recall that certain supervisory measures, although essentially falling under judicial review or, more broadly, curial supervision nevertheless almost invariably involve preliminary steps within the public administration either to initiate the curial procedure concerned or to respond to its external initiation by, for example, a private complainant. Admittedly these measures really depart from the field of subsequent *administrative* supervision or control but the boundary may at least in some cases be fuzzy because administrative investigations and decision-making may be involved before the curial process gets underway. In addition, a supervisory authority will often have responsibilities which emerge from a court decision in such actions, so that the assumption of hermetically sealed categories of supervisory measures may be rather misleading.

(d) Some concluding observations on methodology

European law is familiar with supervisory instruments known to national law in the supervision of personnel, supervision of legality⁶² and budgetary supervision, even if on the central level such measures are relatively rudimentary because of the essentially single-layered nature of the central administration. These forms of supervision are used primarily by the Commission and numerous agencies. For example, the Commission's Code on Good Administrative Practice⁶³ (concerning the members of the

⁶¹ In its Communication concerning the operation of regulatory agencies the Commission plainly say that in regard to European regulatory agencies it does not seek to have the power to 'quash or to oblige [agencies] to withdraw certain individual decisions': COM(2002)718, *supra* note 6, p.12. This is clearly inconsistent with the power which the Commission is meant to have under Council Regulation EC/58/2003, Art. 22(3) (see preceding footnote) and which can be seen to reflect the ECJ's *Meroni* jurisprudence (Case 9/56, *Meroni v. High Authority* [1958] ECR 133 at p. 146, Case 10/56, *Meroni v. High Authority* [1958] ECR 157 at p. 168.

⁶² Council Regulation 2100/94 on plant variety rights; Art. 44, Council Regulation 40/94 on Community trade marks, Art. 118 (in both examples, giving the Commission power to require the annulment or alteration of unlawful acts).

⁶³ SEC(2004)1487.

Commission) illustrates a measure concerning the supervision of personnel within the central administration. Self-monitoring (often coupled, though, with reporting obligations) and internal controls are becoming increasingly important, even though the boundaries remain fuzzy.

Clearly some of the options for both anticipatory and subsequent supervision which are set out above are, for example, not available to a central EU control authority such as the Commission *vis-à-vis* the Member State. For example, the Commission has no control over the resources and the number and type of personnel available to branches of the Member States' administrations, and this restriction also usually applies to other structural determinants.⁶⁴ This is not unexpected; in classical federal systems, and even in some systems of control over municipal authorities, the central administration may not be capable of exercising such control. Certain other measures, for example, interpretive rulemaking may, on the other hand, be of particular importance in (anticipatorily) influencing decisions made in the Member State administrations. The lists above should not be understood as a conclusive presentation of the methodology available or actually employed in EU administration, but rather as an attempt to set out the arsenal of supervisory measures which abstractly could be considered, with two main purposes in mind: to sharpen the positive consideration given of the control framework which exists in the EU and to provide a stimulus for the more systematic structuring and selection of supervisory methods and choices, perhaps even with an eye to at least some standardisation.

A further general consideration is the distinction between supervision as such and the legislative/normative *framework* of supervision. The latter can be located, for example, in the granting of supervisory competences to a control authority; the establishment of legislative obligations or duties upon a supervised authority in relation to measures to be adopted *vis-à-vis* a supervisory body; the legislative determination of the institutional structure and hierarchy of organisations and sub-units; or the legislative specification of decision-making procedures and criteria. Some of these latter elements can also be simply characterised as the legal framework for

⁶⁴ Kadelbach, *supra* note 14, pp.223–224, subject to some narrow exceptions (see Kadelbach at 225) as considered by the ECJ in Case 359/92, *Germany v. Commission* [1994] ECR I–3681 (a legislative requirement in Directive 92/59/EEC on general product safety, Art. 5 that Member States 'establish or nominate authorities to monitor the compliance of products with the obligation to place only safe products on the market and arrange for such authorities to have the necessary powers to take the appropriate measures incumbent upon them' was itself lawful and could be enforced by action of the Commission).

decision-making and administrative action itself. Administrative supervision as such should better be conceived as the (specific) actions of supervisory agents – in exercise of the powers conferred upon them by such rules – to control the actions and decisions of sub-units or other authorities (below them) in accordance with the legal frameworks which constrain them. Administrative supervision is, in this sense, in itself administrative *action*, even if it sometimes involves the employment of quasi-legislative measures (e.g. circulars, guidelines or interpretive rules) by a supervisory authority *vis-à-vis* those bodies under its supervisory oversight.

The boundaries can, though, be fuzzy. For example, one might ask whether the making of *legislative* rules (that is, binding subordinate legislation) is a form of administrative supervision. In my view it is not, whereas *interpretive* (non-binding) rules do fall into the supervisory category, even though it may be the same body which is charged with both tasks. This distinction can be illustrated in the EU context by two elements of the regulation of genetically modified foodstuffs: the Commission has on the one hand a power to issue ‘recommendations’ concerning scientific aspects of information accompanying an application for approval and the preparation of an assessment report,⁶⁵ and on the other hand to make ‘detailed rules for implementing [Article 4]’ (following comitology requirements).⁶⁶

The same classification question can also arise in respect of procedures. Legislation often lays down requirements for the involvement of other authorities (as well as, in some cases, members of the public). Sometimes the ‘other’ authorities in fact include a body which itself exercises supervisory capacities over the decision-maker, as sometimes occurs with the Commission in EU administrative processes. The question I would pose here is whether such (merely) participatory involvement is in fact

⁶⁵ Council Regulation EC/258/97 of 27 January 1997 concerning novel foods and novel food ingredients [1997] OJ L 43/1-6, Art. 4(4). (One is entitled, I think, at this point to note the simply miserable quality of the legislative drafting of this Regulation. Article 4 alone, e.g., contains in the sequence of its paragraphs rules about: (1) the initiation of an approval application; (2) both the obligation to conduct an assessment following a procedure specified in another article (subpara. 1) and obligations on the Member State following the conduct of a particular part of that procedure; (3) the general notification to the Commission of responsible food assessment authorities in each Member State; (4) the obligation on the Commission to issue scientific recommendations; and (5) the requirement to follow comitology procedures (specified elsewhere) for making detailed rules. In other words, this Article alone deals with five separate regulatory subjects some of which are scattered across three or four other provisions, although they should all have been dealt with together.)

⁶⁶ Regulation EC/258/97, *supra* note 65, Art. 4(5).

characterisable as ‘supervisory’, or whether some additional (indeed coercive) element is required to be able to give it this classification. Again taking the context of the approval of genetically modified foodstuffs, a Member State administration to which an application for approval has been made must inform the Commission of this and provide it with a copy of the request; the Commission in its turn supplies a summary of the application to all Member States.⁶⁷ The subsequent report of the nominated ‘competent food assessment body’ is also supplied to all the Member States and the Commission and/or a Member State may make ‘comments or present a reasoned objection’.⁶⁸ These steps can legitimately be regarded as measures of *participation* in the decision-making process. It is true that where an objection is made by either the Commission or a Member State (or where the assessment authority requires an initial assessment⁶⁹) the decision to approve (‘authorization’) is then to be taken by the Commission (in accordance with comitology procedures). One could perhaps view this as the exercise of a supervisory competence, in the sense that the decision is removed from the competence of one body and passed to another (which has other supervisory competences as already noted). This is the conclusion reached by Kadelbach, who views this situation as an example of *coordinative* supervision.⁷⁰ The combined effect of the provisions is, no doubt, to coordinate the regulation of genetically modified foodstuffs throughout the EU. And, yes, some of this coordination is indeed achieved through supervisory measures (the Commission’s scientific recommendations under Article 4(4)). But, both the participatory elements and the transfer of competence to the Commission as decision-maker of last resort in case of conflict are in fact procedural elements laid down by the legislator, not measures which the administrative supervisory body has itself either established or even set in train. Indeed the Commission does not have the competence to set these procedures in train, unless one characterises the Commission’s objection to the approval of the foodstuff under consideration to be so construed; but that seems to me to draw too long a bow: the Commission is not presenting an objection to anything which the administration of the Member State has done or may do; rather it is (possibly along with other Member States) presenting a reasoned objection ‘to the marketing of the food . . . concerned’.

⁶⁷ *Ibid*, Arts. 4(1), 6(2) sub-para. 2.

⁶⁸ *Ibid*, Arts. 6(4) sub-para 1.

⁶⁹ *Ibid*, Art. 6(3) which determines, rather oddly, that an ‘initial assessment report’ shall make a decision, rather than that the assessment *authority* should do so.

⁷⁰ Kadelbach, *supra* note 14, p.228.

The more correct characterisation is, in my view, that – as a result of the legislative framework – the jurisdiction to make a certain decision shifts depending upon in essence objective surrounding circumstances. It is not the Commission here which removes the matter to itself in the exercise of a supervisory competence. Rather the legislator has foreordained such a relocation of competence under defined circumstances. In this example it seems to me difficult to maintain that the Commission is really controlling the decision-making or other action of the Member State administration as such. Without wanting to split hairs, I want to argue that these examples do illustrate the – admittedly fine – line to be drawn between the *allocation* of competences as such between authorities and the *supervision* of the exercise of competences once allocated.

Some forms of genuine *coordinative* supervision do, though, exist.⁷¹ One example has been given above: scientific recommendations of the Commission to Member State administrations, although these may not always necessarily have the purpose of resolving conflicts between Member States, especially as they are given in advance of specific applications for approvals (which will be the usual reason that such differences might emerge). Similarly, in the field of product safety, the Commission is required to issue guidelines for the management of RAPEX by the Commission and the Member States.⁷² These illustrations show, though, that coordinative supervision is in a sense a third, somewhat different, mode of supervision which may in itself be either anticipatory or subsequent (and therefore is to be located on a different vector from the other two modes). A further example of such supervision arises also in the field of product safety where the Commission can decide to require Member States to adopt certain product safety measures when *inter alia* there are differences of approach to the perceived risks between Member States.⁷³ Even though such a decision clearly may in effect resolve differences, the essential characterisation of it is as an anticipatory or subsequent control measure, requiring Member State administrations to take certain action (for example, ban the marketing of a product). This categorisation can again be seen as a case where a matter for decision is removed from the supervised authority to the supervisory authority and, as suggested above, therefore perhaps is not really an administrative supervisory measure. Here, though, I suggest it does indeed have

⁷¹ See generally, Kadelbach, *supra* note 14, pp.227–228.

⁷² Directive 2001/95/EC on general product safety [2002] OJ L 11/4-17 Art. 11(1) sub-para 3. RAPEX is the rapid alert system for dangerous consumer products.

⁷³ Directive 2001/95/EC, *supra* note 72, Art. 13(1).

the character of genuine administrative supervisory action because it is the Commission which decides whether to make a decision binding on the Member States. In contrast, in the preceding example of genetically modified foodstuffs it was the legislature which determined precisely in advance how the approval decision is to be taken: nothing was left to a supervisory authority.

3. Criteria and Standards Supervision

A further important element in considering supervisory administration is the criteria, standards or evaluation upon which supervisory intervention is based. This relates to the *goal of supervision* in specific instances (not to the broad purposes of supervision discussed above in the introduction). Here we can distinguish broadly between:

- control directed primarily to ensuring the *legality* of actions taken (typically *ultra vires* control) and
- control directed to ensuring the achievement of a particular *outcome* or at least the achievement of an outcome conforming with or reflecting certain policies and aims (aim and content control) or supervision of expediency.

These two are fundamentally different and their distinction is familiar in examining the appropriate level of intervention in judicial review. The underlying decentralised concept of administrative implementation (referred to already) is coordinated by a supervision of legality. The Member State remains, however, still fundamentally responsible for correcting the breach of the law;⁷⁴ the Commission is not entitled to interfere in the internal administrative procedures of the Member State administration.⁷⁵ The Member States enjoy here complete organisational autonomy.⁷⁶ What is lacking is, however, a central competence for directive supervision of Member State administrative organs, familiar in national systems. However, in secondary Community law there can be found various instruments which have a comparable effect.⁷⁷ Nevertheless, the classical hierarchical, *material* supervision ('content' control) as found in

⁷⁴ Case 217/89, *Compagnie Interagra SA v. Commission* [1982] ECR 2233 at p.2247.

⁷⁵ See Kadelbach, *supra* note 14, p.223.

⁷⁶ Cases 51-54/71, *International Fruit Company v. Produktschap voor Groenten en Fruit* [1971] ECR 1107 at p.1116.

⁷⁷ Kadelbach, *supra* note 14, p.229.

national systems is strictly not to be seen.⁷⁸ The only real exception to this arises where the Commission takes on the function of coordinating the actions of Member States' administrations, typically in resolving disputes or differences between them by exercising its own competences to make a decision.⁷⁹

The point has been made above that, while the idea of judicial restraint may often lead to restricting *judicial* supervision to the former standard of control, administrative supervision should arguably be subject to a different understanding. In particular, if the public administration is conceived of as a functional unit, where the existence of separate levels merely serves the aim of organisational rationality, there would seem to be no reason why 'internal' supervision should not encompass both standards. This is, though, a key question in the EU context: is the existence of separate levels of administrative responsibility in the EU merely a reflection of the need for organisational functionality, or does it reflect a fundamentally different purpose relating to a (generous) understanding of the autonomy of the Member States. The basic principle that the Member States are responsible for administrative implementation of Community law together with the principle of subsidiarity might lead one to prefer the latter, if one assumes that their purpose is to allow a substantial degree of freedom in the *content* of administrative action. If on the other hand their purpose is merely to allow degrees of freedom in the *methodology* of administrative implementation, one might reasonably conclude that administrative supervision should reach not only into the issue of decisional legality but also into that of its expediency.⁸⁰ This is an issue of major scope which can merely be flagged here but one which deserves further investigation. One thing though is clear: even if the question is open as regards EU supervision of Member States' administrative measures, both standards of supervision are clearly applicable within the central EU administration itself (that is, within the Commission) as well as within the administration of each Member State (except arguably where there is an instrumental fragmentation within federal systems).

⁷⁸ *Ibid.*

⁷⁹ See e.g. Directive 92/59/EEC on product safety, [1992] OJ L 228/24-32 Art. 9; Directive 90/220/EEC on genetically modified organisms, [1990] OJ L 117/15-27 Arts. 12, 13, 21.

⁸⁰ The distinction here between 'legality' and 'expediency' is the same as that found in the German terminological distinction between *Rechtmäßigkeit* and *Zweckmäßigkeit*.

D. THE CONTEXT OF ADMINISTRATIVE SUPERVISION IN THE EU

Against the background of the abstract features of administrative supervision and control sketched above, the key issue demanding investigation is that of the modes, levels and standards of supervision which apply specifically in the EU context. First, it needs to be noted that one is here confronted with a *fundamentally different setting* from that applicable in almost any given national framework, even within federal national frameworks. It was noted above that administrative supervision relies typically on hierarchical arrangements. Hierarchical arrangements are also present within the public administration of the EU, but they are neither simple nor exclusive. Administrative supervision in the EU has then to be divided into significantly different areas of focus and to take into account various multi-level, network and composite elements and their associated complexities:

- internal supervision on the central level, that is, supervision within the central administration and more specifically within the European Commission;
- supervision of European executive and regulatory agencies by central authorities;
- supervision by the central administration of administrative action – perhaps even of the administrations as such – of the Member States;⁸¹
- supervision internal to administrations of the Member States within fields of EU action;
- ‘inter-state’ supervision between Member States, that is supervision of administrative measures of one Member State by the administration of another Member State (for example, in the fields of bank, insurance and securities regulation);⁸²
- supervision within the administrative systems of *federal* Member States themselves;⁸³ and finally

⁸¹ See generally Kadelbach, *supra* note 14, pp.223–228.

⁸² See *ibid.*, p.230.

⁸³ This element contains a multitude of issues. Within a given federal system, e.g. the Federal Republic of Germany, there are intrinsic limits to the capacity of Federal authorities to supervise administrative action taken by the subsidiary units (e.g. the *Länder*). In regard to the non-fulfilment of obligations and duties within the EU, there arises the legal question of the extent of supervisory competence of EU authorities over the subsidiary federal administrations. Even without technical legal barriers to its exercise, the associated fragmentation of supervisory activity significantly increases the cost and burden for EU central authorities. In this

- supervision of *municipal* authorities within the Member States (to the extent that they are charged with the implementation of Community law).⁸⁴

Even the specification of these features does not provide us, however, with a complete picture, partly because the above list does not reveal the further dimensions of EU administration in the form of composite and networked procedures. As well, most fields of EU activity and of EC law have special forms and characteristics of administrative supervision. This is so much the case that in some respects it may be misleading to speak of a uniform law and practice of administrative supervision, even within the central EU administration. Despite this, one can establish certain common features or key characteristics which assist our understanding. Here I note:

- the collegial nature of the European Commission;
- a very strong emphasis on consensus in internal Commission decision-making;
- the lack of any real *institutional* – as distinct from staff – hierarchy within the Commission;
- the growing trend of the Commission towards the establishment of independent – or quasi-independent – administrative agencies (arguably more or less following the US model, although as yet lacking the powers characteristic of the American agencies);⁸⁵
- the formal responsibility of the Member States for the administrative implementation of EC law (referred to above);
- the lack of a clear or simple hierarchical relationship between the central EU administration and the administrations of the Member States; and
- the networked or integrated nature of much decision-making (for example through comitology procedures or transnational administrative acts).

Although not all these elements are directly concerned with administrative supervision as such, they can nevertheless have an important influence

regard it should be noted that EU(L) Art. 4(2) specifically refers to the status of the local self-administration as part of the national identity of the Member States.

⁸⁴ This is a particularly important issue and potentially problematic where municipal authorities have substantial autonomy within their own national systems, e.g. in Germany. Such autonomy creates certain limits on state authorities in their supervision of municipalities, often restricting them to the standard of legality and not permitting an evaluation of the expediency of decision-making.

⁸⁵ See, e.g. COM(2002)718, *supra* note 6.

on it. For example, the lack of a formal hierarchy in the Commission and the nature of the collegiate decision-making of the Commissioners themselves create a strong impetus towards consensus. Both elements, which are inter-related, seem to have the effect that the staff, or at least senior officials, in the Directorates-General arrive at their decisions and take action only after a considerable process of internal consultation. This may also reflect an administrative culture which acknowledges the multinational and multicultural make-up of the institution and a realisation that decision-making under such circumstances needs to rely on cooperation rather than authoritative determination. On the face of it, though, this may not appear to have much to do with supervision, but this would be an incorrect conclusion. As noted above, supervision includes both anticipatory and subsequent elements and especially the former may often have a non-determinative character, taking more the form of guidance. It is just this which characterises internal Commission decision-making. The collegiate and consensual character of administration leads to a very *substantial pre-eminence of anticipatory* supervision and control, both procedurally through the consultations within inter-service committees and working groups and instrumentally in the form of internal guidelines in the form of circulars or notes which typically emerge from the minutes of such consultative meetings. Additionally written guidance within the Commission takes the form of *vademecums* which themselves emerge from or consolidate such notes. (As well, delegations within the Commission – arguably not a form of supervision – are usually formalised through notes.) On the other hand, condemnations or orders reversing decisions already taken appear to be almost always oral and informal.

Admittedly, just where the boundary lies under such circumstances between supervision as such and decision-making frameworks and practice as such is not completely clear. The consensual character of decision-making and the strong anticipatory forms of supervision lead, as one might expect, to a very significantly reduced need for subsequent control. The fact that most decisions have been prepared subject to the involvement of, consultation with and in many cases agreement of all relevant decision-makers and responsible officers means that there is in fact relatively little room for either legal error or policy deviation.⁸⁶ Where, however, subsequent control is required, there emerges a strongly *informal character of corrective supervision*. Such internal subsequent supervision does in fact

⁸⁶ One should not, however, exaggerate this. Clearly the Commission's decisions are regularly subject to external supervision and correction by the Court, so that one can see that the decision-making processes as outlined here provide no guarantee of infallibility.

occur, but in effect only within an informal or personnel hierarchy, but not within an institutional hierarchy as such. This again reflects the collegiate and consensual nature of the institution. An important issue which emerges in the face of the heavy emphasis on anticipatory supervision is whether it does not lead to excessive delays and is not in itself needlessly costly and complicated. It is scarcely possible to provide an all-embracing answer to this. The working practice within the Commission has, though, simply emerged over time and seems not to have been subject to any systematic scrutiny in terms of its efficiency, despite a number of waves of reform directed at the administration of the Community as a whole.

The observations above concerning the Commission suggest that the central EU administration can be seen essentially as a single layer.⁸⁷ In this light, the ever-increasing number of European agencies might be seen as in effect adding a second layer. However given the specialised nature of the subject areas it would be better to conceive of them as satellite institutions. Their location within supervisory arrangements reflects this to the extent that there has largely been no standard methodology, except that the supervision of agencies seems to rely significantly on anticipatory structural elements – requirements, for example, concerning their membership and representation on their governing boards – rather than in the form of directions or guidance as to the nature of individual decision-making, in order to guarantee them as much independence as possible. Here, though, the policy of the Commission is not always clear or settled, and is in the process of development and improvement.

Within the Member States themselves, the nature of administrative supervision, even within fields of EU action, varies almost as much as there are different Member States. There is a major qualification to this, however, in that EC law sometimes requires the Member States to adopt certain forms and standards of administrative supervision within their own systems, without necessarily defining these in a detailed way. A classic example of such a requirement is the anticipatory procedural measure of conducting environmental impact assessment for a wide range of national administrative decisions and actions. Most of the methods of both *ex ante* and *ex post* supervision set out above are available, are in fact employed and can be effective means of control. In supervision between the central and Member States' administrations both anticipatory and subsequent (including corrective) supervision is clearly available and used; both though are usually *very formalised* (as shown by the illustrations from agriculture, foodstuffs, consumer safety, and state aids).

⁸⁷ See Kadelbach, *supra* note 14, p.210.

The lists of possible measures (above) were presented broadly in a sequence of ever-increasing intensity of intervention, although this is certainly not strictly so. Exactly which method more determinedly or seriously intervenes cannot be established in the abstract. More than this: which method is the more effective or better form of supervision cannot be stated in the abstract either. Indeed from the perspective of principal-agent theory the higher the level of (the need for) (direct) intervention, the arguably less effective or less productive is the reliance on an agent as such. The more the principal is required to engage in extensive measures of control and supervision, the less value there may be in leaving the task to an agent in the first place. This emphasises a simple – perhaps banal – point: there are limits to the benefits of control and supervision, and these are most obviously reached when the efficiency gains expected or desired from the activities of an agent are outweighed by the costs of supervision. Indeed even where the costs of control exceed the costs of lack of control – this is not the same as the loss caused by not using an agent in the first place – supervisory measures are inefficient. Nevertheless, if they serve equity goals as well, an additional justification may be present. As well, in the public sector, efficiency issues may be very dispersed, diffuse and complex. For example, if a lack of (sufficient) supervision leads to decision-making which lacks legitimacy within a democratic framework under the rule of law, the overall efficiency losses may quickly become very substantial. In the EU considerations of this kind, related to concerns about legitimacy and institutional coherence, extend also to the interaction of the Member States and of all associated actors with one another. Here there may often be a highly complicated balance which finds its expression in supervisory arrangements which otherwise might be regarded as excessive. In 2006 the Commission released an Action Plan Towards an Integrated Internal Control Framework⁸⁸ in order to improve and develop institutional arrangements in the area of supervision, in response to the so-called ‘Gap Assessment’.⁸⁹ This Plan relates largely to financial management but is, in my view, more widely relevant. Importantly, the Plan acknowledges that control requirements should be proportionate to the risks, recognising that control itself is not costless. It proposes that supervisory oversight concentrate on areas where illegality is more likely. Coupling both of these elements together, it might be preferable to couch the discussion in the language of the economics, especially in the understanding of expected value (or loss), noting that it is not merely a question of risk or even of likely

⁸⁸ COM(2006) 9, *supra* note 37.

⁸⁹ SEC(2005) 49.

illegality. More simply, it is not merely a question of probability. Rather, attention needs to be given to the interaction of both the probability (of illegality or other non-conformity) and the cost or extent of a breach or failing. A low probability of a breach having serious consequences may, in that sense, be less important within a supervisory framework than less serious breaches which are very likely to occur. Cost-benefit analysis of control measures themselves, as suggested in the Plan,⁹⁰ ought to be able to take such differences into account.

In general it can be said that, apart from the field of regulation of Community finances, there is a notable lack of system and standardisation in the administrative supervision of administrative action in the European Union. The Commission has in fact proposed the establishment of 'common guidelines per policy family',⁹¹ and these may indeed produce some measure of improvement. One might, though, legitimately ask whether primary emphasis should not instead be put on at least a structural and methodological uniformity across *all* policy areas. To some extent this indeed has also been proposed,⁹² but there is little to be seen which makes this more specific. Of the five key principles set out in the White Paper on Governance⁹³ the third refers to accountability, which implies the need for effective control, but this is made specific only in regard to regulatory agencies and even in that regard little is added as to what this should mean in practice or how it is proposed in fact to realise it.

E. CONCLUSIONS

The structures and mechanisms of supervision and control through the whole of the EU are numerous, rather unsystematic and diverse in character. In summary one can point to the following key issues which demand attention and further investigation when considering administrative supervision of administrative action in the EU and its further development.

First, there is a large potential for and arguably a substantial need for greater *standardisation* of control measures, structures and methodologies across all sectors, somewhat along the lines of what has already occurred in regard to strengthening financial accountability and control and in regard

⁹⁰ COM(2006) 9, *supra* note 37, Action 7 (in regard to audits at project level).

⁹¹ See COM(2006) 9, *supra* note 37, Action 16.

⁹² See *ibid.*, Action 2.

⁹³ European Commission, European Governance – A White Paper, COM(2001)428 final (25.07.2001).

to independent regulatory agencies. This would ensure a more systematic approach and greater transparency for all actors within the complex of European administration. It would be likely to increase predictability and simplification of procedures and reduce the costs of supervision generally. That some form of standardisation or at least systematisation is in fact possible has been demonstrated by recent academic research on both European administration generally and on supervision itself.⁹⁴ This work has shown that it is possible to detect recurring structures and methodologies in the EU administration. What seems needed, however, is that such work at least gradually induces a factual and normative systematisation in institutional arrangements and methodologies themselves.

Secondly, greater concern needs to be given to the cost-effectiveness and *efficiency of control measures* and in particular whether in some areas, especially within the central community administrative structures themselves, there may be an excessive level of anticipatory control without clearly improving the quality of decisions. More generally though, the cost-effectiveness or efficiency of supervisory measures needs itself to be the subject of detailed scrutiny; a type of benefit–cost analysis or supervisory ‘impact assessment’ may be needed to establish whether the level of supervision and control in any given sector is sufficient, insufficient or excessive. It should be emphasised again that simply ‘more’ supervision does not necessarily produce better administration, nor even better supervision. I am aware that the results of any such evaluation may in fact run counter to the proposal for standardisation made in the preceding paragraph. It needs to be acknowledged that standardisation of supervisory structures and measures may not always provide the most efficient result across diverse fields. Therefore, that proposal is made advisedly. What seems clear at present, though, is that the variation in supervisory methodologies and intensities across sectors seems not to have arisen on the basis of particularly systematic thinking about their efficiency or lack of it, so that it seems at least plausible that more uniformity and standardisation would provide a useful starting point.

Thirdly, attention needs to be given to administrative supervision of administrative measures which as such lie outside either central Community administration or the administration of individual Member States. *Cooperative or transnational administrative acts*, as key elements of the integrated nature of Community administration also require

⁹⁴ See here, e.g., Schmidt-Aßmann, *supra* note 26, pp. 21–22; M. Eekhoff, *Die Verbundaufsicht* (Tübingen: Mohr Siebeck, 2006) generally but in particular pp. 111–169; Albert J. Gil Ibanez, *The Administrative Supervision and Enforcement of EC Law – Powers, Procedures and Limits* (Hart, Oxford, 1999).

supervisory control, whether anticipatory or subsequent. Such forms of administrative action are becoming increasingly relied upon, and supervisory control needs to keep pace with these developments. Such supervision does not itself have to be either cooperative (although some such forms do already themselves exist, as noted above) or itself transnational; central supervision through the Commission is, in fact, likely to be the correct approach in such areas.

Fourthly, significant attention needs to be given to the distinction between the supervision of legality and the *supervision of the expediency of decisions* (their 'content'). In particular, critical examination is needed of when and where both are desirable and possible, and by what means. Existing systems of control of legality may, as noted earlier, reflect a more integrated chain of control than exists even for the chain of administrative command and management. On the other hand, where the chain of control of expediency is less complete and thoroughgoing, Member States' administrations remain more independent and 'self-regulatory'. This may be a proper reflection of the principle of subsidiarity but, in a highly complex and large body politic such as the European Union, this may permit significant policy divergence (thus possibly adversely affecting the achievement and weighting of goals set on the supranational level). Consideration is needed as to whether more *integrated* administrative control is required, not just to ensure the legality of administrative action but also to achieve greater functional harmony in regard to its policy content.

9. Judicial review of integrated administration in the EU

Alexander H. Türk

I. INTRODUCTION

The judicial architecture of the European Community was designed to follow the logic of a system of executive federalism.¹ Such a system would entrust the adoption of general and abstract rules to the Community, while the implementation and application of those rules would be the responsibility of the Member States. Private parties, while unable to challenge general Community rules, would be entitled to question their validity in the national courts in pursuance of an action brought against the national authorities which had applied them. On the other hand, where the Commission was, exceptionally, entrusted with the application of Community rules, individuals would be given direct access to the European Court to contest their validity, provided certain standing requirements were met.

The development of the Community legal order has, however, led to a more complex system of EU administrative governance.² This system of integrated administration is characterised by its intensive co-operation between administrative actors from the national and Community levels.³ The involvement of national administrations in the decision-making processes of the Community and the participation of Community actors in the implementation of Community law in the national legal systems have added to the difficulties which individuals already face within the current judicial architecture.

While the restrictive conditions of direct access for individuals to the

¹ For a description of the classic model of executive federalism, see, for example, K. Lenaerts, 'Some Reflections on the Separation of Powers in the European Community' (1991) 28 *CMLRev* 11 at 11 ff.; B. Dubey, 'Administration indirecte et fédéralisme d'exécution en Europe' [2003] *CDE* 87.

² See H. Hofmann and A. Türk (eds.), *EU Administrative Governance*, Edward Elgar Publishing (Cheltenham, 2006).

³ See H. Hofmann and A. Türk, 'The Development of Integrated Administration in the EU and its Consequences' (2007) 13(2) *European Law Journal* 253.

Community Courts to challenge Community acts of a general nature under Article 230(4) have been the subject of considerable scrutiny and criticism,⁴ other aspects of the Community's system of judicial review have received less attention, but have had an equally deleterious effect on an individual's right to an effective remedy as provided in Articles 6 and 13 of the Convention on Human Rights and Article 47 of the Charter of Fundamental Rights. This chapter aims to examine the difficulties individuals have to face within the Community's system of administrative governance in accessing the Community Courts, by discussing in turn the avenues of judicial review provided for in Articles 230, 234 and 288(2) of the EC Treaty.

II. ARTICLE 230 ECT

Article 230(4) EC constitutes the main avenue for private parties to challenge Community acts directly in the Community Courts.⁵ Under this provision, individuals can challenge decisions which are addressed to them and decisions addressed to a third party or adopted in the form of a regulation if they are of direct and individual concern to them. Even though the Court made it clear in *Codorniu*⁶ that the general application of an act is not a bar to Article 230(4), it is clear from the case law that private parties will only exceptionally be able to claim to be individually concerned by such acts.⁷ Under the *Plaumann*⁸ formula, individuals will be individually concerned only if the Community Courts consider them as sufficiently

⁴ See A. Arnall, 'Private Applicants and the Action for Annulment under Art. 173 of the EC Treaty' (1995) 32 *CMLRev* 7; A. Arnall, 'Private Applicants and the Action for Annulment since *Codorniu*' (2001) 38 *CMLRev* 7; P. Ragolle, 'Access to Justice for Private Applicants in the Community Legal Order: Recent (R)evolutions' [2003] *ELRev* 90; J. A. Usher 'Direct and Individual Concern – an Effective Remedy or a Conventional Solution?' (2003) *ELRev* 575; E. Berry and S. Boyes, 'Access to Justice in the Community Courts: a Limited Right?' [2005] *Civil Justice Quarterly* 224; P. Craig, *EU Administrative Law*, OUP (Oxford, 2006), sect. 10.4; T. Hartley, *The Foundations of European Community Law*, 6th edition, OUP (Oxford, 2007), sect. 12; A. Ward, *Judicial Review and the Rights of Private Parties in EU Law*, 2nd edition, OUP (Oxford, 2007), sect. 6 F; A. Türk, *Judicial Review in EU Law*, Edward Elgar Publishing (Cheltenham, 2009), pp. 45–100.

⁵ An application lies with the Court of First Instance and on appeal with the Court of Justice.

⁶ Case C-309/89, *Codorniu v. Council* [1994] ECR I-1853.

⁷ See A. Türk, *The Concept of Legislation in European Community Law*, Kluwer (The Hague, 2006), at p. 173.

⁸ Case 25/62, *Plaumann v. Commission* [1963] ECR 95.

distinguished from other persons. The Court has shown a more generous approach in cases in which Community law grants individuals participation rights in administrative procedures which culminate in the adoption of acts by Community institutions.⁹ All the same, for the vast majority of Community acts of general application which are applied by the national authorities individual concern will constitute an ‘insurmountable barrier’¹⁰ to direct access.

Difficulties arise, however, not only from the restrictive interpretation of the notion of individual concern for acts of general application. The integrated nature of administrative governance in the Community often leads to situations where adverse effects for individuals result from the input which national authorities make in the adoption of implementing acts by Community institutions, here mainly the Commission, and the contributions which Community institutions, again mainly the Commission, make in the adoption of acts by national authorities. Such effects can often not be entirely removed by simply challenging the final decision, but may require a judicial remedy against the actions of the participating administrative actors in the adoption of the act. Obstacles to judicial review under Article 230 create here the concept of reviewable acts and the requirement of direct concern.

1. The Concept of Reviewable Act¹¹

a) Definition

Article 230(1) states that the Court shall review ‘acts . . . other than recommendations and opinions’. According to a standard formula, the Court has held that ‘the only measures against which an action for annulment may be brought under Article 230 EC are those which have binding legal effects capable of affecting the interests of the applicant by bringing about a distinct change in his legal position’.¹² On the one hand, this

⁹ See Case T-339/00, *Bactria v. Commission* [2002] ECR II-2287, para. 51. See also Ward, *supra* note 4, pp. 301–305; A. Türk, *supra* note 4, pp. 76–86.

¹⁰ A. Barav, ‘Direct and Individual Concern: An Insurmountable Barrier to the Admissibility of Individual Appeal to the EEC Court’ (1974) 11 *CML Rev* 191.

¹¹ See Arnall (2001), *supra* note 4, at pp. 14–23; Hartley, *supra* note 4, chapter 11; A. Türk, *supra* note 4, pp. 12–40.

¹² Case T-369/03, *Arizona Chemical and Others v. Commission* [2005] ECR II-5839, at para. 56. While the Court uses this formula usually also in cases brought by Member States (see Case C-163/06P *Finland v. Commission*, [2007] ECR I-5127, at para. 40), the CFI has recently questioned this approach in Case T-233/04 *Netherlands v. Commission*, judgment of 20 April 2008, when it stated in

makes it clear, as the Court already pointed out in *ERTA*, that such a definition comprises ‘all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects’.¹³ Such a concept is therefore considerably wider than that laid down in Article 249, and thus ‘conclusions’ by the Member States adopted in Council for negotiations concerning an international agreement,¹⁴ a letter written by Commission staff,¹⁵ and even an oral decision can be reviewable acts.¹⁶ On the other hand, the requirement that the measure must affect the applicant’s ‘legal position’ constitutes a considerable hurdle of access to the European Court. The individual might have an interest in challenging the Commission’s refusal to initiate a procedure, in which the national administrations would participate during an in-depth investigation. Also, a private party might want to have a measure which constituted merely a contribution to the final decision reviewed. In both cases, the act in issue affects the applicant’s interest, but it is more doubtful whether it has an impact on his legal position.

b) Initiation of an administrative procedure

Where the Commission refuses to initiate a procedure in which the Member States, mainly through a committee set up at Community level, have to be consulted, the applicant is deprived of an in-depth examination of its complaint. In *DuPont*¹⁷ the CFI had to assess whether the rejection by the Commission of the applicants’ request to open an investigation into the withdrawal of the benefit of the general tariff preference system for PET film originating in India constituted a reviewable act. Under the system of generalised tariff preferences laid down in Council Regulation 3281/94,¹⁸ the Member States or certain third parties can bring to the Commission’s attention information which warrants a temporary withdrawal of the preferences granted.

para. 37 that a Member State as privileged applicant need not prove ‘that an act of the Commission which it is contesting produces legal effects with regard to that Member State in order for its action to be admissible’. The ruling of the CFI in Case T-233/04 is currently under appeal in Case C-279/08.

¹³ Case 22/70, *Commission v. Council* [1971] ECR 263, at para. 42.

¹⁴ *Ibid.*

¹⁵ See Case T-84/97, *BEUC v. Commission* [1998] ECR II-795, at para. 48; Case T-113/00, *DuPont and others v. Commission* [2002] ECR II-3681, at para. 45.

¹⁶ See Joined Cases 316/82 and 40/83, *Kohler v. Court of Auditors* [1984] ECR 641, at paras. 9–13; Case T-3/93, *Air France v. Commission* [1994] ECR II-121, at paras. 57–59.

¹⁷ Case T-113/00, *DuPont and others v. Commission* [2002] ECR II-3681.

¹⁸ [1994] OJ L 354/9.

The Commission is obliged to communicate the information immediately to the Member States which may then initiate consultations in the Generalised Preferences Committee. The CFI stated that '[a] third party demonstrating an interest in a temporary withdrawal measure is, accordingly, entitled to expect that the Commission will examine the information supplied to it in order to ascertain whether that information falls within one of the abovementioned cases and, if it does, that the Commission will forward it to the Member States'.¹⁹ The limited right which the third party has would be denied if the Commission could refuse to act on the information provided. The CFI considered the Commission's letter in which it rejected the applicants' complaint as a reviewable act, as the letter 'can be read only as giving the Commission's definitive reply to the information received by it . . . and as bringing to a close, in its first stage, a procedure which might otherwise have led to the initiation of consultations . . . and, consequently, to the investigation requested by the applicants'.²⁰ The Commission's definitive rejection without examination of the information submitted by the applicants was therefore held to have altered their legal position.²¹ On the other hand, in the absence of any express or implied procedural guarantees provided for in Community law,²² a refusal to adopt an act of general application by the Community administration cannot constitute a reviewable act.²³

c) Contributions by national authorities or the Commission during the administrative procedure

aa) Administrative procedure at EC level Where the Commission conducts an administrative procedure which involves several stages before the institution arrives at a final decision, the Court would consider an act as reviewable 'only if it is a measure definitively laying down the position of the Commission or the Council in the conclusion of that procedure, and not a provisional measure intended to pave the way for the

¹⁹ Case T-113/00, *DuPont and others v. Commission* [2002] ECR II-3681, at para. 51.

²⁰ *Ibid.*, at para. 54.

²¹ *Ibid.*, at para. 55.

²² See Case T-13/99, *Pfizer Animal Health v. Council* [2002] ECR II-3305, at paras. 101-102.

²³ Case T-369/03, *Arizona Chemical and Others v. Commission* [2005] ECR II-5839, upheld on appeal in Case C-150/06 P, *Arizona Chemical and Others v. Commission*, [2007] ECR I-39*. Cf. Case T-120/96, *Lilly Industries v. Commission* [1998] ECR II-2571, at para. 53.

final decision'.²⁴ Consequently, intermediate steps in competition,²⁵ anti-dumping²⁶ or staff cases²⁷ cannot be subject to annulment proceedings in the European Court. Consequently, a Commission proposal to a comitology committee could not be considered a reviewable act.²⁸ Further, in *Pfizer*²⁹ the CFI held that the referral [sic] by the Commission to the European Agency for the Evaluation of Medicinal Products (EMA) under Article 30 of Directive 2001/83³⁰ because of divergences between the summaries of product characteristics (SPCs) for Lopid did not amount to a reviewable act, as it merely 'sets a consultative procedure in motion and does not in itself entail any harmonisation of the Lopid SPCs'.³¹

Similar considerations apply in cases where national authorities, represented in a committee at Community level or on their own, contribute to the administrative procedure at EC level. The CFI in *Olivieri*³² rejected as inadmissible an action brought against the revised opinion of the Committee for Proprietary Medicinal Products (CPMP). The CFI argued that the revised opinion was 'an intermediate measure whose purpose is to prepare for the marketing authorisation decision'³³ taken by the Commission. The opinion was merely a preparatory measure 'which does not definitively lay down the Commission's position'³⁴ and was therefore not reviewable. This makes it clear that the opinion of a comitology

²⁴ Case 60/81, *IBM v. Commission* [1981] ECR 2639, at para. 10.

²⁵ See also Joined Cases T-10/92 R etc., *Cementeries CBR and others v. Commission* [1992] ECR II-1571, at paras. 47-48 for a statement of objections; Case C-282/95 P, *Guérin automobiles v. Commission* [1997] ECR I-1503, at para. 36, for an Article 6 letter.

²⁶ Case C-156/87, *Gestetner Holdings v. Council and Commission* [1990] ECR I-719, at para. 8, concerning the rejection of a proposed undertaking. See also Joined Cases C-133/87 and C-150/87, *Nashua Corporation v. Commission and Council* [1990] ECR I-719, at para. 9.

²⁷ Case 78/63, *Huber v. Commission* [1964] ECR 367; Case 11/64, *Weighardt v. Commission* [1965] ECR 285, at p. 298; Case 346/87, *Bossi v. Commission* [1989] ECR 303, at para. 24; Joined Cases T-32/89 and T-39/89, *Marcopoulos v. Court of Justice* [1990] ECR II-281, at para. 22.

²⁸ Case T-369/03, *Arizona Chemical and others v. Commission* [2005] ECR II-5839, at para. 65. See also Case T-454/05R, *Sumitomo Chemical and Another v. Commission* [2006] ECR II-31.

²⁹ Case T-123/03, *Pfizer v. Commission* [2004] ECR II-1631.

³⁰ OJ (2001) L 311/67.

³¹ *Ibid.*, at para. 32.

³² Case T-326/99, *Olivieri v. Commission and European Agency for the Evaluation of Medicinal Products* [2003] ECR II-6053.

³³ *Ibid.*, at para. 53.

³⁴ *Ibid.*, at para. 53.

committee in an administrative procedure at Community level will not be considered a reviewable act.³⁵

Reference should also be made to the Court's judgment in *Emerald Meats*.³⁶ In this case the Commission had decided on the extent to which applications for import licences for frozen meat could be accepted for the years 1990 and 1991. Under the existing rules it was for the national authorities to receive applications and to draw up lists of those eligible and the quantities to be taken into account. Contrary to the applicants' assertion, the Court found that the Commission was 'neither under a duty nor indeed empowered to check the correctness of the lists or information notified to it by the Member States' authorities and that, since it is responsible only for determining the extent to which applications admitted by the national authorities may be accepted, the Commission itself does not allocate or reallocate the quantities thus determined of the persons entitled and, in particular does not have the power to substitute itself for the national authorities for the purposes of the issue of import licences'.³⁷ The decisions of the national authorities could therefore be reviewed only in the national courts.³⁸

Finally, a Community measure will not be considered as reviewable act, where the Community institution merely takes notice of a decision producing legal effects in the Community legal order by a national authority without having any discretion in the matter.³⁹

bb) Administrative procedure at national level Also contributions by the Commission to administrative or judicial proceedings at national level are frequently considered as not reviewable. In *Van Parys*⁴⁰ the CFI had the opportunity to decide whether a measure adopted by the Commission in a procedure which ended with a final decision taken by a Member State authority could be a reviewable act. The CFI found that only the competent national authority was entitled under Article 6(2) of Regulation 1442/93⁴¹ to determine the quantity of bananas to be allocated to each operator. A measure by which the Commission reduced the quantity

³⁵ Case 25/70, *Köster* [1970] ECR 1161, at paras. 10 and 12.

³⁶ Joined Cases C-106/90, C-317/90 and C-129/91, *Emerald Meats v. Commission* [1993] ECR I-209.

³⁷ *Ibid.*, at para. 38.

³⁸ *Ibid.*, at para. 40.

³⁹ See Case C-208/03, *Le Pen v. EP* [2005] ECR I-6051, in which the EP took notice of the French government's declaration that Jean-Marie Le Pen was barred from holding office as an MEP.

⁴⁰ Case T-160/98, *Van Parys and Another v. Commission* [2002] ECR II-233.

⁴¹ OJ (1993) L 142/6.

of bananas marketed by the applicants was therefore ‘no more than an intermediary measure forming part of the preparatory work leading to determination, by the national authorities, of the quantity referred to in the second paragraph of Article 6 of Regulation No 1442/93’.⁴² The CFI interpreted the reduction by the Commission of the applicants’ reference quantity as amounting to ‘no more than a proposal’⁴³ which could be modified by the competent national authority.

Likewise, the Court has made it clear that mere opinions which merely provide the applicant with information do not produce legal effects. In *Italy v. Commission*,⁴⁴ the Commission had informed the Italian State Agency for Intervention in Agricultural Markets of its position on the application of the Community rules on aid for the production of soya beans. The Court considered the Commission’s message as mere opinion without legal effects, as ‘the application of Community provisions on aid for soya bean production is a matter for the national agencies appointed for that purpose and none of the provisions of the aforesaid regulations adopted in this field confers on the Commission power to adopt decisions on their interpretation; the Commission merely has the possibility, which is always open to it, of expressing an opinion which is not binding on the national authorities’.⁴⁵ Similarly, in *Sucrimex and Westzucker v. Commission*⁴⁶ the Court found that the application of EC provisions on export refunds was a matter for the national authorities. Consequently, when the Commission informed the national authority that there were no grounds for paying the refund in issue, this could not be considered as a reviewable act. On the other hand, a legally binding instruction by the Commission to a Member State constitutes a reviewable act.⁴⁷

In *Tillack*,⁴⁸ OLAF forwarded information which contained the results of its internal investigation concerning the leak of Commission and

⁴² Case T-160/98, *Van Parys and Another v. Commission* [2002] ECR II-233, at para. 64.

⁴³ *Ibid.*, at para. 66.

⁴⁴ Case 151/88, *Italy v. Commission* [1989] ECR 1255.

⁴⁵ *Ibid.*, at para. 22. See also Case C-308/95, *Netherlands v. Commission* [1999] ECR I6513, at paras. 27–29; Case T-234/04, *Netherlands v. Commission*, [2007] ECR II-4589, at para. 61; Case C-163/06, P *Finland v. Commission* [2007] ECR I-5127, at paras. 40–41; Cases T-393/06 R I, T-393/06 R II and T-393/06 R III, *Makhteshim-Agan Holding BV and Others v. Commission* [2007] ECR II-32*, at para. 40.

⁴⁶ Case 133/79, *Sucrimex and Westzucker v. Commission* [1980] ECR 1299.

⁴⁷ See Case C-46/03, *UK v. Commission* [2005] ECR I-10167, at para. 24.

⁴⁸ Case C-521/04 P(R), *Tillack v. Commission* [2005] ECR I-3103.

OLAF documents implicating the applicant, a reporter, in the payment of money to the Belgian authorities to obtain those documents. As a result the Belgian authorities opened an investigation for breach of professional secrecy, searched the applicant's home and seized numerous documents in his possession. The Court found that the transmission by OLAF was not a reviewable act, as it was not intended 'to have binding legal effects on those to whom it is addressed'.⁴⁹

And in *Philip Morris*⁵⁰ the CFI ruled that two decisions by the Commission to commence legal proceedings against the applicant before a federal court in the USA could not be considered as reviewable acts. The CFI found that the commencement of legal proceedings was an indispensable step for obtaining a judgment, but did not in itself modify the legal position of the applicants. Such a modification would only result from the final judgment given by the court seized.⁵¹

It is also debatable to what extent Commission guidelines, some of which, in particular in the field of state aid,⁵² are of great significance for national authorities, can be reviewed. The Court⁵³ has confirmed the Commission's competence to adopt such guidelines, as 'such measures reflect the Commission's desire to publish directions on the approach it intends to follow'.⁵⁴ The Court finds that 'the adoption of such guidelines by the Commission is an instance of the exercise of its discretion and requires only a self-imposed limitation of that power when considering the aids to which the guidelines apply, in accordance with the principle of

⁴⁹ *Ibid.*, at para. 31. See also Case T-193/04, *Tillack v. Commission* [2005] ECR II-3995 and Case T-309/03, *Grau v. Commission* [2006] ECR II-1173.

⁵⁰ Joined Cases T-377/00, T-379/00, T-380/00, T-260/01 and T-272/01, *Philip Morris and Others v. Commission* [2003] ECR II-1, at paras. 79, 97 and 99. This judgment was upheld on appeal in Case C-131/03P, *Reynolds Tobacco and Others v. Commission* [2006] ECR I-7795.

⁵¹ *Ibid.*, at para. 79. See also Case C-191/95, *Commission v. Germany* [1998] ECR I-5449, at para. 47, where the Court pointed out that the commencement of proceedings against a Member State under Article 226 does not *per se* alter the legal position in question.

⁵² See H. Hofmann, 'Administrative Governance in State Aid Policy', in H. Hofmann and A. Türk (eds.), *supra* note 2.

⁵³ Case C-382/99, *Netherlands v. Commission* [2002] ECR I-5163, at para. 24. See also Case T-35/99, *Keller and another v. Commission* [2002] ECR II-261, at para. 77; Case T-214/95, *Het Vlaamse Gewest v. Commission* [1998] ECR II-717, at para. 79; Case C-242/00, *Germany v. Commission* [2002] ECR I-5603, at para. 27; Case C-310/99, *Italy v. Commission* [2002] ECR I-2289, at para. 52.

⁵⁴ Case T-187/99, *Agrana Zucker und Stärke v. Commission* [2001] ECR II-1587, at para. 56.

equal treatment'.⁵⁵ Such guidelines must respect the Treaty rules⁵⁶ and are not capable of affecting the scope of primary or secondary legislation.⁵⁷ The institution which has adopted them is bound by its guidelines, and the Court, which is not bound by such guidelines,⁵⁸ will 'verify whether . . . the requirements which the Commission has itself laid down, as mentioned in those guidelines, have been observed'.⁵⁹ Where they do not determine rights and obligations of third parties, guidelines seem therefore only capable of internal effects, in that they are binding only on the institution which adopted them. However, the Court has in several judgments cast doubt on this assumption. The Court has allowed certain internal measures to be challenged under Article 241 EC.⁶⁰ In *Dansk Rorindustri*⁶¹ the Court considered that the Commission's Guidelines on the calculation of fines under Regulation 17/62⁶² as 'rules of conduct designed to produce external effects'.⁶³ The Court argued that 'in adopting such rules of conduct and announcing by publishing them that they will henceforth apply to the cases to which they relate, the institution in question imposes a limit on the exercise of its discretion and cannot depart from those rules under pain of being found, where appropriate, to be in breach of the general principles of law, such as equal treatment or the protection of legitimate expectations. It cannot therefore be excluded that, on certain conditions and depending on their conduct, such rules of conduct, which are of general application, may produce legal effects'.⁶⁴ The Court further

⁵⁵ Case T-214/95, *Het Vlaamse Gewest v. Commission* [1998] ECR II-717, at para. 89.

⁵⁶ Case C-382/99, *Netherlands v. Commission* [2002] ECR I-5163, at para. 24; Case C-310/99, *Italy v. Commission* [2002] ECR I-2289, at para. 52; Case T-214/95, *Het Vlaamse Gewest v. Commission* [1998] ECR II-717, at para. 79.

⁵⁷ Case T-187/99, *Agrana Zucker und Stärke v. Commission* [2001] ECR II-1587, at para. 56.

⁵⁸ Case C-310/99, *Italy v. Commission* [2002] ECR I-2289, at para. 52.

⁵⁹ Case T-35/99, *Keller and another v. Commission* [2002] ECR II-261, at para. 77.

⁶⁰ See Case 148/73, *Louwage and another v. Commission* [1974] ECR 81, at para. 12; Joined Cases 80 to 83/81 and 182 to 185/82, *Adam and others v. Commission* [1984] ECR 3411, at para. 22; Joined Cases 181/86 to 184/86, *Del Plato and others v. Commission* [1987] ECR 4991, at para. 10.

⁶¹ Joined Cases C-189/02, P etc., *Dansk Rorindustri and others v. Commission* [2005] ECR I-5425.

⁶² Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65 of the ECSC Treaty, OJ (1998) C 9/3.

⁶³ Joined Cases C-189/02 P etc., *Dansk Rorindustri and others v. Commission* [2005] ECR I-5425, at para. 210.

⁶⁴ *Ibid.*, at para. 211. See also Opinion of AG Tizzano, *ibid.*, at para. 59.

found in *CIRFS*⁶⁵ that ‘the rules set out in the discipline and accepted by the Member States themselves have the effect, *inter alia*, of withdrawing from certain aid falling within its scope the authorization previously granted and hence of classifying it as new aid and subjecting it to the obligation of prior notification’.⁶⁶ The Court concluded from this that the ‘discipline’ had binding legal effects.⁶⁷ The ‘discipline’ was contained in a letter sent by the Commission to the Member States in which it stated that the Member States should desist from granting regional aid to the synthetic fibre industry.

d) Impact on interests or legal position as relevant criterion

The Community Courts have rejected many applications by private parties for the annulment of Commission acts on the basis that an act can be reviewed only if it brings about a change in the applicant’s legal position. However, the case law is not entirely consistent on this point.

In *Geotronics*⁶⁸ the CFI was concerned with the Commission’s rejection of the applicant’s tender for the supply of electronic tachometers to the Romanian ministry of agriculture to be financed under the PHARE programme on the basis that it had not fulfilled the conditions applicable to the tender. Following the reasoning of the Court in *STS*,⁶⁹ the CFI found that the rejection was not a reviewable act as ‘no legal relationship arises between the tenderers and the Commission, since the latter restricts itself to taking funding decisions on behalf of the Community, and its measures cannot have the effect, in relation to tenderers, of substituting a Community decision for the decision of the beneficiary country under the PHARE programme’.⁷⁰ However, on appeal the Court⁷¹ reversed the CFI’s judgment. Interestingly, the Court defined reviewable acts as ‘acts or decisions which have binding legal effects such as to affect the interests of the applicant’,⁷² thereby leaving out the usual requirement that the act had to change the applicant’s legal position. The Court held that the Commission’s decision could be severed from the contractual procedure ‘inasmuch as, first, it was adopted by the Commission in the exercise of its own powers and, secondly, it was specifically directed at an individual

⁶⁵ Case C-313/90, *CIRFS and others v. Commission* [1993] ECR I-1125.

⁶⁶ *Ibid.*, at para. 35.

⁶⁷ *Ibid.*, at para. 36. See also Case C-242/00, *Germany v. Commission* [2002] ECR I-5603, at para. 35.

⁶⁸ Case T-185/94, *Geotronics v. Commission* [1995] ECR II-2795.

⁶⁹ Case 126/83, *STS v. Commission* [1984] ECR 2769.

⁷⁰ *Ibid.*, at para. 32.

⁷¹ Case C-395/95 P, *Geotronics v. Commission* [1997] ECR I-2271.

⁷² *Ibid.*, at para. 10.

undertaking, which lost any chance of actually being awarded the contract simply because that act was adopted'.⁷³ It is not clear from the judgment how the Commission's decision affected the applicant's legal position.

Similar problems arise in state aid and merger proceedings. In state aid cases, it is doubtful whether competitors of an undertaking benefiting from state aid are affected in their legal position by a Commission decision concerning such aid, which is addressed to the Member State which granted the aid. In *Cofaz*⁷⁴ the Commission adopted a decision declaring the tariff structure for national gas prices in the Netherlands compatible with the Common Market. The decision produced legal effects for the Netherlands, as it allowed the latter to apply a preferential tariff system to Dutch producers of nitrate fertilizers for the supply of natural gas intended for the manufacture of ammonia. It is, however, difficult to see how the Commission's decision could affect the legal position of the applicant, which as a French producer of nitrate fertilizers seemed to be affected only in its competitive situation.⁷⁵ It seems that in state aid cases brought by competitors, the Court does not apply the requirement that the applicant's legal position be affected, and instead focuses its attention on the requirements of direct and individual concern,⁷⁶ which seem to be concerned mainly with procedural and economic considerations.

Similarly, in merger cases it is doubtful whether the Commission's decision concerning the merger, which is addressed to the parties to the merger, affects the legal position of competitors. In *Air France*⁷⁷ the CFI found admissible the applicant's action against the Commission's decision which declared that the merger between British Airways and TAT posed no serious competition concerns. The CFI did not raise the issue of whether the decision changed the applicant's legal position. The CFI found that it was common ground that the applicant was directly concerned, and highlighted the applicant's procedural involvement and the impact of the decision on its competitive situation as sufficient to find the applicant to be individually concerned.⁷⁸ In *BaByliss*⁷⁹ the CFI stated that

⁷³ *Ibid.*, at para. 14.

⁷⁴ Case 169/84, *Cofaz and others v. Commission* [1986] ECR 391.

⁷⁵ The Commission expressly raised this point in para. 13 of the judgment, *ibid.*

⁷⁶ See Case T-380/94, *AIUFFASS and another v. Commission* [1996] ECR II-2169, at paras. 44-52; Case T-442/93, *AAC and others v. Commission* [1995] ECR II-1329, at paras. 44-53; Case T-149/95, *Ducros v. Commission* [1997] ECR II-2031, at paras. 32-42.

⁷⁷ Case T-2/93, *Air France v. Commission* [1994] ECR II-323.

⁷⁸ *Ibid.*, at paras. 40-48.

⁷⁹ Case T-114/02, *BaByliss v. Commission* [2003] ECR II-1279.

the Commission's decision which declared the merger between SEB and Moulinex compatible with the common market brought about 'an immediate change in the situation in the markets concerned'.⁸⁰ This reference to the economic impact of the measures falls short of the requirement that the act affects the legal situation of the applicant, which as competitor of the merging undertakings was merely affected in its competitive position on the market.

However, it should be noted that in the cases discussed, in which the Court considered the impact on the applicant's interest to be sufficient, a legally binding act was addressed to a third party. These cases would therefore not support any suggestion that a Community measure which affects the applicant's interest but does not produce legally binding effects for the applicant or a third party could be considered as a reviewable act. Consequently, Community measures which form part of an integrated procedure will not be considered as reviewable acts if they do not affect the applicant's legal position, or at least that of a third party, even though they may significantly affect the applicant's interest. Such measures can be reviewed only indirectly in an action brought against the final act concluding such a procedure.

2. Standing Requirements: the Relevance of Direct Concern

Even if an act is regarded as reviewable, individuals still need to overcome the restrictive standing requirements laid down in Article 230(4). An applicant needs to demonstrate that an act which is not addressed to him is of direct and individual concern. The interpretation of individual concern by the Community Courts has been widely discussed in academic literature and the criticism formulated therein has led to attempts within the Community Courts for a more liberal interpretation, which the Court has rebuffed in their entirety. The Court's interpretation of individual concern, however controversial it might have become, is of less interest in the present context, as it does not raise any particular issues with regard to the integrated nature of European administration.⁸¹

In contrast, the cooperation between national and supranational administrations presents a considerable challenge for the interpretation of direct

⁸⁰ *Ibid.*, at para. 89 with a reference to para. 80 of Case T-2/93, *Air France v. Commission* [1994] ECR II-323. See also Case T-158/00, *ARD v. Commission* [2003] ECR II-3825, at para. 60.

⁸¹ A more liberal interpretation of individual concern would, however, have improved direct access to the Court and in many cases would have obviated the need to contest the validity of Community acts in the national courts.

concern.⁸² Direct concern might be in doubt in the following cases: where a Community act requires further implementation at Community or national level, where a Community act authorises a Member State to take a particular course of action, where the Community grants Member States funds which benefit private parties, or in case of a directive addressed to Member States. Given that the implementation and enforcement of Community acts are normally a matter for the Member States, this requirement often determines whether an action can be brought in the Community Courts under Article 230(4) or whether the individual has to challenge a national act in the national courts.

In order for an applicant to be directly concerned by an EC measure, the Community Courts require that 'that measure must directly affect the legal situation of the person concerned and its implementation must be purely automatic and result from Community rules alone without the application of other intermediate rules'.⁸³ This seems to be obvious in case of regulations, is sometimes problematic for decisions and seems to be excluded in the case of directives.

a) Regulations⁸⁴

As regulations are directly applicable in the legal systems of the Member States, they can directly concern 'the legal situation of the person concerned', where their implementation is 'purely automatic and result[s] from Community rules alone without the application of other intermediate rules'.⁸⁵ The Court found such a situation to exist in *International Fruit*.⁸⁶ Each week the Member States would communicate to the Commission the quantities of dessert apples from third countries for which import licences

⁸² On direct concern see generally A. Albors-Llorens, *Private Parties in European Community Law: Challenging Community Measures*, OUP (Oxford, 1996), pp. 63–75; A. Arnall (2001), *supra* note 4, pp. 25–30; T.C. Hartley, *supra* note 4, pp. 363–366; A. Ward, *supra* note 4, pp. 317–321; A. Türk, *supra* note 4, pp. 54–66.

⁸³ Case T–69/99, *DSTV v. Commission* [2000] ECR II–4039, at para. 24. Compare with the definition of AG VerLoren van Themaat in Case 11/82, *Piraiki-Patraiki v. Commission* [1985] ECR 207, at p. 216, where he considers an EC measure of direct concern 'if, even though it requires the adoption of a further national implementing measure, it is possible to foresee with certainty or with a high degree of probability that the implementing measure will affect the applicant and the manner in which it will do so'.

⁸⁴ The term regulation is used here with reference to the form in which the act was adopted, and not its substance.

⁸⁵ Case T–69/99, *DSTV v. Commission* [2000] ECR II–4039, at para. 24.

⁸⁶ Cases 41 to 44/70, *NV International Fruit Company v. Commission* [1971] ECR 411.

into the EC had been applied. The Commission would then take a decision with regard to those licences. On the basis of that decision each Member State ought to issue the licence to any interested party applying to it. The Court found that ‘the national authorities do not enjoy any discretion in the matter of the issue of licences and the conditions on which applications by the parties concerned should be granted’.⁸⁷ The duty of the national authorities was merely to collect the data necessary so that the Commission could take its decision, which the national authorities had to carry out. The Court consequently concluded that the ‘measure whereby the Commission decides on the issue of the import licences directly affects the legal position of the parties concerned’.⁸⁸ Similarly, the Court found in *Weddel*⁸⁹ that ‘it is sufficient to state that Regulation No 2806/87 fixes in great detail the criteria on the basis of which import licences must be granted, without leaving any discretion to the agencies of the Member States responsible for issuing licences. Consequently, the regulation is of direct concern to the applicant’.⁹⁰

However, the direct applicability of regulations does not always lead to individuals being directly concerned by them. In *Beauport*⁹¹ the Court did not consider the applicants, sugar producers from Guadeloupe and Martinique, as directly concerned, as ‘only the measures adopted by the French Republic under the derogating rule laid down by Regulation 298/78 could be of direct . . . concern to the applicants’.⁹² AG Warner had already pointed out in his Opinion that in accordance with the ‘clear and consistent’ case law of the Court, ‘where an act of a Community Institution does not itself have an immediate effect on a person’s rights, but merely empowers a Member State to take action that may have such an effect, it is not the act of the Community, but the action, if any, of the Member State, that may be of direct concern to that person’.⁹³ However, it is not always easy to determine whether a provision of a regulation is of direct concern or not.⁹⁴

⁸⁷ *Ibid.*, at para. 25. See also Case C–152/88, *Sofrimport v. Commission* [1990] ECR I–2477, at para. 9.

⁸⁸ *Ibid.*, at para. 28.

⁸⁹ Case C–354/87, *Weddel v. Commission* [1990] ECR I–3847.

⁹⁰ *Ibid.*, at para. 19.

⁹¹ Joined Cases 103 to 109/78, *Société des Usines de Beauport v. Council* [1979] ECR 17.

⁹² *Ibid.* at para. 22.

⁹³ Opinion of AG Warner in Joined Cases 103 to 109/78, *Société des Usines de Beauport v. Council* [1979] ECR 17, p. 31. See also Case T–127/05, *Lootus v. Council*, order of 9 January 2007, at paras. 39–48; Case C–441/05, *Roquette Frères v. Commission* [2007] ECR I–1993, at paras. 43–47.

⁹⁴ See Case C–73/97P, *France v. Comafrika and Others* [1999] ECR I–185, where the Court of Justice on appeal rejected the Court of First Instance’s finding that the regulation in issue was of direct concern to the applicants.

b) Decisions⁹⁵

The early cases before the Court were dominated by the question under what circumstances authorisations granted by the Commission to a Member State could directly concern private parties. In *Plaumann*⁹⁶ AG Roemer found that where a Member State took action following an authorisation by the Commission, a private party could not be directly concerned, as 'only when the Member State avails itself of the authorization, which is left to its discretion, are legal effects created for the individual'.⁹⁷ This approach was followed by the Court in *Alcan*⁹⁸ where the Commission refused to grant Belgium and Luxembourg authorisation to open for the year 1968 a tariff quota for unwrought aluminium. The Court found that a decision concerning the authorisation of such quotas 'has thus no effect other than to create a power in favour of the Member States concerned, and does not confer any rights on possible beneficiaries of any measures to be taken subsequently by the said States'.⁹⁹ The Court argued that it did not matter that the decision was a refusal rather than an authorisation, as the benefits of a reduced tariff would result only from the national decision. The Court concluded that '[t]he decision rejecting the request does not therefore concern the applicants in any other manner than would the positive decision which they wish to obtain'.¹⁰⁰ Hence the applicants were not directly concerned by the refusal to grant the authorisation.

In *Bock*¹⁰¹ and *Piraiki-Patraiki*¹⁰² the concept of direct concern was more liberally construed¹⁰³ by also including cases where the Member State concerned had made it expressly or implicitly clear how to exercise its discretion once the authorisation was granted. In *Bock*¹⁰⁴ the German authorities left the applicant in no doubt that they would reject its application, as soon as the Commission had given its authorisation. Once the Commission had authorised Germany to take protective measures, the German authorities rejected the application. The fact that the German authorities had discretion to use the authorisation would have meant that

⁹⁵ The term decision here refers to the form and not the substance of the act.

⁹⁶ Case 25/62, *Plaumann v. Commission* [1963] ECR 95.

⁹⁷ *Ibid.*, p. 115. See also the Opinion of AG Roemer in Case 1/64, *Glucoseries réunies v. Commission* [1964] ECR 813, p. 421.

⁹⁸ Case 69/69, *Alcan Aluminium v. Commission* [1970] ECR 385.

⁹⁹ *Ibid.*, at para. 8.

¹⁰⁰ *Ibid.*, at para. 16.

¹⁰¹ Case 62/70, *Bock v. Commission* [1971] ECR 897.

¹⁰² Case 11/82, *Piraiki-Patraiki v. Commission* [1985] ECR 207.

¹⁰³ See Albers-Llorens (1996), *supra*, p. 68.

¹⁰⁴ Case 62/70, *Bock v. Commission* [1971] ECR 897.

the Commission's decision could not directly concern the applicant. The Court decided differently and found the applicant directly concerned by holding that 'the appropriate German authorities had nevertheless already informed the applicant that they would reject its application as soon as the Commission had granted them the requisite authorisation. They had requested that authorisation with particular reference to the applications already before them at that time.'¹⁰⁵ In *Piraiki-Patraiki*¹⁰⁶ the Court went even further and accepted direct concern where the authorised Member State had made it implicitly clear how it would exercise its discretion. The Court remarked that 'without implementing measures adopted at the national level the Commission decision could not have affected the applicants'.¹⁰⁷ This, however, in the Court's view, did not 'prevent the decision from being of direct concern to the applicants if other factors justify the conclusion that they have a direct interest in bringing the action'.¹⁰⁸ Even before being authorised to do so by the Commission, France had applied a very restrictive system of licences for imports of cotton yarn from Greece. The Court therefore found that 'in those circumstances the possibility that the French Republic might decide not to make use of the authorization granted to it by the Commission decision was entirely theoretical, since there could be no doubt as to the intention of the French authorities to apply the decision'.¹⁰⁹ For the applicants to be directly concerned it was obviously not necessary for them to be actually affected, but for such impact to be a practical certainty. AG VerLoren van Themaat seemed to have come to the same conclusion, even though he proposed a different test for direct concern.¹¹⁰ He found the applicants directly concerned, as 'the legal consequences for the parties concerned, as well as their identity, can be deduced from the contested decision with certainty or with a high degree of probability'.¹¹¹

The above cases concern prior authorisations, which are not of direct concern to third parties unless the Member State has made it expressly

¹⁰⁵ *Ibid.*, at para. 7.

¹⁰⁶ Case 11/82, *Piraiki-Patraiki v. Commission* [1985] ECR 207.

¹⁰⁷ *Ibid.*, at para. 7.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*, at para. 9.

¹¹⁰ *Ibid.*, Opinion of AG VerLoren van Themaat, p. 216, where he stated that '[a] measure taken by the Community is defined as being of direct material concern to an interested party if, even though it requires the adoption of a further national implementing measure, it is possible to foresee with certainty or with a high degree of probability that the implementing measure will affect the applicant and the manner in which it will do so'.

¹¹¹ *Ibid.*, Opinion of AG VerLoren van Themaat, p. 219.

or implicitly clear how it would use the authorisation. The Community Courts had to decide however also on Commission decisions taken to confirm or reject measures already adopted by a Member State. Direct concern depends in these cases on the effect of such *ex post* authorisations. In *Toepfer*¹¹² the Commission adopted a decision by which it authorised Germany to maintain the protective measure already taken by Germany. AG Roemer found the applicants not to be directly concerned as the Commission decision to authorise, in contrast to one which abolished or amended, the protective measures adopted by Germany did not affect Germany's discretion. The AG argued that 'even after the Commission has given its authorization, the Member State retains its complete freedom of action in the sense that it can revoke the protective measure which has been adopted'.¹¹³ The Court differed in its analysis from the AG and considered the applicants directly concerned. The Court stated that a measure which allowed Germany to retain its protective measures had the same effect as a decision which amended or abolished protective measures, as that 'decision does not merely approve such measures, but renders them valid'.¹¹⁴

In contrast, in *DSTV*¹¹⁵ the Court made it clear that a Commission decision which found an order made by the UK Government to be compatible with Community law was not of direct concern to the applicant. The Order effectively banned the 'Eurotica-Rendezvous-Vous' programme broadcast in the UK by the Danish television company DSTV. The Court stated that the Commission decision was 'limited merely to pronouncing *ex post facto* on the compatibility with Community law of the Order, which was adopted, independently, by the United Kingdom in the exercise of its discretionary power'.¹¹⁶ The Court held that, unlike the situation in *Toepfer* 'the Commission did not, in the present case, retrospectively authorise the Member State concerned to retain a national measure'.¹¹⁷ Further, in contrast to in *Bock*, the Commission did not 'give the Member State concerned prior authorisation to adopt national measures'.¹¹⁸ *DSTV* makes it clear that *ex post* authorisations, whether positive or negative, are of direct concern only if they have retroactive effect.¹¹⁹ The complex-

¹¹² Joined Cases 106 and 107/63, *Toepfer v. Commission* [1965] ECR 405.

¹¹³ AG Roemer, *ibid.*, at p. 418.

¹¹⁴ *Ibid.*, p. 411.

¹¹⁵ Case T-69/99, *DSTV v. Commission* [2000] ECR II-4039.

¹¹⁶ *Ibid.*, at para. 27.

¹¹⁷ *Ibid.*, at para. 28.

¹¹⁸ *Ibid.*, at para. 29.

¹¹⁹ See also Case T-130/06, *Drax Power Ltd. and Others v. Commission* [2007] ECR II-67*; Case T-13/07, *Cemex UK Cement v. Commission*, [2007] ECR II-146*; Case T-27/07, *U.S. Steel Košice v. Commission*, [2007] ECR II-128*.

ity of such an assessment is apparent in *Infront*.¹²⁰ The CFI considered a decision by the Commission, by which the latter approved and published a list that had been notified to it by the UK of events of major importance under Council Directive 89/552,¹²¹ as amended, as being of direct concern to the applicant, which had obtained the broadcasting rights for these events. The CFI made it clear that the Commission decision was not of direct concern to the applicant in relation to the effect of the UK measures in the UK,¹²² but only in so far as it enabled the implementation of the mechanism of mutual recognition by the other Member States provided for in the Directive.¹²³

The Community Courts also seem to have difficulties in assessing direct concern where the Community adopts decisions on the provision of funds to Member States to finance certain projects carried out by third parties. The Member States as formal addressees are undoubtedly directly concerned by these measures. The direct concern of third parties is however doubtful.

In *Interhotel*¹²⁴ the Commission adopted two decisions, both addressed to Portugal, which reduced the assistance which had originally been granted by the European Social Fund (ESF) for two training projects submitted on behalf of the applicant. The Court found that even though the decision was addressed to Portugal, it ‘deprived the applicant of part of the assistance which had originally been granted to it, the Member State not having any discretion of its own in that respect’.¹²⁵ Consequently, the Court considered the applicant directly and individually concerned.

In contrast, Commission decisions concerning funds made available to the Member States from the European Agricultural Guidance and Guarantee Fund (EAGGF) seem to concern only the Member States to which they are addressed, but not the third parties which carry out the

¹²⁰ Case T-33/01, *Infront v. Commission* [2005] ECR II-5897. The judgment of the CFI has been upheld on appeal in Case C-125/06 *Commission v. Infront*, judgment of 13 March 2008.

¹²¹ OJ (1989) L 298/23.

¹²² See Case T-33/01, *Infront v. Commission* [2005] ECR II-5897, at para. 135, in which the CFI made it clear that the Commission decision did not constitute a retroactive authorisation of the British measures, which existed independently of the Commission decision.

¹²³ *Ibid.*, at para. 150. See also the Opinion of AG Bot on appeal in Case C-125/06 P, *Commission v. Infront*, Opinion of 18 October 2007.

¹²⁴ Case C-291/89, *Interhotel v. Commission* [1991] ECR I-2257.

¹²⁵ *Ibid.*, at para. 13. See also Case C-304/89, *Oliveira v. Commission* [1991] ECR I-2283, at para. 13.

projects. In *CNTA*¹²⁶ the applicant applied to the competent national authority for subsidies provided for by Community agricultural law. The national authority was not convinced that the applicant was eligible and made the payment of the subsidies conditional upon a guarantee by the applicant to pay the money back should the EAGGF consider the applicant as not eligible. These doubts were justified, as the Commission in a decision addressed to France refused to recognise the subsidies made to the applicant as chargeable to the EAGGF. The Court pointed out that 'the decision relates only to financial relations between the Commission and the French Republic'.¹²⁷ The Court found that the fact that the decision prompted the national authority to recover the money from the applicant 'was not a direct consequence of the contested decision itself but derived from the fact that the SIDO [the national authority] had made the definitive grant of the subsidies conditional upon their finally being charged to the EAGGF'.¹²⁸ The decision therefore did not directly affect the applicant's legal position.¹²⁹ The Court arrived at a similar conclusion in *Coillte*.¹³⁰ In this case the Commission in a decision addressed to Ireland declared certain expenditures incurred by the national authority as not eligible under the EAGGF. The CFI repeated its dictum that 'such a decision relates only to financial relations between the Commission and the Member State concerned'.¹³¹ The CFI explained in more detail the reasons why such decisions do not directly concern third parties. The CFI found that 'a decision on the expenditure incurred by Member States under the EAGGF has a declaratory rather than a constitutive function, since the direct effects to which those traders are subject derive from the decisions adopted by the national intervention authorities in the exercise of their own powers'.¹³² The Commission, the CFI argued, had no power to require the national authorities to take specific measures; in particular it cannot ask the national authorities to recover the sums from the recipients. The Member States only have to 'refund to the EAGGF the sums corresponding to the expenditure excluded from Community financing'.¹³³ Therefore, if the national authorities decided to have the funds reimbursed by the recipients, it would be 'the direct consequence,

¹²⁶ Joined Cases 89 and 91/86, *CNTA v. Commission* [1987] ECR 3005.

¹²⁷ *Ibid.*, at para. 9.

¹²⁸ *Ibid.*, at para. 13.

¹²⁹ *Ibid.*, at para. 14. See also Case T-54/96, *Oleifici Italiana and another v. Commission* [1998] ECR II-3377, at paras. 56-59.

¹³⁰ Case T-244/00, *Coillte Teoranta v. Commission* [2001] ECR II-1275.

¹³¹ *Ibid.*, at para. 41.

¹³² *Ibid.*, at para. 44.

¹³³ *Ibid.*, at para. 45.

not of the contested decision, but of the action which would be taken for that purpose by those authorities'.¹³⁴ In any event, the national authorities might decide not to claim the money back and bear the financial burden themselves.

Similar issues arise in European Regional Development Fund (ERDF) cases. In *SLIM Sicilia*¹³⁵ the Commission had in 1984 initially granted financial assistance under the ERDF for the project for methanation of the city of Syracuse, Italy. The grant had to be finally concluded by September 1995, unless the project was suspended for judicial reasons. In 2000, the Commission rejected the request for an extension by the Italian government, and reduced the assistance to the amount already paid to Italy. The CFI pointed out that the Commission decision had effects for the applicant's legal position only if the applicant had to repay the difference between what he received and what the Commission had actually paid to the Italian State.¹³⁶ Such an obligation could however be derived neither from the decision itself, nor from any provision of Community law.¹³⁷ The CFI stated that the national authorities had discretion for the reimbursement of the difference. The Court did not consider it as decisive that the public authorities had expressed their intention in the concession contract that the applicant should bear the financial consequences of any Commission decisions affecting the assistance. The CFI seemed to have attached great weight to the autonomous decision by the Italian authorities to pay the applicant the outstanding amount without awaiting the Commission's decision on the extension they had requested. That decision, argued the CFI, 'comes between the contested decision and the applicant's legal situation'.¹³⁸ Similarly, in *Regione Siciliana I*¹³⁹ the CFI argued that the applicant was not directly concerned by the Commission's decision to close the assistance relating to a project for the Messina–Palermo Motorway. Even though the decision, which was addressed to Italy, meant that financial assistance would no longer be granted and that certain amounts even had to be repaid by Italy, the CFI argued that the financial assistance was granted to the Italian Republic and nothing prevented Italy paying out of its own funds the portion of Community financing with-

¹³⁴ *Ibid.*, at para. 47.

¹³⁵ Case T-105/01, *SLIM Sicilia v. Commission* [2002] ECR II-2697.

¹³⁶ *Ibid.*, at para. 50.

¹³⁷ *Ibid.*, at para. 51.

¹³⁸ *Ibid.*, at para. 53.

¹³⁹ Case T-341/02, *Regione Siciliana v. Commission* [2004] ECR II-2877. The ruling was upheld on appeal in Case C-417/04 P, *Regione Siciliana v. Commission* [2006] ECR I-3881.

drawn by the Commission. Moreover, the Commission decision did not oblige Italy to recover the sums withdrawn from the beneficiaries.

The CFI attempted a more liberal approach in *Regione Siciliana II*.¹⁴⁰ In this case the Commission had initially in 1987 granted Italy ERDF assistance of almost € 50 million for the third part of construction work on a dam across the Gibbesi. In 2002, the Commission cancelled the aid granted and requested from the Italian authorities the advance of € 39 million made by the Commission to be repaid, as the project did not seem to be capable of becoming operational and its intended use had been considerably altered.¹⁴¹ The CFI found the applicant which had carried out the project was directly concerned by the Commission's decision. The CFI argued that the decision affected the applicant's legal position by having the 'direct and immediate effect of changing the applicant's financial situation by depriving the applicant of the balance of the assistance . . . remaining to be paid by the Commission'.¹⁴² The money would now not be paid to Italy, which in turn could not pass it on to the applicant. The CFI stated that the applicant's legal situation was also affected in respect of its duty to repay the sums already advanced. The CFI held that 'the effect of the contested decision is directly to change the applicant's legal status from that of unarguably being a creditor in respect of those sums to that of debtor, at least potentially'.¹⁴³ The CFI made it clear that the theoretical possibility that the Italian authorities would not request the repayment and would pay the remainder of the assistance was not relevant, as such national decision would have to be adopted 'precisely in order to counter the automatic effects of the contested decisions'.¹⁴⁴ The CFI distinguished this case from the ruling in *Coillte*, discussed above,¹⁴⁵ by arguing that in the latter case the Commission's decision 'did not automatically and mechanically cause the withholding of a balance still owed to the beneficiary'¹⁴⁶ and that 'only the adoption of a national decision subsequent to the

¹⁴⁰ Case T-60/03, *Regione Siciliana v. Commission* [2005] ECR II-4139.

¹⁴¹ The project was designed to ensure a reliable water supply for an industrial centre which was to be built in Licata and for the irrigation of agricultural land. The destined use of the dam water was changed when it became clear the industrial centre would not materialise. Moreover, at the time the Commission adopted its decision the temporary reservoirs of the dam had not been built and the aqueduct had not been completed, even though it constituted an integral part of the project.

¹⁴² *Ibid.*, at para. 53.

¹⁴³ *Ibid.*, at para. 43.

¹⁴⁴ *Ibid.*, at para. 60.

¹⁴⁵ See pp. 237-238 above.

¹⁴⁶ Case T-60/03, *Regione Siciliana v. Commission* [2005] ECR II-4139, at para. 61.

Commission's contested decision could obligate the beneficiary to repay the advances already received'.¹⁴⁷ This ruling was clearly at odds with the Court's ruling in *Regione Siciliana I*¹⁴⁸ and on appeal the CFI's judgment was consequently set aside.¹⁴⁹

The rulings in the EAGGF and ERDF cases should be contrasted with the decision of the Court in *Dreyfus*.¹⁵⁰ At first instance, the CFI¹⁵¹ found that the refusal of the Commission to approve a contract concluded by the applicant with Exportkhleb, a Russian company authorised by the Russian Federation to conclude contracts for the purchase of wheat, did not affect the commercial validity of the contract and was therefore not of direct concern to the applicant. The Commission's refusal affected only its legal relations with VEB, the Russian Federation's financial agent, to which the decision was addressed, in so far as it meant that Community funding was not made available for the contract. The Court¹⁵² on appeal overturned the CFI's judgment by holding that it was 'purely theoretical'¹⁵³ that Exportkhleb would perform the contract in the form rejected by the Commission and thereby forgo Community funding. Therefore, 'although the contested decision was addressed to the VEB, as financial agent of the Russian Federation, it directly affected the appellant's situation'.¹⁵⁴ In contrast, in *Greenpeace*¹⁵⁵ the Commission had apparently taken a decision to continue to grant Spain financial assistance under the European Regional Development Fund for two power plants in the Canary Islands. The Court found that it was the decision to build the two power stations in question, which was liable to affect the environmental rights arising under Directive 85/337 that the appellants, certain environmental associations and individuals, sought to invoke. The Court consequently held that 'the contested decision, which concerns the Community financing of those power stations, can affect those rights only indirectly'.¹⁵⁶ In contrast to *Dreyfus*, and the rulings in *Bock* and *Piraiki-Patraiki*, the Court must have assumed that it was not just 'purely theoretical' that the

¹⁴⁷ *Ibid.*, at para. 61.

¹⁴⁸ Case C-417/04 P, *Regione Siciliana v. Commission* [2006] ECR I-3881.

¹⁴⁹ Case C-15/06 P, *Regione Siciliana v. Commission* [2007] ECR I-2591.

¹⁵⁰ Case C-386/96 P, *Dreyfus v. Commission* [1998] ECR I-2309.

¹⁵¹ Case T-485/93, *Dreyfus v. Commission* [1996] ECR II-1101.

¹⁵² Case C-386/96 P, *Dreyfus v. Commission* [1998] ECR I-2309.

¹⁵³ *Ibid.*, at para. 52.

¹⁵⁴ *Ibid.*, at para. 54.

¹⁵⁵ Case C-321/95 P, *Greenpeace Council and Others v. Commission* [1998] ECR I-1651.

¹⁵⁶ *Ibid.*, at para. 31. See also Case C-486/01 P, *Front National v. European Parliament* [2004] ECR I-6289, at para. 40.

Spanish companies would have carried out the project even in the absence of Community funding, which given the amount of Community funding involved is rather doubtful.

c) Directives

In *Gibraltar*¹⁵⁷ the Court did not address the issue, but AG Lenz stated that the directive under review had indeed left a certain amount of discretion to the Member States. However, he argued that for certain provisions of the directive such discretion existed only in theory, as Member States would not use that discretion. As the directive directly deprived the applicant of certain undefined advantages, this would be sufficient to hold that the directive was of direct concern. In contrast, the CFI in *Salamander* categorically denied the possibility of direct concern of directives. The CFI required an individual to be directly concerned that ‘the measure must directly affect his legal situation and leave no discretion to the addressees of that measure who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from the Community rules alone without the application of other intermediate rules’.¹⁵⁸ The CFI pointed out that a directive could not impose obligations on individuals and could therefore not be relied upon by individuals against other individuals. Consequently, ‘a directive which, as in the present case, requires Member States to impose obligations on economic operators is not of itself, before the adoption of the national transposition measures and independently of them, such as to affect directly the legal situation of those economic operators . . .’.¹⁵⁹ The CFI also made it clear that the obligation imposed by the Court in *Inter-Environnement Wallonie*¹⁶⁰ to refrain, during the period laid down for transposition of the directive, from taking any measures which may seriously compromise the aims of that directive applies only to Member States and could not be extended to individuals. Similarly, the CFI in *Japan Tobacco*¹⁶¹ rejected the claim that Article 7 of

¹⁵⁷ Case C-298/89, *Government of Gibraltar v. Council* [1993] ECR I-3605.

¹⁵⁸ Joined Cases T-172/98 and T-175/98 to 177/98, *Salamander AG and Others v. European Parliament and Council* [2000] ECR II-2487, at para. 52.

¹⁵⁹ *Ibid.*, at para. 54. See also Opinion of AG Colomer in Case C-23/00P, *Council v. Boehringer* [2002] ECR I-1873, at para. 53. See Case T-45/02, *DOW AgroSciences BV and Another v. European Parliament and Council* [2003] ECR II-1973, in which the CFI denied direct concern of an amendment to a directive which merely provided for further action to be taken by the EP and the Council.

¹⁶⁰ Case C-129/96, *Inter-Environnement Wallonie v. Région Wallonne* [1997] ECR I-7411.

¹⁶¹ See Case T-223/01, *Japan Tobacco Inc and JT International SA v. European Parliament and Council* [2002] ECR II-3259.

Directive 2001/37¹⁶² was of direct concern to the applicants. Even though Article 7 did not leave any discretion to the Member States whether or not to act in order to achieve the result prescribed therein, the CFI emphasised that ‘it does not follow that an automatic and immediate change is thereby brought about to the applicants’ legal position or existing rights’.¹⁶³

d) Rationale of direct concern

It can be seen from the above discussion that the case law on direct concern is not without its ambiguities. First, one could argue that direct concern requires that the Community act produce a direct impact on the legal position of the applicant. This was the conclusion drawn by the CFI in *DSTV* where it considered it necessary for an act to be of direct concern that ‘that measure must directly affect the legal situation of the person concerned and its implementation must be purely automatic and result from Community rules alone without the application of other intermediate rules’.¹⁶⁴ This explains in particular the CFI’s ruling in *Salamander*, where it was argued that a directive cannot directly concern an individual, as it cannot impose obligations on individuals. Direct concern was seemingly denied on the basis that a directive could not affect the legal position of individuals. In contrast, other cases seem to indicate that direct concern even exists where the Community act does not affect the legal position of an individual, but where such an impact is foreseeable, in *Bock* because of an express declaration by the Member State in issue, in *Piraiki-Patraiki* due to the circumstances of the case. Obviously, on this basis directives could be of direct concern where it is foreseeable how their provisions will be implemented.

Secondly, even though a substantial number of cases are decided on the basis of discretion as the relevant criterion, it has been argued that instead of focusing on discretion ‘what is really central to the notion of direct concern is the existence of a direct relationship of causality between the Community decision and the damage suffered by the applicant’.¹⁶⁵ Indeed,

¹⁶² OJ (2001) L 194/26.

¹⁶³ Case T-223/01, *Japan Tobacco Inc and JT International SA v. European Parliament and Council* [2002] ECR II-3259, at para. 50.

¹⁶⁴ Case T-69/99, *DSTV v. Commission* [2000] ECR II-4039, at para. 24. A different definition of direct concern was used by AG VerLoren van Themaat in Case 11/82, *Piraiki-Patraiki v. Commission* [1985] ECR 207, p. 216, where he considers an EC measure of direct concern ‘if, even though it requires the adoption of a further national implementing measure, it is possible to foresee with certainty or with a high degree of probability that the implementing measure will affect the applicant and the manner in which it will do so’.

¹⁶⁵ See A. Albers-Llorens (1996), *supra* note 82, p. 73.

discretion as a test for direct concern might not be satisfactory in all instances.¹⁶⁶ It is doubtful in the first place whether an adequate definition of discretion can be found. Moreover, in certain cases the Court rejected direct concern despite the fact that the Member State in issue had no discretion as to the application of the Community act. Furthermore, it is difficult to employ this test where acts are addressed not to Member States, but to individuals. On this understanding 'the *raison d'être* of this *locus standi* condition is to ensure that the prejudice sustained by the applicants derives directly from the Community decision'.¹⁶⁷

III. ARTICLE 234: VALIDITY REVIEW¹⁶⁸

The Court has recently rejected attempts to abandon the *Plaumann* formula in favour of a broader interpretation of individual concern in Article 230(4), which would allow private parties to challenge Community acts of general application directly in the Community Courts. The Court of Justice instead placed the burden firmly on the national courts, which are to provide remedies for individuals who could raise the validity of a Community act in the national court, which could then refer the matter to the Court under Article 234.¹⁶⁹ The indirect review under Article 234 thus assumes paramount importance, given that the Court of Justice has expressly refused to grant standing in the Community Courts where an individual would not have a remedy in a national court.¹⁷⁰

It is, however, debatable whether the validity review in Article 234 provides an effective remedy.¹⁷¹ AG Jacobs argued in *UPA*¹⁷² that access to national courts might often not be possible because the Community rules would not require any implementing act on the part of the national authorities. The Court has tried to counter this argument in *UPA* by

¹⁶⁶ *Ibid.*, pp. 70–74.

¹⁶⁷ *Ibid.*, p. 73.

¹⁶⁸ See A. Ward, *supra* note 4, chapter 7; A. Türk, *supra* note 4, pp. 213–238.

¹⁶⁹ See J. Temple Lang, 'Actions for Declarations that Community Regulations are Invalid; the Duties of National Courts under Article 10 EC' (2003) *ELRev* 102; see also Article 19(1)(2) TEU (Lisbon): 'Member States shall provide remedies sufficient to ensure legal protection in the fields covered by Union law'.

¹⁷⁰ Joined Cases T–236/04 and T–241/04, *EEB and Another v. Commission* [2005] ECR II–4945, at para. 67; Case T–369/03, *Arizona Chemical and others v. Commission*, [2005] ECR II–5839, at para. 95.

¹⁷¹ For a negative verdict see A. Ward, *supra* note 4, chapter 7. For a more balanced view see J. Usher, *supra* note 4; A. Türk, *supra* note 4, pp. 231–237.

¹⁷² Case C–50/00 P, *Unión de Pequeños v. Council* [2002] ECR I–6677.

stating that ‘in accordance with the principle of sincere cooperation laid down in Article 5 of the Treaty, national courts are required, so far as possible, to interpret and apply national procedural rules governing the exercise of rights of action in a way that enables natural and legal persons to challenge before the courts the legality of any decision or other national measure relative to the application to them of a Community act of general application, by pleading the invalidity of such an act’.¹⁷³ As one author pointed out, this solution ‘quite simply fails to deal with the situation where the applicant’s legal situation is affected by a regulation which is not of direct and individual concern, as traditionally interpreted, and which has not received or required national implementation’.¹⁷⁴ It should be noted, however, that the facts in *UPA* seem to suggest that a remedy was available. The applicants could have applied for their usual subsidies and the refusal to grant them by the national authorities would have enabled them to bring an action in the national court.

In *Jégo Quéré*¹⁷⁵ the CFI pointed out that the traditional interpretation of individual concern under Article 230(4) would force the applicants to raise the question of the validity of the Commission regulation in a national court, but only if they were prepared to contravene the law first. The Court¹⁷⁶ on appeal rejected the suggestion that that would leave the applicants without an effective remedy:

It is possible for domestic law to permit an individual directly concerned by a general legislative measure of national law which cannot be directly contested before the courts to seek from the national authorities under that legislation a measure which may itself be contested before the national courts, so that the individual may challenge the legislation indirectly. It is likewise possible that under national law an operator directly concerned by Regulation No 1162/2001 may seek from the national authorities a measure under that regulation which may be contested before the national court, enabling the operator to challenge the regulation indirectly.¹⁷⁷

In some Member States, national courts have accommodated individuals’ requests to challenge Community acts of general application, even without any national implementing acts having been adopted.¹⁷⁸ The

¹⁷³ *Ibid.*, at para. 42

¹⁷⁴ J. Usher, *supra* note 4, p. 584.

¹⁷⁵ Case T-177/01, *Jégo Quéré v. Commission* [2002] ECR II-2365.

¹⁷⁶ Case C-263/02 P, *Jégo Quéré v. Commission* [2004] ECR I-3425.

¹⁷⁷ *Ibid.*, at para. 35.

¹⁷⁸ See the references from English courts in Case C-74/99, *Imperial Tobacco and others* [2000] ECR I-8599; Case C-27/00 and C-122/00, *Omega Air and others* [2002] ECR I-2569; Case C-491/01, *British American Tobacco and*

English courts, for example, have accepted actions and made references to the Court in the case of a directive which had not been implemented¹⁷⁹ and a regulation which did not require any national implementing measures.¹⁸⁰ The ruling in *Jégo Quéré* makes it clear that the duty of sincere cooperation obliges national courts to provide an adequate remedy only 'so far as possible'.¹⁸¹ However, the ruling seems also to suggest that where national courts could not provide an adequate remedy under national law in the absence of a national implementing act, the national authorities had to provide an individual with a measure which could form the basis for a challenge in national courts.

Disadvantages arise for individuals who have brought their action in the national court also from the ruling in *Foto-Frost*,¹⁸² in which the Court held that national courts were precluded from declaring Community acts invalid. Even though it found that this limitation on national courts was required to ensure the uniformity of Community law and the coherence of the system of judicial protection,¹⁸³ the ruling in *Foto-Frost* does not prevent national courts from examining the validity of Community acts. The Court found that national courts 'may consider the validity of a Community act and, if they consider that the grounds put forward before them by the parties in support of invalidity are unfounded, they may reject them, concluding that the measure is completely valid'.¹⁸⁴ The Court expanded on this ruling in its judgment in *International Air Transport Association*¹⁸⁵ in response to the question by the High Court as to whether under Article 234(2) a reference was necessary only where there was more than a certain degree of doubt as to its validity. The Court made it clear that:

Imperial Tobacco [2002] ECR I-11453; Case C-344/04, *IATA and ELFAA* [2006] ECR I-403. See also J. Usher, *supra* note 4, p. 586; A. Ward, *supra* note 4, pp. 348-349.

¹⁷⁹ See Case C-74/99, *Imperial Tobacco* [2000] ECR I-8599.

¹⁸⁰ Joined Cases C-27/00 and C-122/00, *Omega Air* [2002] ECR I-2569.

¹⁸¹ See Case C-263/02 P, *Jégo Quéré v. Commission* [2004] ECR I-3425, at para. 32. But see J. Temple-Lang, *supra* note 168, who argues, at p. 111, that national courts were under a duty to provide an appropriate remedy. See also A. Ward, *supra* note 4, at p. 349.

¹⁸² Case 314/85, *Foto-Frost v. Hauptzollamt Lübeck-Ost* [1987] ECR 4199, at para. 15.

¹⁸³ For a critical appraisal of these reasons see A. Ward, *supra* note 4, pp. 352-354.

¹⁸⁴ *Ibid.*, at para. 14.

¹⁸⁵ Case C-344/04, *International Air Transport Association and European Low Fares Airline Association v. Department for Transport* [2006] ECR I-403.

Article 234 EC does not constitute a means of redress available to the parties to a case pending before a national court and therefore the mere fact that a party contends that the dispute gives rise to a question concerning the validity of Community law does not mean that the court concerned is compelled to consider that a question has been raised within the meaning of Article 234 EC Accordingly, the fact that the validity of a Community act is contested before a national court is not in itself sufficient to warrant referral of a question to the Court for a preliminary ruling.¹⁸⁶

The Court found that the national court:

may examine the validity of a Community act and, if they consider that the arguments put forward before them by the parties in support of invalidity are unfounded, they may reject them, concluding that the act is completely valid. On the other hand, where such a court considers that one or more arguments for invalidity, put forward by the parties or, as the case may be, raised by it of its own motion . . . , are well founded, it is incumbent upon it to stay proceedings and to make a reference to the Court for a preliminary ruling on the act's validity.¹⁸⁷

While the ruling in *IATA* was clearly limited to national courts falling within Article 234(2), the recent judgment of the CFI in *Danzer*¹⁸⁸ seems to have extended this approach to last instance courts under Article 234(3).¹⁸⁹ It is submitted that this would leave the assessment of the validity of a Community act entirely within the hands of the national court. The only means of redress for the individual would then consist in seeking redress from the Member State under *Franovich*.¹⁹⁰ As the recent judgment in *Köbler*¹⁹¹ made clear, this remedy is available in principle where national courts of last instance have breached Community law, but is unlikely to succeed in practice.

National courts encounter even more severe limitations on the possibility to refer under Article 68 ECT and Article 35(1) TEU. Article 68 ECT limits the power to refer questions of the validity of Community acts adopted under Title IV (Visas, Asylum and Immigration) to last instance courts.¹⁹² An individual would therefore have to appeal its case to a court

¹⁸⁶ *Ibid.*, at para. 28.

¹⁸⁷ *Ibid.*, at paras. 29 and 30.

¹⁸⁸ Case T-47/02, *Danzer v. Council* [2006] ECR II-1779.

¹⁸⁹ *Ibid.*, at para. 37. The judgment seems to suggest that last instance courts are, however, subject to the limitations set out in Case 283/81 *CILFIT* [1982] ECR 3415 and Case C-495/03, *Intermodal Transports* [2005] ECR I-8151.

¹⁹⁰ Joined Cases C-6/90 and C-9/90, *Franovich and Bonifaci v. Italy* [1991] ECR I-5357.

¹⁹¹ Case C-224/01, *Köbler v. Austria* [2003] ECR I-10239.

¹⁹² See J. Usher, *supra* note 4, p. 588.

against whose judgment there is no judicial remedy under national law, thereby considerably increasing the expense and delay of the proceedings. Even worse is the position under the third pillar.¹⁹³ While direct actions against third pillar acts are not possible for individuals,¹⁹⁴ the jurisdiction of the Court to give preliminary rulings under Article 35(1) TEU on the validity of framework decisions, decisions and measures implementing conventions depends on the willingness of Member States to be subjected to such jurisdiction.¹⁹⁵ Article 35(3) TEU gives Member States a choice whether to limit the possibility of making a reference to the national court of last instance or to allow any national court to make a reference. The Court has recently ruled in relation to Article 35(1) TEU that ‘the right to make a reference to the Court for a preliminary ruling must therefore exist in respect of all measures adopted by the Council, whatever their nature or form, which are intended to have legal effects in relation to third parties’.¹⁹⁶ While this generous interpretation of the scope of Article 35(1) TEU includes common positions which have such legal effects,¹⁹⁷ the protection of private parties under this provision falls well short of that provided under Article 234 ECT. It would only be with the entering into force of the Lisbon Treaty that the restrictive provisions of Article 68 ECT and 35(1) TEU would be abolished, allowing acts adopted in the area of freedom, security and justice¹⁹⁸ to fall under the regular regime of Article 267 TFEU.

On the other hand, Article 234 offers individuals certain advantages. First, the strict standing requirements imposed by Article 230(4) do not apply in case of a validity reference. Neither does the time-limit laid down in Article 230(5) have to be observed. It should, however, be noted that the Court has found that ‘a decision which has not been challenged by

¹⁹³ See *ibid.*, pp. 593–595.

¹⁹⁴ Article 35(6) TEU allows Member States and the Commission to bring a direct action only against decisions and framework decisions.

¹⁹⁵ Article 35(2) TEU. For a list of Member States which have accepted the jurisdiction of the Court see OJ (2005) L 327/19.

¹⁹⁶ Case C–354/04 P, *Gestoras Pro Amnistia and Others v. Council* [2007] ECR I–1579, at para. 52.

¹⁹⁷ *Ibid.*, at para. 53.

¹⁹⁸ See Part Three, Title V of the TFEU. See, however, Title VII of the Protocol No. 36 of Transitional Provisions. For a transitional period of five years the powers of the Court of Justice remain those provided under the existing Title VI of the TEU in relation to acts of the Union adopted in the field of police and judicial cooperation in criminal matters which were adopted before the Treaty of Lisbon (see Article 10(1) of the Protocol). The limitation does not apply to amendments of such acts (see Article 10(2) of the Protocol). Special provisions apply to the UK (see Article 10(4) and (5) of the Protocol).

the addressee within the time-limit laid down in Article 173 [now Article 230] of the EC Treaty becomes definitive as against him'.¹⁹⁹ This means that the decision can no longer be called into question by a reference under Article 234. A decision cannot become definitive only as against its addressee, but also against a third party, where that third party could undoubtedly have challenged that decision.²⁰⁰ The Court held in *TWD Textilwerke Deggendorf* that in this case it was not possible 'to call in question the lawfulness of that decision before the national courts in an action brought against the measures taken by the national authorities for implementing that decision'.²⁰¹ An indirect challenge to a Community act is therefore excluded whenever the applicant could 'without any doubt' have brought an action against that act. This rationale for excluding indirect challenges applies also to regulations, even though the possibility that an individual could have challenged a regulation 'without any doubt' is rather the exception.²⁰² However, in *Nachi* the Court extended the approach adopted in *Textilwerke Deggendorf* to anti-dumping regulations by holding that a regulation could also become definitive against an individual 'in regard to whom it must be considered to be an individual decision and who could undoubtedly have sought its annulment under Article 230 EC'.²⁰³ The Court's approach to determining the admissibility of an indirect challenge on the basis of whether the applicant could have challenged the act under Article 230(4) is problematic because of the notorious uncertainties surrounding direct and individual concern under Article 230(4).²⁰⁴

A second advantage of the preliminary rulings procedure seems to consist in the fact that Article 234 does not seem to be limited to reviewable acts in the meaning of Article 230. An interpretation of Article 234(1)(b)

¹⁹⁹ Case C-241/01, *National Farmers' Union v. Secrétariat général du gouvernement* [2002] ECR I-9079, at para. 36, where a Member State (France) failed to challenge an act under Article 230(2).

²⁰⁰ See Case C-182/92, *TWD Textilwerke Deggendorf v. Germany* [1994] ECR I-833.

²⁰¹ *Ibid.*, at para. 16. See also Case C-232/05, *Commission v. France* [2006] ECR I-100071, at para. 59.

²⁰² Case C-241/95, *The Queen v. Intervention Board for Agricultural Produce, ex p. Accrington Beef Co. Ltd. And Others* [1996] ECR I-6691, at para. 15; Case C-408/95, *Eurotunnel SA and Others v. Sea France* [1997] ECR I-6315, at para. 29.

²⁰³ Case C-239/99, *Nachi Europe GmbH v. Hauptzollamt Krefeld* [2001] ECR I-1197, at para. 37. See, however, Case C-351/04, *Ikea Wholesale* [2007] ECR I-7723, at para. 25.

²⁰⁴ See A. Arnull (1995), *supra* note 4, p. 44; A. Arnull (2001), *supra* note 4, p. 52; A. Ward, *supra* note 4, pp. 322-323; A. Türk, *supra* note 4, p. 217.

which limits the phrase ‘acts of the institutions’ to decisions, regulations and directives²⁰⁵ seems to be too narrow. In *Grimaldi*²⁰⁶ the Court pointed out that ‘unlike Article [230] of the EEC Treaty, which excludes review by the Court of acts in the nature of recommendations, Article [234] confers on the Court jurisdiction to give a preliminary ruling on the validity and interpretation of all acts of the institutions of the Community without exception’.²⁰⁷

As discussed above, Community measures which form part of proceedings leading to the adoption of a national act cannot be reviewed under Article 230, as they cannot be considered as reviewable acts. Article 234 would therefore allow private parties to raise the validity of such measures in an action before the national court. A reference would, however, depend on the relevance of the Community measure for the outcome in the national court.²⁰⁸ This is particularly relevant in cases where the Community merely issues non-binding interpretations of the applicable Community law. On the other hand, certain Community acts, such as recommendations²⁰⁹ and guidelines, which are non-reviewable under Article 230, may produce sufficient legal effects to be relevant in a case before the national court. In *Tillack*²¹⁰ the applicant challenged the referral by OLAF of information concerning suspicions of breach of professional secrecy and bribery to the national judicial authorities, which led to the search of the applicant’s home and office and the seizure of professional documents and personal belongings. The CFI found that the referral could not be considered a reviewable act within the meaning of Article 230. However, in response to the suggestion that this would deprive the applicant of an effective judicial protection, the CFI responded that ‘the applicant also had the opportunity to request the national courts, which have no jurisdiction themselves to declare that the act by which OLAF forwarded information to the Belgian judicial authorities is invalid . . . , to make a preliminary reference to the Court of Justice in that regard’.²¹¹

²⁰⁵ See apparently A. Ward, *supra* note 4, at p. 339.

²⁰⁶ Case C-322/88, *Grimaldi* [1989] ECR 4407.

²⁰⁷ *Ibid.*, at para. 8.

²⁰⁸ In Case C-296/03, *Glaxosmithkline* [2005] ECR I-669, at para. 22, the Court stated that it would reject a reference where ‘the appraisal of the validity of a rule of Community law sought by the national court bears no relation to the actual facts of the main action or its purpose’.

²⁰⁹ *Ibid.*, at para. 18.

²¹⁰ Case T-193/04, *Tillack v. Commission* [2006] ECR II-3995.

²¹¹ *Ibid.*, at para. 80.

IV. ARTICLE 288(2): NON-CONTRACTUAL LIABILITY

The difficulties which private parties face in accessing the Community Courts to have Community acts reviewed make Article 288(2) with its limited admissibility requirements an attractive remedy. In *Zuckerfabrik Schöppenstedt*, the Court emphasised the autonomous nature of the remedy under Article 288(2) with regard to Article 230 EC and found that an action under Article 288(2) EC ‘differs from an application for annulment in that its end is not the abolition of a particular measure, but compensation for damage caused by an institution in the performance of its duties’.²¹² However, applicants not only are faced with a strict substantive test of Community liability, but have to clear admissibility hurdles which result mainly from the integrated nature of administration in Community law.

1. Joint Liability of the Community and Member States

The structure of interaction between Community and national authorities in the adoption and application of Community law makes it likely that damage is caused to individuals not exclusively as a result of a Community act, but as a result of the co-operation between the Community and national authorities. Such joint liability may arise in a number of different circumstances.²¹³ It can occur where the Commission wrongfully authorises a Member State to take a certain course of action. This scenario was at issue in the early case of *Kampffmeyer v. Commission*,²¹⁴ where the Commission unlawfully authorised the refusal by the German authorities to grant import permits to German grain dealers. Joint liability can also result from an unlawful instruction given by the Commission to a national authority. In *Krohn v. Commission*,²¹⁵ the German authorities, on instructions from

²¹² Case 5/71, *Zuckerfabrik Schöppenstedt v. Council* [1971] ECR 975, at para. 3.

²¹³ See W. Wils, ‘Concurrent Liability of the Community and a Member State’ (1992) *ELRev* 191; P. Oliver, ‘Joint Liability of the Community and the Member States’ in T. Heukels and A. McDonnell (eds), *The Action for Damages in Community Law* (1997); M. de Visser, ‘The Concept of Concurrent Liability and its Relationship with the Principle of Effectiveness: A One-way Ticket into Oblivion?’ (2004) 11 *Maastricht Journal of European and Comparative Law* 4; T.C. Hartley, *supra* note 4, pp. 453–460.

²¹⁴ Joined Cases 5, 7, 13–24/66, *Kampffmeyer v. Commission* [1967] ECR 245. See also Case C–80/04 P, *DLD Trading v. Council*, order of 12 April 2005 (unpublished).

²¹⁵ Case 175/84, *Krohn v. Commission* [1986] ECR 753.

the Commission, refused to grant the applicant import licences for the import of manioc from Thailand. On the other hand, the Court does not recognise any Community liability where the Commission merely provides the national authority with an opinion which is not binding. In *Sucrimex and Westzucker v. Commission*²¹⁶ the Court found that the application of EC provisions on export refunds was a matter for the national authorities. Consequently, when the Commission informed the national authority that there were no grounds for paying the refund in issue, the Court found that this was part of 'the internal co-operation between the Commission and the national bodies responsible for applying Community rules in this field; as a general rule this co-operation cannot make the Community liable to individuals'.²¹⁷ The rejection of a causal link between the Commission's action and the damage sustained by the applicant is, however, difficult to justify. Given that the Commission would not have reimbursed the Member State for the payment of the refund, the national authority had *de facto* no other choice but to reject the applicant's claim. Joint liability of the Community and the Member State can also be established where the Community fails to supervise Member States adequately.²¹⁸

The main area for joint liability is, however, the application by Member States of Community legislation. This can be the case where the national authorities require individuals to make payments on the basis of an unlawful EC act. In *Haegeman v. Commission*,²¹⁹ the national authorities collected a countervailing charge imposed by Community regulations on imports of Greek wine into the Community. Equally, where the national authorities refuse to grant payments, licences or other measures on the basis of an unlawful Community act, joint liability will exist. In *Compagnie d'approvisionnement and Grands Moulins v. Commission*,²²⁰ the applicants

²¹⁶ Case 133/79, *Sucrimex and Westzucker v. Commission* [1980] ECR 1299.

²¹⁷ *Ibid.*, at para. 22. See also Case 217/81, *Compagnie Interagra v. Commission* [1982] ECR 2233, at para. 8.

²¹⁸ See Case 4/69, *Lütticke v. Commission* [1971] ECR 325. See, however, Joined Cases C-106/90, C-317/90 and C-129/91, *Emerald Meats v. Commission* [1993] ECR I-209.

²¹⁹ Case 96/71, *Haegeman v. Commission* [1972] ECR 1005. See also Case 26/74, *Roquette v. Commission* [1976] ECR 677; Case 46/75 *IBC v. Commission* [1976] ECR 65; Case 20/88, *Roquette v. Commission* [1989] ECR 1553; Case C-282/90, *Vreugdenhil v. Commission* [1992] ECR I-1937; Case T-167/94, *Detlef Nölle v. Council and Commission* [1995] ECR II-2589.

²²⁰ Joined Cases 9 and 11/71, *Compagnie d'approvisionnement and Grands Moulins v. Commission* [1972] ECR 391. See also Case 43/72, *Merkur v. Commission* [1973] ECR 1055; Case 153/73, *Holtz & Willemsen v. Council and Commission* [1974] ECR 675; Case 74/74, *CNTA v. Commission* [1975] ECR 533; Case 99/74, *Grands Moulins v. Commission* [1975] ECR 1531; Case 281/82, *Unifrex v. Commission and*

complained that the applicable Commission regulations fixed the subsidies to be granted by the national authorities on imports of common wheat and meslin from third countries at an inadequately low level. In *De Boer Buizen v. Council and Commission*,²²¹ the national authorities refused to grant export licences for steel tubes and pipes to the USA on the basis of Community regulations implementing an arrangement between the Community and the USA.

Joint liability also arises where the Member States implement Community Directives. In *Assurance v. Council and Commission*²²² the applicants claimed that they suffered damage as a result of the exclusion of export credit insurance operations for the account of or guaranteed by the state from the scope of Council Directive 87/343. Even though the directive had to be implemented by the Member States, the applicants brought a compensation claim under Article 288(2) against the Council and the Commission.

2. Exhaustion of Remedies

In cases of joint liability, the individual may have a remedy not only in the Court of First Instance, but also in a national court. In such instances, the question is where the applicant has to bring his action, in the national court or the European Court. The ECJ has made it clear that it has exclusive jurisdiction over compensation claims against the Community under Article 288(2). Conversely, it has consistently refused to rule on the liability of national authorities, which is therefore a matter for national courts. However, the Court has established the principle that applicants first have to exhaust remedies in the national courts before an action for damages against the Community can be considered as admissible.²²³ The European Court has pointed out that where the application of a

Council [1984] ECR 1969; Case C-119/88, *AERPO v. Commission* [1990] ECR I-2189; Case C-55/90, *Cato v. Commission* [1992] ECR I-2533; Case T-18/99, *Cordis v. Commission* [2001] ECR II-913.

²²¹ Case 81/86, *De Boer Buizen v. Council and Commission* [1987] ECR 3677. See also Case 101/78, *Granaria v. Hoofdproduktieschap voor Akkerbouwprodukten* [1979] ECR 623; Case 12/79, *Wagner v. Commission* [1979] ECR 3657; Joined Cases C-104/89 and C-37/90, *Mulder and others and Heinemann v. Council and Commission* [1992] ECR I-3061; Case T-93/95, *Laga v. Commission* [1998] ECR II-195; Case T-94/95, *Landuyt v. Commission* [1998] ECR II-213.

²²² Case C-63/89, *Assurances du Crédit and Compagnie Belge d'Assurance Crédit v. Council and Commission* [1991] ECR I-1799. See also Case T-210/00, *Etablissements Biret v. Council* [2002] ECR II-47; Case T-47/02, *Danzer v. Council* [2006] ECR II-1779.

²²³ See A. Ward, *supra* note 4, pp. 375-391.

Community measure is left to the national authorities, the applicant has to contest the Community measure first in the national court, which can refer the question of the validity of the EC act to the Court under Article 234 EC.²²⁴ However, after some uncertainty as to the extent of the obligation to exhaust national remedies, the Court made it clear in *Unifrex v. Commission* that ‘the existence of such means of redress will be capable of ensuring the effective protection of the individuals concerned only if it may result in making good the alleged damage’.²²⁵

Where the applicant has suffered loss for an amount unduly paid to the national authority which requested the payment on the basis of an unlawful EC act, the Court would require the applicant to seek his remedy in the national court. Consequently, an action in the European Court is inadmissible, as the applicant should claim restitution in the national court.²²⁶ This also includes ‘ancillary questions’, such as the payment of interest²²⁷ or the reimbursement of legal costs.²²⁸ On the other hand, where a ruling by the European Court on the invalidity of the EC act in issue would not have led to the recovery of the payment made in the national court, the action is admissible.²²⁹ Similarly, where the damage consists of loss in addition to the payment of the duty demanded by the national authorities and does not constitute ‘ancillary’ damage, an action for compensation is admissible in the European Court as no national remedy would be available.²³⁰

The same principle applies where the national authority refuses to grant payment to an individual on the basis of an unlawful Community

²²⁴ Case T-47/02, *Danzer and another v. Council* [2006] ECR II-1779, at paras. 31–33.

²²⁵ See Case 281/82, *Unifrex v. Commission and Council* [1984] ECR 1969, at para. 11. See also Case 175/84, *Krohn v. Commission* [1986] ECR 763, at para. 27; Case T-195/00, *Travelex and Other v. Commission* [2003] ECR II-1677, at para. 87; Case C-80/04P, *DLD Trading v. Council*, order of 12 April 2005 (unpublished), at para. 47.

²²⁶ Case 96/71, *Haegeman v. Commission* [1972] ECR 1005, at para. 16. See also Case 26/74, *Roquette v. Commission* [1976] ECR 677, at para. 11; Case 20/88, *Roquette v. Commission* [1989] ECR 1553, at para. 15; Case C-282/90, *Vreugdenhil v. Commission* [1992] ECR I-1937, at para. 12; Case T-167/94, *Detlef Nölle v. Council and Commission* [1995] ECR II-2589, at para. 36; Case T-91/05, *Sinara Handel v. Council and Commission* [2007] ECR II-245, at para. 79.

²²⁷ Case 26/74, *Roquette v. Commission* [1976] ECR 677, at para. 12.

²²⁸ Case T-167/94, *Detlef Nölle v. Council and Commission* [1995] ECR II-2589, at para. 37. On the question of ‘ancillary damage’ see A. Ward, *supra* note 4, pp. 383–389.

²²⁹ Case 20/88, *Roquette v. Commission* [1989] ECR 1553, at para. 16.

²³⁰ Case 26/74, *Roquette v. Commission* [1976] ECR 677; Case C-282/90, *Vreugdenhil v. Commission* [1992] ECR I-1937, at paras. 13–15.

act.²³¹ The Court considers that an action for ‘payment of amounts due under Community regulations’²³² from the national authority which refuses to comply with the request is a matter for the national courts.²³³ The applicant normally has an effective remedy in the national court only if the national court can, after the European Court has invalidated the unlawful Community act, grant the payment. This is usually the case where the Community institution replaces a previous act which contained a financially more favourable measure for the applicant.²³⁴ On the other hand – and this is the normal case – the national authority is not in a position to grant the payment, even after the European Court has annulled the unlawful Community act, as this would require some action on the part of the Community institution competent to act. In this case the individual does not have an effective remedy in the national court and can claim compensation directly in the European Court.²³⁵ Similar considerations apply where the national authorities refuse a licence or other act on the basis of an unlawful Community act. Where the national court can grant the desired act after the unlawful Community act has been removed by the Community Court, the applicant is considered to have an effective remedy and an action in the European Court is inadmissible.²³⁶ Where such a remedy does not exist in the national court, the action in the European Court is admissible.²³⁷ Equally admissible is an action for damages in addition to loss sustained through the refusal to pay the requested amount

²³¹ This case should be distinguished from a situation where the national authority refuses to make a payment to which the applicant was entitled under EC law, but which is withheld because the Community rules do not provide for reimbursement. See Case 99/74, *Grands Moulins v. Commission* [1975] ECR 1531, where the Court held the action inadmissible.

²³² Joined Cases 64 and 113/76, 167 and 239/78, 27, 28 and 45/79, *Dumortier Frères v. Council* [1979] ECR 3091, at para. 6.

²³³ Joined Cases 106 to 120/87, *Asteris v. Greece* [1988] ECR 5515, at para. 25; Case 281/82, *Unifrex v. Commission and Council* [1984] ECR 1969, at para. 11.

²³⁴ Case 46/75, *IBC v. Commission* [1976] ECR 65.

²³⁵ Joined Cases 9 and 11/71, *Compagnie d’approvisionnement and Grands Moulins v. Commission* [1972] ECR 391; Case 43/72, *Merkur v. Commission* [1973] ECR 1055, at para. 6; Case 153/73, *Holtz & Willemsen v. Council and Commission* [1974] ECR 675; Case 74/74, *CNTA v. Commission* [1975] ECR 533; Case 281/82, *Unifrex v. Commission and Council* [1984] ECR 1969, at para. 12; Opinion of AG Darmon in Case C–55/90, *Cato v. Commission* [1992] ECR I–2533, at para. 23.

²³⁶ Case 12/79, *Wagner v. Commission* [1979] ECR 3657, at paras. 12–14.

²³⁷ Case 81/86, *De Boer Buizen v. Council and Commission* [1987] ECR 3677, at para. 10; Joined Cases C–104/89 and C–37/90, *Mulder and others and Heinemann v. Council and Commission* [1992] ECR I–3061, at para. 9.

or to grant the desired licence or other act, as in this case no national remedy would be available.²³⁸

Finally, where the loss sustained by the applicant is of a different kind from the one outlined above, an action in the European Court for compensation for such damage is admissible if an effective remedy does not exist in the national court.²³⁹ However, where such additional loss resulted from a joint decision by the Community and the national authorities, as in *Kampffmeyer v. Commission*,²⁴⁰ the European Court will declare an action for compensation admissible, but will stay the proceedings to await the outcome of the compensation claim in the national court.

V. CONCLUSION

The Court has defended the current judicial architecture in its judgment in *Jégo Quéré*²⁴¹ on the ground that:

[b]y Articles 230 EC and Article 241 EC, on the one hand, and by Article 234, on the other, the Treaty has established a complete system of legal remedies and procedures designed to ensure review of the legality of acts of the institutions, and has entrusted such review to the Community Courts. Under that system, where natural or legal persons cannot, by reason of the conditions for admissibility laid down in the fourth paragraph of Article 230 EC, directly challenge Community measures of general application, they are able, depending on the case, either indirectly to plead the invalidity of such acts before the Community Courts under Article 241 EC or to do so before the national courts and ask them, since they have no jurisdiction themselves to declare those measures invalid, to make a reference to the Court of Justice for a preliminary ruling on validity.²⁴²

It has been widely argued that the current system is in need of reform.²⁴³ It is apparent that the reform efforts have so far focused on the restrictive

²³⁸ See Case 175/84, *Krohn v. Commission* [1986] ECR 753; Case C-119/88, *AERPO v. Commission* [1990] ECR I-2189.

²³⁹ See Joined Cases 65 and 67-85/75, *Cotelle v. Commission* [1976] ECR 391; Case 281/84, *Zuckerfabrik Bedburg v. Council and Commission* [1987] ECR 49, at para. 12; Case C-63/89, *Assurances du Crédit and Compagnie Belge d'Assurance Crédit v. Council and Commission* [1991] ECR I-1799; Case T-210/00, *Etablissements Biret v. Council* [2002] ECR II-47, at paras. 36-38.

²⁴⁰ Joined Cases 5, 7, 13-24/66, *Kampffmeyer v. Commission* [1967] ECR 245.

²⁴¹ Case C-263/02 P, *Jégo Quéré v. Commission* [2004] ECR I-3425.

²⁴² *Ibid.*, at para. 30.

²⁴³ On suggestions as to the reform of the relationship between the Court of Justice, the Court of First Instance and the national courts see P. Craig, *supra* note 4, chapter 9.

standing requirements in Article 230(4) in case of a challenge against acts of general application. AG Jacobs in *UPA*²⁴⁴ and the CFI in *Jégo Quéré*²⁴⁵ have each presented their own, albeit different, suggestions for a more liberal interpretation of individual concern. And the solution in Article 263(4) TFEU dispenses altogether with the need to show individual concern where private parties bring an action ‘against a regulatory act which is of direct concern to him or her and does not entail implementing measures’. It is not the place of this chapter to argue on the merits of these suggestions.²⁴⁶ It should, however, be clear that such solutions merely offer a remedy against final administrative acts, be they of Community or national origin. What they do not offer is a solution to the integrated nature of European administration, in which administrative decisions are often adopted in composite procedures involving national and supranational actors. The right to an effective remedy under Articles 6 and 13 ECHR and Article 47 of the Charter of Fundamental Rights requires, however, an answer to these problems as well.

²⁴⁴ Opinion of AG Jacobs in Case C–50/00 P, *Unión de Pequeños v. Council* [2002] ECR I–6677, at para. 60: ‘a person is to be regarded as individually concerned by a Community measure where, by reason of his particular circumstances, the measure has, or is liable to have, a substantial adverse effect on his interests’.

²⁴⁵ Case T–177/01, *Jégo Quéré v. Commission* [2002] ECR II–2365, at para. 51: ‘a natural or legal person is to be regarded as individually concerned by a Community measure of general application that concerns him directly if the measure in question affects his legal position, in a manner which is both definite and immediate, by restricting his rights or by imposing obligations on him’.

²⁴⁶ J. Usher, *supra* note 4, at p. 599, has argued that the conventional solution ‘shifts the current distinction between general and individual acts to a new frontier between legislative and non-legislative acts’; A. Türk, *supra* note 4, pp. 166–169.

10. Participation and participation rights in EU law and governance

Joana Mendes*

1. INTRODUCTION

Participation is ubiquitous in EU law and governance. Participatory phases are found in decisional procedures defined in many regulations and directives, be these an obligation impinging upon Member States, be they a procedural duty of EU administrative bodies, either determined by the EU legislator or self-imposed. Participation can, therefore, be seen as a dominant feature of the governance arrangements which have developed over the last decades.¹

However, since participation has manifold meanings, the extent of this pervasion may be deceptive. This is the case if one intends participation as the procedural intervention of natural and legal persons whose substantive rights and interests are potentially affected by a Community regulatory measure, with a view both to ensuring the procedural protection of those rights and interests and to attaining an accurate representation of the factual situation based on an exact representation and consideration of the interests involved on the part of the deciding body.

This chapter argues that there is a mismatch between, on the one hand, the powers exerted by the European administration, particularly taking into account the effects which they may have in the legal sphere of persons concerned, and, on the other, the procedural guarantees which are afforded to them under the right to be heard as this has been developed by the European Courts (ECJ and CFI). Considered the core of the rights of the defence, the right to be heard, as it has been shaped by the Courts derives from an adversarial, bilateral conception of the procedure, and is thus primarily recognised to addressees of unfavourable administrative

* This chapter is based on the doctoral research I developed at the European University Institute, under the supervision of Professor Jacques Ziller.

¹ Joanne Scott and David Trubek, 'Mind the Gap: Law and New Approaches to Governance in the European Union', [2002] *European Law Journal* 1, at p. 5.

decisions, and, more broadly, to those directly and individually concerned by them. As such, the procedural protection of persons affected by European administrative action is also limited to procedures leading to the adoption of individual decisions. It will be shown that the subjective and objective limits thus placed on participation rights are not only unsuited to the procedural protection of holders of legitimate interests affected by European administrative action, but are also unjustifiable in the light of the rationales of participation defended by the European Courts.

The argument will be developed as follows. In the first section, the various usages of the concept in different contexts of EU law and governance will be illustrated, on the basis of a brief account of the meanings of participation. This will illustrate that a 'thicker' meaning of participation, capable of grounding procedural guarantees to persons affected in their legal spheres by European regulatory measures, is virtually absent from the EU governing and administrative structures, as shaped by the Commission's governance initiatives. At the same time, the narrower legal approach to participation, which can be seen in the Court's jurisprudence, is excessively restrictive for this purpose, for the reasons briefly presented above. These reasons will be developed in the second part of the chapter, where the limits to the Court's approach to participation rights will be highlighted. Finally, the third section will examine the criteria that, drawing on the concept of participation propounded above, may guide the recognition of participation rights in a way that is more consonant with the breadth of EU regulatory powers and with the complexity of the administrative relationships that emerge thereupon.

2. THE PLURAL FACETS OF PARTICIPATION

Participation, in its simplest and most general form, can be described as the opportunity to take part in decision-making processes.² In this broad sense, it comprises both the participation of public entities in decision-making processes which are attributed to the competence of a different entity or administration, on the one hand, and the involvement of the public or of interest holders in the exercise of public functions, on the other. The former phenomenon is particularly frequent in complex, multi-layered administrative systems and stems from the need to ensure administrative collaboration among different services and different levels of

² This first approach is often present in writings on participation. Among others, Mario Chiti, *Partecipazione popolare e pubblica amministrazione*, Pacini Editore (Pisa, 1977), pp. 34–35.

administration, or, more strictly, to respect the allocation of competences among them when they are implicated in a given decision. The latter is the subject of this chapter.³ In this latter sense, it is possible analytically to distinguish multiple meanings of participation, according to the rationales underlying the intervention of private parties. In reality, these are often intertwined and it is not always easy to isolate one from the other.

Firstly, participation may be grounded on the need to gather information on the factual situation which will be decided upon. Administrations have limited resources, at least in the face of the technical complexity implied in regulatory options. Regulatees are often better placed to provide the information needed for decision-making, without prejudice to other sources which the decisional body may resort to. Secondly, participation may be a means of ensuring the responsiveness of regulatory decisions. Calling interested parties to intervene in decisional procedures and, eventually, to influence regulatory outcomes arguably allows enacted rules to be more in tune with the social and economic needs of the regulated sector. Thirdly, the intervention of interested parties prior to the adoption of the final decision arguably favours compliance and facilitates implementation. Having been able to take part in the decisional process and, possibly, to have their views reflected or attended to in the final act or to understand the reasons why this was not the case enhances adherence to the regulatory option of the decisional body and, thus, abidance. In these three senses, participation is instrumental to the effectiveness of decision-making. In so far as the intervention in the procedure of parties external to the institutionalised decisional structure is directed at facilitating the fulfilment of the decisional function, participation assumes in these three cases a function of collaboration with the decision maker. Ultimately, it may be superseded by other regulatory techniques which ensure the same goals.⁴

A fourth, stronger, meaning of participation is grounded on ensuring respect for the dignity of the persons affected by regulatory decisions. Participation, in this sense, is grounded on the 'moral imperative' of allowing the persons concerned to defend their subjective rights and

³ Although the participation of public entities in decisional procedures has, in general, different rationales from the participation of private persons, these two phenomena can be equated in certain cases. For example, the procedural intervention of a public entity in order to respect its attributed competences is, in a way, similar to the participation of private persons ensured to respect the public interference in their legal spheres.

⁴ Joined cases T-371/94 and T-394/94, *British Airways and Others v. Commission* [1998] ECR II-2405, paras. 60 and 64.

interests before the adoption of a decision which may negatively impact on their legal sphere (*audi alteram partem*). Finally, participation can be understood as a tool for ‘public-making’,⁵ enhancing democracy by promoting ‘active citizenship’ through complementary means to those typical of democratic representation. The ‘public’, ‘the civil society’ or ‘the citizens’ (without any further qualification which restricts access to the procedure) are called upon to intervene in regulatory processes, and this is perceived as a means of creating an active public, or, at least, of avoiding public disaffection with political institutions. A weaker manifestation of this meaning may be identified in participatory mechanisms primarily directed at ensuring the transparency of decisional processes.

2.1. Participation in EU Governing and Administrative Structures

These different meanings permeate the EU governing and administrative structures. The consultative committees defined in the Treaty reveal the concern to involve interested parties in the Community rulemaking activity, arguably due to the instrumental reasons of responsiveness and compliance. Beyond the activity of these committees, the collaboration of persons concerned by Community regulatory activity in the form of their procedural intervention in decisional processes is a longstanding and entrenched feature of Community decisional structures. This is due not only to a fairly reduced administrative apparatus when compared to the tasks that the Community performs,⁶ but also to the need, felt in particular by the Commission, to create a proper constituency, in the line of the neo-functional trend dominant during the first period of integration.⁷

The practice by the Commission of consulting national administrations, private experts and interest groups, both when defining the contours of Community policies and when delineating the practical conditions of

⁵ This expression was suggested by Professor Neil Walker (recognising the lack of a more adequate term) in a discussion I had with him on participation. I thank him for clarifications on the systematisation I present in this section.

⁶ The relationship between a reduced administrative apparatus and resort to collaboration of concerned parties is explicit in the Treaty which established the European Coal and Steel Community. Indeed, Article 5, while defining in broad terms the competences of the Community, determined that these were to be carried out by the institutions ‘with a minimum of administrative machinery and *in close co-operation with the parties concerned*’ (emphasis added).

⁷ Justin Greenwood, *Interest Representation in the European Union*, Palgrave Macmillan (Basingstoke, 2003), p. 4.

application for those policies, is well-known.⁸ This practice has given rise to the creation of diverse committees, among which interest committees composed of representatives from the social and economic sectors concerned set up to ensure their input in decision-making (for example, the advisory groups dealing with matters covered by the common agricultural policy).⁹ In some cases, representatives from interest groups take part in comitology committees' discussions and negotiations, contrary to what is statutorily defined.¹⁰ More broadly, the Commission often resorts to various forms of consultation in order to gather technical information and to ensure the responsiveness of its regulatory policies (for example publication of consultative documents, such as green and white papers, internet consultations and hearings of specific groups through workshops, conferences or seminars). Often, the legislator defines the consultation duties impinging directly on Community administrative bodies.

The intent to seek the collaboration of interested parties and the one to open up decisional procedures in order to ensure transparency and the adherence of specific publics often converge in these consultation mechanisms and duties. In some cases, however, it is possible to isolate one of the two meanings as the prevailing rationale for participation. So, for example, the public inquiry period regarding the scientific opinion of the European Food Safety Authority envisaged for the authorisation, modification, suspension and revocation of the marketing authorisations of genetically modified food and feed (in line with the principles defined in the general food safety regulation) is destined to ensure the transparency of these procedures and thereby to tackle the risk of public mistrust regarding Community decisions. Two arguments support this

⁸ For an early account, Emil Noël, 'Comment fonctionnent les institutions de la Communauté Économique Européenne' [1963] *Revue du Marché Commun* 14, at p. 20.

⁹ Dating back to the 1960s, they are now regulated by Decision 2004/391/EC of 23 April 2004, OJ (2004) L 120/50.

¹⁰ Peter van der Knaap, 'Government by Committee: Legal Typology, Quantitative Assessment and Institutional Repercussions of Committees in the European Union', in Robin H. Pedler and Günther F. Schaefer, *Shaping European Law and Policy. The Role of Committees and Comitology in the Political Process*, European Institute of Public Administration (Maastricht, 1996) pp. 83, at p. 101. Annette Töller, 'The "Article 19 Committee": the Regulation of the Environmental Management and Audit Scheme', in M.P.C.M van Schendelen (ed.), *EU Committees as Influential Policymakers* Ashgate (Aldershot, 1998) pp. 179, at p. 181–182. No mention of this practice is found in the Report from the Commission on the working of committees during 2007 (COM(2008)844 final, Brussels, 15 December 2008), nor in previous ones, which unsurprisingly are confined to the formal functioning of the comitology committees.

interpretation: first, the fact that no particular connection to the subject matter is required to access the procedure – comments are received from ‘the public’ in general – and, secondly, the fact one of the regulatory concerns in this sector is to ensure consumer confidence in the decision-making processes underpinning food law.¹¹ A different rationale grounds the consultation of interested parties ‘regarding the form in which applications for authorisation [of medicinal products] are to be presented’ as well as the drafting of the structure and level of fees paid by undertakings to obtain and maintain Community marketing authorisations, envisaged in the legal regime for the authorisation and supervision of medicinal products. This consultation is arguably grounded on the need to secure the collaboration of persons concerned in the definition and implementation of these rules.¹²

In a different way, giving rise to distinct types of decision-making, some participation practices have mutated into forms of involvement of private persons in decisional processes where they acquire formal decisional powers – the 1985 ‘new approach to harmonisation’ is but one example – or negotiating powers – a different technique of involvement of concerned parties which can be exemplified by the partnership principle in the management of structural funds.¹³

Taking into account its pervasiveness across policy sectors, one may claim that participation is an inbuilt and reflexive feature of the European polity. Participation in this context is essentially intended as a means of enhancing the decisional function and its regulatory effects (in the triple

¹¹ Articles 9(7), 10(1), 18(7) and 22(1) of Regulation 1829/2003, of the European Parliament and of the Council, of 22 September 2003, on genetically modified food and feed OJ (2003) L 268/1 (amended). Also Article 9 of recital 5 and 9 and 22 of the preamble to Regulation 178/2002, of the European Parliament and of the Council, of 28 January 2002, laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety, OJ (2002) L 31/1.

¹² Articles 6(4) and 70(1) of Regulation 726/2004, of the European Parliament and of the Council, of 31 March 2004, laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency, OJ (2004) L 136/1 (amended).

¹³ Now enshrined in Article 11 of Council Regulation 1083/2006, of 11 July 2006, laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999, OJ (2006) L 210/25 (amended). On the distinction between non-decisional participation and these various forms of public-private regulation, see Fabrizio Cafaggi, ‘Rethinking Private Regulation in the European regulatory space’, in Fabrizio Cafaggi (ed.), *Reframing Self-regulation in European Private Law*, Alphen aan den Rijn: Kluwer Law International, (2006) p. 3, at pp. 22–35.

meaning mentioned above) but it is also pervaded by a sense of reaching out to specific publics. Recent normative developments have furthered its instrumental use and, at least in appearance and in certain contexts, have imbued participation with a fully-fledged connotation of ‘public-making’. The 2001 White Paper on Governance is a conspicuous example of this blend of meanings of participation. There, most notably, participation is dressed up by the rhetoric of ‘[connecting] Europe closer to its citizens’.¹⁴ Nevertheless, the ‘principle of participation’ as adopted in the White Paper essentially perpetuated former practices of consultation and interest representation which were eventually retouched and better structured due to the Commission’s search for social legitimacy.¹⁵ At the same time, the wording of the principle of participatory democracy, first enshrined in the Constitutional Treaty and now in the Lisbon Treaty, represents little more than a crystallisation of the abovementioned practices.¹⁶ Concretely, among other developments, consultation became one of the pillars of the Commission’s strategy of better law-making, inserted into procedures of impact assessment.¹⁷ Moreover, specific regulatory approaches have been developed where the involvement of concerned parties is of central relevance (for example, the Lamfalussy regulatory approach in the field of financial services, where involvement of market practitioners is destined

¹⁴ Commission of the European Communities, ‘European Governance. A White Paper’, COM(2001)428 final, Brussels, 25 July 2001, p. 8.

¹⁵ The claimed principle of participation is formulated thus: ‘[t]he quality, relevance and effectiveness of EU policies depend on ensuring wide participation throughout the policy chain – from conception to implementation. Improved participation is likely to create more confidence in the end result and in the Institutions which deliver policies. Participation crucially depends on central governments following an inclusive approach when developing and implementing EU policies’: White Paper, *cit.* (n.14), p. 10.) On this, Kenneth A. Armstrong, ‘Rediscovering Civil Society: the European Union and the White Paper on Governance’ (2002) 8 *European Law Journal* 102; Paul Magnette, ‘European Governance and Civic Participation: Beyond Elitist Citizenship?’ (2003) 51 *Political Studies* 144.

¹⁶ Future Article 8B(1) to (3) of the EU Treaty, following amendment by Treaty of Lisbon, OJ (2007) C 306/1. Article I–47(1) to (3) of the Treaty establishing a Constitution for Europe, OJ (2004) C 310/1.

¹⁷ Communication from the Commission, ‘European Governance: Better Lawmaking’, COM(2002)275 final, Brussels, 5 June 2002, p. 3; Communication from the Commission, ‘Towards a reinforced culture of consultation and dialogue – General principles and minimum standards for consultation of interested parties by the Commission’, COM(2002) 704 final, Brussels, 11 December 2002, p. 15. Highlighting the limited scope of application of these principles and standards, Paul Craig, *EU Administrative Law*, Oxford University Press (Oxford, 2006) p. 135.

to ensure inclusiveness and acceptance, as well as better rulemaking)¹⁸. However, the thicker meaning of participation, underpinned in respect for the dignity of the person, capable of ensuring procedural protection to persons affected by regulatory measures, is virtually absent from these developments.

2.2. Participation in the Case Law of the EU Courts

The stricter legal approach to participation contained in the case law of the EU Courts reveals a narrower picture than the one depicted above. Participation assumed in this context the form of a right to be heard, recognised ‘in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person’ and considered ‘a fundamental principle of Community law which must be guaranteed even in the absence of any rules governing the procedure in question’.¹⁹ Arguably, the core justifying criterion for applying the *audi alteram partem* principle lies in the adverse effect that an administrative decision may have *vis-à-vis* individual parties,²⁰ which corresponds to the fourth meaning of participation outlined above. Participation has the function of defence, affording anticipated procedural protection to affected interests, and it is thus seen as a complement to judicial review, as the participant is able to contradict the possible future decision, invoking errors, flaws or mistakes which might lead to the illegality of the final act.²¹ The intervention of the person targeted by the administrative procedure is grounded on a principle of justice. It is a formality required by the rule of law, being typical of individual procedures from which sanctions or

¹⁸ ‘Final Report of the Committee of Wise Men on the Regulation of European Securities Market’, Brussels, 15 February 2001, pp. 32–33 (available at http://ec.europa.eu/internal_market/securities/docs/lamfalussy/wisemen/final-report-wise-men_en.pdf). See also Article 5 of Commission Decision 2001/527/EC, of 6 June 2001, establishing the Committee of European Securities Regulators, OJ (2001) L 191/43, amended by Commission Decision 2004/7/EC of 5 November 2003, OJ (2001) L 3/32.

¹⁹ For example, Case 234/84, *Belgium v. Commission* [1986] ECR 2263, para. 27; Case C–135/92, *Fiskano v. Commission* [1994] ECR I–2885, para. 39; Case T–260/94, *Air Inter v. Commission* [1997] ECR II–997, para. 59.

²⁰ Hanns Peter Nehl, *Principles of Administrative Procedure in EC Law*, Hart Publishing (Oxford, 1999), pp. 71 and 84.

²¹ Referring to Italian administrative law, but of general relevance, Massimo Occhiena, ‘Partecipazione al procedimento amministrativo’, in Sabino Cassese (ed.), *Dizionario di Diritto Pubblico*, Giuffrè (Milan, 2006), vol. V, p. 4128, at p. 4134.

penalties may emerge or in which a potential advantageous position is denied to an applicant.²²

However, the right to be heard also emerges in the Courts' jurisprudence as an objective procedural standard which structures the exercise of administrative powers, be it because it ensures the position of affected private parties, be it because it enables the administrative authority to correctly assess the factual situation which it is called upon to appreciate. In this sense, the rationale of the right to be heard lies in a principle of care, according to which the administrative authorities should carry out a scrupulous examination of the facts and take into account all their possible facets, parallel to the second meaning of participation indicated above.²³ The stance according to which an infringement of the right to be heard can only lead to the annulment of the decision on procedural grounds if the applicant challenging the validity of the 'irregular' decision can prove that this would have been different otherwise converges with this interpretation, as it enhances the objective side of the right to be heard.²⁴ This dualism – participation grounded on the dignity of the person and participation as a factor which contributes to the correct exercise of the administrative

²² This stance underlined judgments such as the ones issued in Case 17/74, *Transocean Marine Paint Association v. Commission* [1974] ECR, 1063, at paras 15 and 16; in Case 85/76, *Hoffmann-La Roche & Co. AG v. Commission* [1979] ECR 461, at paras 9 and 15; in Joined cases 46/87 and 227/88, *Hoechst AG v. Commission* [1989] ECR 2859; at paras 13 to 15 and 52; Case C-49/88, *Al-Jubail Fertilizer Company (Samad) and Saudi Arabian Fertilizer Company (Safco) v. Council* [1991] ECR I-3187, at paras 15 to 18; as well as in Case T-450/93, *Lisrestal – Organização Gestão de Restaurantes Colectivos Lda and others v. Commission* [1994] ECR II-1177, at paras 42, 45, 47 and 48 and in Case C-32/95 P, *Commission v. Lisrestal – Organização Gestão de Restaurantes Colectivos Lda and others* [1996] ECR I-5373, at paras 24, 26 to 30 and 33.

²³ Cf., for example, Case 34/77, *Jozef Oslizlok v. Commission* [1978] ECR 1099, at para. 18, or, more noticeably, Case C-269/90, *Technische Universität München v. Hauptzollamt München-Mitte* [1991] ECR I-5469, at paras 13, 14 and, especially, 24. The Court has extended procedural protection of concerned parties on the basis of the principle of care, which it clearly separates from the right to be heard (in Case T-167/94, *Detlef Nölle v. Council and Commission* [1995] ECR II-2589, paras 63 and 78; see next section, below). On this, Nehl, *cit.* (n.20), Chapter 9.

²⁴ The Court has not been consistent in this point. Tridimas considers that the stance referred to in the text is the dominant one (Takis Tridimas, *The General Principles of EU Law*, 2nd edition, Oxford University Press (Oxford, 2006), pp. 391 and 392). Nehl points out cases where the Court adopted a different stance, but underlines the limitations of inferring consequences from this development, *cit.* (n.20), pp. 97–98. For an intermediate stance, closer to the latter, see Case T-147/97, *Champion Stationery Mfg Co. Ltd and others v. Council* [1998] ECR II-4137, para. 79 and Case C-194/99, *Thyssen Stahl v. Commission* [2003] ECR I-10821, para. 31.

function – has accompanied the jurisprudential developments in this matter.²⁵

3. LIMITS TO PARTICIPATION RIGHTS IN EU LAW

The Courts have maintained a pragmatic approach to participation, refraining from constructing a consistent doctrinal basis for the right to be heard. Although it is possible to identify situations where the right will be granted more likely than not,²⁶ outside its core purview (adjudicatory, trial-type administrative procedures which may produce adverse effects in the legal sphere of the addressees of individual decisions) and the fields of law where it has been recognised, the final conclusion remains dependent on the judicial appreciation of each case. In the end, the Courts' possibly purposeful pragmatism leaves room to accommodate different solutions.²⁷ This relative character of the right to be heard has been highlighted in *Yusuf* and *Kadi*, where the fundamental rights and the type of restriction at issue implied the need to comply with the rights of the defence of the individuals concerned, even if at only a subsequent phase of the procedure.²⁸

Furthermore, two boundaries limit the permissible scope of rights of participation. First, the right to be heard has been chiefly recognised to legal or natural persons or public bodies targeted by administrative decisions, or to persons who are adversely affected by those decisions in a similar manner. The Courts' jurisprudence has been

²⁵ Eric Barbier de La Serre, 'Procedural Justice in the European Community Case-law Concerning the Rights of the Defence: Essentialist and Instrumentalist Trends' (2006) 12 *European Public Law* 225, in particular pp. 228–229.

²⁶ On this see *ibid.*, p. 248.

²⁷ See Nehl, *cit.* (n.20), pp. 95 and 98, who is critical, and Barbier de La Serre, *cit.*, (n.25), pp. 248–250, upholding this pragmatism with some reservations.

²⁸ Case T–306/01, *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council and Commission* [2005] ECR II–3533, at paras 326 and 327; Case T–315/01, *Yassin Abdullah Kadi v. Council and Commission* [2005] ECR II–3649, at paras 256 and 257. Beyond the respect of the rights of the defence, these cases raise important questions pertaining, in particular, to the relations between Community and international law and the jurisdiction of Community Courts to review Community acts which implement resolutions adopted by the United Nations Security Council. The judgments were controversial and these issues have been widely debated in the literature. Specifically on the right to be heard, see joined Cases C–402/05 P and C–415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council and Commission* [2008] nyr., para. 333 to 348, as well as Opinion of Advocate General Maduro, delivered on 16 January 2008 in Case C–402/05 P, *Yassin Abdullah v. Council and Commission* nyr., para 47 and 51 to 53.

predominantly underpinned in an adversarial-adjudicative conception of process rights,²⁹ and this has arguably limited the expansion of participation rights to the intervention of other interested parties.³⁰ Apart from the specific procedures where intervention of interested parties is expressly envisaged (for example, competition, anti-dumping, Community trademark),³¹ holders of legitimate interests and of general interests the closeness of which to the material relationship at issue could justify extended legal protection or the input of which could contribute to a sound decision may be denied legally protected and judicially enforceable participation rights.

There are, however, in the Court's case law, indications which allow us to overcome this limitation. In some judgments, the Courts went beyond the strict formality of procedures, in particular the bilateral scheme of the relationship established between the deciding body and the person targeted by an administrative measure, and took into account the position which other private parties have in relation to the administrative decision. In *Lisrestal*, the Court recognised the right to be heard of the beneficiary of the European Social Fund, even though the beneficiary was not the interlocutor of the Commission, on the grounds that he was directly concerned and adversely affected by a decision reducing the amount of the aid granted. The most significant statement in this judgment is that the applicable regulation, determining the competence of the Commission to suspend, reduce or withdraw aid and to order the refund of paid amounts for which beneficiaries have primary liability establishes a direct link between these

²⁹ The 'trial-type-of-process' origin of the right to be heard is well expressed by the use of the term '*droits de la défense*' or 'rights of the defence', often used in the Courts' jurisprudence. The influence of this judicial conception is equally shown in the reasoning of some judgments and in the reference to the need to ensure the right to be heard 'in all procedures, even of administrative nature' (Case 85/76, *Hoffmann-La Roche v. Commission* [1979] ECR 461, at para. 9; Joined cases 100 to 103/80, *SA Musique Diffusion française and others v. Commission* [1983] ECR 1825, at para. 10; Case T-11/89, *Shell International Chemical Company Ltd v. Commission* [1992] ECR II-757, at para. 39; *Thyssen Stahl, cit.* (n. 24), at para. 30). It is, moreover, confirmed by the wording frequently reiterated by the Courts: 'respect for the rights of the defence is, in all proceedings *initiated against a person* which are liable to culminate in a measure adversely affecting that person, a fundamental principle of Community law which must be guaranteed even in the absence of any rules governing the proceedings in question' (e.g. *Belgium v. Commission, cit.* (n. 19), at para. 27; *Fiskano, cit.* (n. 19), at para. 39; *Air Inter, cit.* (n. 19), at para. 59; *Yusuf, cit.* (n. 28), at para. 325; *Kadi, cit.* (n. 28), at para. 255).

³⁰ Similarly to what may occur at national level. For the English case, Paul Craig, *Administrative Law*, 5th edition, Sweet and Maxwell (London 2003), p. 409.

³¹ See, below, section 4.2.

and the Commission.³² In *Nölle*, the Court, faithful to a bilateral view of the administrative relationship, considered that no right to be heard could be accorded to an independent importer in the realm of an anti-dumping procedure on the ground that this 'was not against the applicant and could not for that reason result in a measure adversely affecting it'. However, the independent importer could access the procedure, on the grounds that it had demonstrated a 'sufficient interest as an "interested party"' for the purpose of taking part in the anti-dumping procedure. It follows that the Commission, in accordance with the principle of care, must 'consider seriously and in detail whether [the] arguments or proposals [invoked by the interested party] are well founded'. The principle of care is thus intended as 'a rule protecting individuals'.³³

A second limitation to participation rights pertains to the realm of acts to which the right to be heard is applicable. The Court has sustained that this right, intended as a general principle of law when exercised in individualised administrative procedures, cannot be transposed to the realm of general acts involving a choice of economic policy. The Court first grounded this stance on the need to respect the Treaty determinations in relation to consultation as well as the democratic principles stemming from the Treaty (*Atlanta*). In subsequent judgments, however, this reasoning was extended to general acts adopted on the basis of a regulation or directive (for example, *Bergaderm*).³⁴ Any possibility of legally enforced participation (and, hence, anticipated legal protection) in relation to a wide range of administrative regulatory acts is thus excluded, whenever rights of participation have not been expressly enshrined in a Treaty article or in Community legislation, even when substantive rights and interests are effectively affected by general rules. The cases in which the Court has recognised the right to be heard in procedures leading to the adoption of general acts are clearly circumscribed – investigative proceedings prior to the adoption of anti-dumping regulations, given the partially individualised nature of the latter (they are applicable to specific imported

³² *Lisrestal v. Commission*, *cit.* (n. 22), paras 47 and 48 (see also paras 43 to 45), and *Commission v. Lisrestal*, *cit.* (n. 22), paras 28 and 29.

³³ *Nölle*, *cit.* (n. 23), paras 63 and 78. For a sharp criticism of this judgment, Nehl, *cit.* (n. 20), pp. 76–7. Nehl notes that the scope of the principle of care is not clear, in particular it is not always easy to delimit it from the scope of the right to be heard (*cit.*, pp. 110–111, 131–132, 162–163).

³⁴ Case T–521/93, *Atlanta AG and others v. Council and Commission* [1996] ECR II–1707, at paras 70–72; Case C–104/97 P, *Atlanta AG and others v. Commission and Council* [1999] ECR I–6983, at paras 37 and 38 (and, before, in Case T–199/96, *Laboratoires pharmaceutiques Bergaderm SA and Jean-Jacques Goupil v. Commission* [1998] ECR II–2805, at paras, 50, 58 and 59).

products and are thus susceptible to producing adverse consequences and affecting ‘directly and individually’ the undertakings concerned).³⁵ In addition, the requirement of ‘direct and individual concern’, the condition for access to justice under Article 230(4) EC, has been considered irrelevant for the purposes of access to rulemaking procedures.³⁶ This stance may void the procedural protection of individuals in European law in cases where general rules tend to replace individual decisions as a form of regulation, but where the rules adopted may be sufficiently detailed to impact on individuals’ legitimate interests.³⁷

Arguably, the connections between access to administrative procedures and access to justice have been a fundamental barrier to further jurisprudential developments in this matter,³⁸ especially as far as extending the procedural protection afforded by rights of participation to persons other than those individually and directly concerned by a given act, and, thereby, to general and abstract acts (with the mentioned exception of anti-dumping regulations) is concerned. Underlying the Courts’ stance is the assumption that sustaining participation in rulemaking procedures or expanding procedural rights beyond what is determined in the Treaty or in secondary legislation goes against the Courts’ powers under the Treaty.³⁹

³⁵ Case C-49/88, *Al-Jubail Fertilizer Company (Samad) and Saudi Arabian Fertilizer Company (Safco) v. Council of the European Communities* [1991] ECR I-3187, para. 15. Opinion of AG Darmon delivered on 7 February 1991 in *Al-Jubail* [1991] ECR I-3205, at paras 72 to 75, drawing on the Opinion of AG Warner delivered on 14 February 1979 in Case 113/77, *NTN Toyo Bearing Company and others v. Council* [1979] ECR 1212, p. 1262.

³⁶ Case T-13/99, *Pfizer Animal Health SA v. Council* [2002] ECR II-3305, at paras 88–105 and 487, and Case T-70/99, *Alpharma Inc. v. Council* [2002] ECR II-3495, at paras 80–97 and 388.

³⁷ On this, Craig, *EU Administrative Law*, *cit.* (n. 17), pp. 318–322.

³⁸ These have been underlined by the Courts, for example, in Case C-198/91, *William Cook plc v. Commission* [1993] ECR I-2487, at para. 23; Case C-225/91, *Matra v. Commission* [1993] ECR I-3203, at para. 17). In *Pfizer* and *Alpharma*, the reverse situation occurred: direct and individual concern was recognised to access judicial review, but considered unsuited to ground a right to be heard (see footnote 36). The result is, however, the same: recognising a right to be heard in *Pfizer* and *Alpharma*, when at stake was a procedure leading to the adoption of a regulation, would open a Pandora’s box.

³⁹ *Atlanta* (CFI judgment), *cit.* (n.34) at para. 71 and *Atlanta* (ECJ judgment), *cit.* (n.34) at para. 38 (‘In the context of a procedure for the adoption of a Community act based on an article of the Treaty, the only obligations of consultation incumbent on the Community legislature are those laid down in the article in question’) and Case T-198/01, *Technische Glaswerke Ilmenau GmbH v. Commission* [2004] ECR II-2717, at para. 194 (‘the Community Court cannot, on the basis of the general legal principles relied on by the applicant, such as those

In addition, the political implications of an expansion of participation, often emphasised by the Commission in its initiatives to ‘bring the citizens closer to the European institutions’, have possibly prevented a more favourable jurisprudential stance in relation to participation rights.

However, this leads to a mismatch between the powers exercised by Community administrative bodies and the procedural protection of the persons concerned: the scope of procedural protection afforded by Community rules and principles does not accompany the power to interfere in the person’s legal sphere. A food business operator may have charges and duties imposed on him without having had the opportunity to express his views in the corresponding procedure (the procedure that led to the decision imposing charges and duties), when the conditions for the use of the products he deals with are determined by a regulation following a procedure initiated by another person.⁴⁰ A consumer organisation the input of which into decisional procedures is in principle looked upon favourably cannot claim a participation right on which to ground its procedural intervention and related claims.⁴¹ Further, in most cases where the Courts have extended participation or some of the related procedural guarantees to interested parties other than the person on whose sphere the administrative act directly impinges, they remain faithful to an adversarial conception of the administrative procedure which involves the administration and the person targeted by the administrative decision in a bilateral relationship, other persons being considered third parties to the proceedings.⁴² While this may be accurate in some situations, in others it

of the right to due process, the right to be heard, sound administration or equal treatment, extend the procedural rights which the Treaty and secondary legislation confer on interested parties in procedures for reviewing state aid’).

⁴⁰ Cf. procedure for the approval of smoke flavourings used or intended for use in or on foods, ruled by Regulation 2065/2003, of the European Parliament and of the Council, of 10 November 2003, OJ (2003) L 309/1, in particular Article 9(4).

⁴¹ Case C-170/89, *Bureau Européen des Unions de Consommateurs v. Commission* [1991] ECR I-5709, at paras 19–21.

⁴² *Nölle*, *cit.* (n. 20), at paras 63 and 76. *Technische Glaswerke*, *cit.* (n. 39), at paras 60 and 61. Even *Lisrestal*, despite the breakthrough, is still indebted to this conception (*Lisrestal*, *cit.* (n. 22), paras 43 and 45). Arguably, in *Al-Jubail* this conception is not so markedly dominant (given the hybrid nature of anti-dumping regulations). Yet, it is present in the formulation of the right to be heard: ‘[requirements stemming from the right to a fair hearing] must be observed *not only in the course of proceedings which may result in the imposition of penalties*, but also in investigative proceedings prior to the adoption of anti-dumping regulations which, despite their general scope, *may directly and individually affect* the undertakings concerned and entail adverse consequences for them’ (at para. 15, emphasis added).

may be unsuited to properly representing the effective position of affected parties and, in current EU law, thus places them in an uncertain position regarding their procedural rights. In the field of state aid, for example, only recently have the Courts issued judgments which ensure procedural guarantees to the parties concerned, who, not being the addressees of state aid decisions, are called upon to participate, under Article 88(2) EC, in the procedure assessing the compatibility of an aid with Community rules.⁴³

On the other hand, stances favourable to the procedural protection of interested persons are unlikely to come about through the Commission's practice: although this last welcomes sources of information and collaboration in the exercise of its regulatory functions, it is not willing to follow legal rules which could enshrine procedural rights to persons affected by its activity.⁴⁴ Without denying that there are costs associated with participation and that ensuring a 'timely delivery of policy' is a worthy aim, this stance may, in certain cases, infringe human dignity as a value underlying the right to participate in procedures affecting one's rights and interests, for example, one's professional reputation.⁴⁵

The current rules on the right to be heard are at odds with a paradigm of administrative law which propounds rules and principles developed to ensure the correct exercise of the administrative function in respect of the rights and legitimate interests of citizens. It may be argued that the EU, predominantly focused on the goals of economic integration, is essentially output-oriented and that such a paradigm is either unsuited to EU administrative law or, at least, not inherent in the nature of the EU polity. This

⁴³ In *Technische Glaswerke, cit.*, the Court reviewed the motivation of the Commission's decision in the light of its ability to allow 'the applicant, as a party concerned, to understand why its argument had been rejected' (para. 67; this was confirmed in appeal: Case C-404/04 P, *Technische Glaswerke Ilmenau GmbH v. Commission* [2007] ECR I-1, at para. 35). In *Kuwait*, the Court held that 'the Commission is obliged duly to place the interested parties in a position to put forward their comments in the course of a formal investigation procedure on State aid': Case T-354/99, *Kuwait Petroleum (Nederland) BV v. Commission* [2006] ECR II-1475, at para. 83.

⁴⁴ Communication from the Commission, 'Towards a reinforced culture of consultation', *cit.* (n. 17), pp. 10 and 15.

⁴⁵ Case T-326/99, *Nancy Fern Olivieri v. Commission* [2003] ECR II-6053 where the Court, sanctioning the Commission's abovementioned stance, recognised the utility of the applicant's procedural intervention in a procedure for the approval of medicinal products, but denied her any guarantee which would enable her to assess how her contribution had been taken into account (paras 72 to 74 and 91). As to whether her professional reputation had been harmed in the whole procedure, the Court concluded that the applicable regulation did not allow the Commission to take these considerations into account (para. 97).

argument is, however, weak. It ignores the features of EU law which place the individual and the protection of his rights at the core of the EU legal system, namely the doctrine of direct effect, the conception of fundamental rights as part of the general principles of EU law and the European citizenship.⁴⁶

Concomitantly, the status quo is problematic under the rule of law. It is submitted that, in a system respectful of the rule of law, the procedural protection of individuals and their legally protected interests affected by the exercise of the Union's administrative power needs to be a central concern.⁴⁷ The fact that the Charter of Fundamental Rights recognises the rights of persons in their relationships with the European administration confirms that this aspect is not fully neglected by EU law. Nevertheless,

⁴⁶ The 'motivations' or, possibly, claimed limitations of these features in securing the position of the individual in EC law do not override this statement. Direct effect has been instrumental in ensuring the effectiveness of EU law (Francis G. Jacobs, 'The Evolution of the European Legal Order' (2004) *Common Market Law Review* vol. 41, issue 2, 303, at p. 308), as European citizenship may be considered as a tool for intensifying the process of integration and modest in view of the rights and duties of which it is composed (see Ulrich K. Preuss, 'The Relevance of the Concept of Citizenship for the Political and Constitutional Development of the EU', in Ulrich K. Preuss and Ferran Requejo Coll (eds), *European Citizenship, Multiculturalism, and the State*, Nomos (Baden-Baden, 1998) p. 11, at pp. 14–15). As to fundamental rights, it may be argued that the claims based on their violation have been weak in leading to the annulment of legislative acts, and, in addition, that the EU 'continues to be a weak actor as far as the promotion of human rights is concerned', apart from having double standards regarding its own members, on the one hand, and external actors, on the other (Paul Craig and Gráinne de Búrca, *EU Law. Texts, Cases and Materials*, 4th edition, Oxford University Press (Oxford, 2008), pp. 390–391 and 407–408; the quotation is from p. 408). In any case, these features do have the effect of giving the individual a central position in EU law. Regarding direct effect see Bruno de Witte, 'Direct Effect, Supremacy, and the Nature of the Legal Order', in P. Craig and G. de Búrca (eds.), *The Evolution of EU Law*, Oxford University Press (Oxford, 1999), pp. 177–213, at pp. 205–207). Despite the drawbacks pointed out, 'a strong commitment to human rights is one of the principal characteristics of the European Union' (Philip Alston and J.H.H. Weiler, 'An "ever closer union" in Need of a Human Rights Policy: the European Union and Human Rights', in P. Alston *et al.* (eds.) *The EU and Human Rights*, Oxford University Press (Oxford, 1999), p. 6) and, admittedly, the status of European citizenship in itself entails the potential for reinforcing the position of the individual in the integration process (Preuss, *cit.*, p. 25).

⁴⁷ This concern is manifested in *Al-Jubail*, where the Court argued for a 'scrupulous' action of the Community institutions in view of the possibility that European rules might 'not provide all the procedural guarantees for the protection of the individual which may exist in certain national legal systems' (*cit.*, n.35, para. 16).

the corresponding provision, restating previous case law, suffers from the deficiencies pointed out above.⁴⁸ Finally, in a regulatory system such as the Union's, where the decision-making power is spread across different levels connected under complex administrative procedures, one cannot rely for the purposes of procedural protection on the principle that participation is a matter to be left to national rules. Participation needs to occur at the stage of the procedure where the decisions are formed, in order to preserve its *effet utile*.⁴⁹ In the light of what was argued above, this requires an extended procedural protection going beyond that afforded by the recognition of the right to be heard as a fundamental principle of EU law.

4. PARTICIPATION RIGHTS AND THE PROCEDURAL PROTECTION OF HOLDERS OF LEGITIMATE INTERESTS

4.1. Underpinning Participation Rights: Concept of Participation

Participation should be intended in a broader sense than the strict formulation of the right to be heard developed by the Community Courts. This is predominantly underpinned in an adversarial conception of the administrative procedure and arguably influenced by the requirement of individually and directly concerned persons, defined as a condition to access the judicial review of Community acts.⁵⁰ A broader concept of participation is defined by reference to the persons whose intervention is considered legally relevant and to the functions of this intervention. On the one hand, the intervention of participants presupposes the entitlement of a substantive interest potentially affected by the outcome of the procedure. On the other, the legal relevance of the participants' intervention in the procedure is assessed in the light of two combined functions of participation: procedural protection of affected legal spheres (participation grounded on the person's dignity) and an accurate representation of the factual situation (participation as a means of gathering information and facilitating implementation and compliance structures in

⁴⁸ Article 41 of the EU Charter of Fundamental Rights, OJ (2000) C364/1.

⁴⁹ This has been recognised by the Courts (cf., e.g., Case T-346/94, *France-aviation v. Commission* [1995] ECR II-2841, paras 30 and 34).

⁵⁰ Article 230(4) EC.

the exercise of the decisional function).⁵¹ This combined criterion allows a stricter sense of procedural participation to be distinguished from the multiple meanings of participation and, particularly, from the somewhat disparate uses that especially the Commission has made of this concept in its governance initiatives. At the same time, the proposed criterion departs from the narrow judicial conception of participation rights: those affected are not necessarily directly and individually concerned and the acts covered by participation rights may be of a general nature as long as the conditions on which participation rights are grounded are fulfilled. These aspects will be dealt with below. First, however, two fundamental premises of participation should be clarified.

Firstly, the substantive relationship of interested parties to the procedure is the basis for a claim for participation rights; these are, in a sense, instrumental to the underlying substantive positions. In other words, the ultimate reason for the procedural intervention resides in a particular relation between the participant and the material situation which motivated the procedure. Access is restricted: the entity of reference of this concept of participation is not the citizen, nor the public, nor civil society indistinctly, but the person situated in a social group or setting which is affected by the decisional process.⁵² In short, participation rights should be granted to natural and legal persons who are the holders of individual and collective interests concerned by the final decision.

Secondly, this definition of participation assumes that a clear-cut distinction between a negative or subjective function of participation – participation as defence grounded on the person's dignity – and a positive or objective function – participation as collaboration with the deciding body – cannot be upheld.⁵³ On the one hand, participation as collaboration entails the protection of the interests voiced in the procedure. On the other, when intervening to defend his interests, the participant collaborates in the decision-making process by providing information and

⁵¹ While these are the rationales underlying the Courts' case law on the right to be heard, the Courts' judgments have coined a restrictive stance regarding participation rights, for the reasons pointed out above. Moreover, as stated, they have essentially maintained a pragmatic approach, refraining from providing a coherent doctrinal basis grounded in these rationales.

⁵² Distinguishing two systems of representation (representative democracy and interest representation) by reference to the citizen and to '*l'homme situé*' see Jean Boulois, 'Représentation et participation dans la vie politique et administrative', in Francis Delpérée (ed.), *La participation directe du citoyen à la vie politique et administrative. Travaux des XXI^{es}, Journée d'Études Juridiques Jean Dabin (12th)*, Bruylant (Brussels, 1986), p. 49, at pp. 50–51.

⁵³ This clear-cut distinction underlies the Court's judgment in *Nölle*.

alternative interpretations of the facts under assessment. Thus, the difference between the two functions is not qualitative, but merely quantitative, measured in the predominance of one function over the other, which in the end depends on the relevance of the personal factor in the underlying material situation.⁵⁴ In addition, the enhancement of procedural rules which are likely to lead to correct outcomes, in so far as they ensure an accurate representation of the variables involved in decision-making, is a requirement of the rule of law, as is the respect for the person's dignity. Both are essential to the material justice of the final decision, which should be ensured beyond the formal correctness of the procedure.⁵⁵ Therefore, a clear-cut distinction between the two rationales distorts and overly simplifies the conceptual and effective reality of participation. Both converge under the same legal principle – the rule of law – and the values warranted thereby.

It should, moreover, be noted that the eventual plural configuration of the content of the act resulting from a participative procedure, in the sense defended in the above paragraphs, does not in principle imply that administrative decisions should be consensual or based on a compromise between competing interests, and much less that the administration gives away its decision-making powers. While, admittedly, participation might lead to compromised solutions, it should strictly serve the functions pointed out above. In any event, 'responsibility [of the administration] for the decisions taken must be the limit to participation in the procedure'.⁵⁶ Participants are not granted proper decision-making power within the decisional structure (at least, not in a legal sense). Their views may be taken into consideration, but the final act adopted does not need to mirror the interests voiced in the procedure.

⁵⁴ As underlined by Cassese, the 'non-unity' of the theme of participation derives from the diversity of the position of the participant in relation to the subject matter underlying the procedure 'sometimes external or marginal to the procedure and to the function which the latter performs, sometimes, on the contrary, central and dominant' (Sabino Cassese, 'Il privato e il procedimento amministrativo', (1970) 79 *Archivio Giuridico Filippo Serafini* 25, at p. 31, author's translation).

⁵⁵ David Duarte, *Procedimentalização, participação e fundamentação: para uma concretização do princípio da imparcialidade administrativa como parâmetro decisório*, Almedina (Coimbra, 1996), pp. 137–139, and, further, p. 166. Nevertheless, it is not ruled out that the quantitative difference may influence the content of participation (Craig, *Administrative Law*, cit. (n. 30), pp. 408–409 and 429–431).

⁵⁶ Vasco Pereira da Silva, *Em busca do acto administrativo perdido*, Almedina (Coimbra, 1996), pp. 403–404.

4.2. Two Variables: Types of Power and Affected Interests

It follows from the considerations presented above that the normative justification for participation rights depends on the convergence of two factors: there must be public interference in the legal sphere of legal or natural persons *and* a correlative change in these persons' advantageous or disadvantageous positions stemming from a public action. In other words, participation rights are justified where the regulatory activity of the Union institutions and bodies amounts to shaping administrative relationships between public and private entities, in the sense that they either define or decisively determine the content of the rights, interests, duties and charges recognised to or impinging upon the persons concerned.

The concept of administrative relationship, in the meaning conveyed here, encompasses the links established between different legal spheres, involving both public entities and natural and legal persons, creating or affecting rights, interests, charges and duties which emerge from the legal norms applicable to a certain material situation. They often involve more than two persons, in interrelated sets of favourable and unfavourable positions (complex administrative relationships), be they of a substantive or procedural nature.⁵⁷

4.2.1. Types of power

The line dividing the type of power exerted which gives rise to the right to be heard is not so much that which distinguishes between discretionary and mandatory powers, as the Court of First Instance has held in recent controversial judgments.⁵⁸ The decisive criterion is the end result of the administrative decision: whether it may or may not determine an advantageous or disadvantageous position for the persons concerned, for example, whether it may negatively impact on their fundamental rights or on previously recognised rights and legally protected interests, by restricting, suspending or extinguishing them, or whether it may constitute an onus in their regard or deny them a benefit sought. While the impact and meaning of participation may be different before the exercise of discretionary or of mandatory powers, the rationales underlying rights of participation are equally valid in both cases. Arguing that participation is relevant

⁵⁷ On the concept of complex administrative relationships see Eberhard Schmidt-Assmann, *La teoría general del derecho administrativo como sistema*, Marcial Pons (Madrid, 2003), pp. 25, 185 and 316; on procedural administrative relationship, *idem*, pp. 375–376.

⁵⁸ *Yusuf, cit.*, paras 326 to 329 and *Kadi, cit.*, paras 254 to 259 (overruled by the ECJ, without clarifying this matter – see *Kadi and Al Barakaat, cit.* (n.28)).

only in the face of the exercise of a discretionary choice, in so far as it contributes towards structuring the process of deciding which solution is best compatible with the public interest, implies debasing the dignitarian rationale which underpins a 'stronger' meaning of participation. Further, even if one attributes a prevailing weight to the instrumental rationale of participation, participation is equally relevant where the decision-maker's choice is bound by objective parameters (i.e. the decision does not result from a discretionary appreciation, in a narrow sense) but the final decision entails nonetheless an assessment of technical or specialised knowledge.⁵⁹ Lastly, and still under an eminently instrumental logic, even in cases of mandatory powers, the facts on the basis of which the administration decides may be controversial, the intervention of the persons affected in order better to define the issue under appraisal being useful.

Now, such powers may be manifested both through the enactment of an individual decision and through the adoption of a rule. First, the distinction between individual and general acts is far from clear, unless based on legal fictions.⁶⁰ In fact, the exertion of normative power conveys 'extremely

⁵⁹ This recalls the distinction between discretionary powers proper and technical discretionarity. On this distinction see, among others, Bernardo Mattarella, 'Discrezionalità amministrativa', in Cassese (ed.), *Dizionario di Diritto Pubblico*, cit. (n. 21), vol. III, p. 1993, at p. 2000.

⁶⁰ In EU law, take the example of anti-dumping regulations, of regulations which define the list of tradable products attesting to their compatibility with public health rules, or of the recent regulations adopting measures directed against the property of persons suspected of terrorist association. The first have been characterised as having a hybrid nature (in particular, the Opinion of AG Warner, quoted above, n. 35). The second may be considered general administrative acts: they are concrete, given that they refer to specific products and define their 'legal status', but general in effect, in so far as they define the conditions of use that must be abided by market operators dealing with them (on general administrative acts, referring to Italian administrative law, see Massimo Severo Giannini, *Diritto amministrativo*, 3rd edition, Giuffrè (Milan, 1993), vol. II, p. 288; they resemble the *décisions d'espèce* of French administrative law: see René Chapus, *Droit administratif général*, Monchrestien (Paris, 2008), pp. 516–522). Arguably, in the third case, administrative acts are adopted in the form of a regulation (the type of situation envisaged in Article 230(4) of the EC Treaty). The Court of First Instance provided a different interpretation. It considered that the fact that the persons named on the regulation 'appear to be' directly and individually concerned by it does not affect the general nature of the act, which determines an *erga omnes* prohibition on funding or making economic resources available to the persons named in the regulation (*Yusuf*, cit. (n. 28), para. 186), and overlooked the fact that the regulation in issue also determined that all funds and economic resources of the persons named in the regulation's annex should be frozen (see paras 185 to 188 of the judgment). This interpretation was upheld by the Court of Justice (*Kadi and Al Barakaat*, cit., n. 28, paragraph 242).

varied contents, of atypical symbolic expression (plans, graphs, chemical or mathematical formulae, etc.) and of varied subjective range', often blurring the distinction between the norm and the act that implements it.⁶¹ At the very least, one may maintain that there are different shades of general and abstract characteristics of regulations. Secondly, and consequently, acts of a general nature may impact on private legal spheres in a similar way to individual acts. Independently of the possibility of an administrative act being adopted under the form of a regulation, the regulation may intensively define the contours of the material situation in such a way as to decisively condition the content of the administrative relationships which will for part of its realm.⁶²

4.2.2. Affected interests

As stated, the recognition of rights of participation needs to be related to the position of the individuals *vis-à-vis* the administrative decision. The concept of administrative relationship helps to delimit the range of persons who may be granted access to the procedure. On a first approach, these are all those who are somehow implicated in the administrative relationship which emerges from the public intervention. Two groups of interested persons should be distinguished: first, persons whose subjective rights and interests are directly affected by the outcome of the procedure, who can generally be termed holders of legitimate interests. Their access to the procedure is not strictly dependent on the 'ownership' of a right, or on a norm which is intended legally to protect the relevant interests of persons.⁶³ More broadly, holders of legitimate interests are those whose legal sphere may be affected by the outcome of the procedure and whose legal position is protected and needs to be taken into consideration by the legal system, it being thus legally relevant.⁶⁴ The second group consists of persons who voice interests protected by the legal system which, by force of the applicable legal norms, are pertinent to the regulation of the material situation under analysis, that is, holders of general interests. In this case, the interests voiced by participants are legally relevant in so far as their fulfilment is, in general, one of the goals of the legal system and, in

⁶¹ Juan Alfonso Santamaria Pastor, *Fundamentos de derecho administrativo*, Ramon Areces (Madrid, 1988), vol. I, p. 712.

⁶² Craig, *EU Administrative Law*, *cit.* (n.17), pp. 319–321.

⁶³ This last statement recalls the German doctrine of the protection norm: Schmidt-Assmann, *cit.*, pp. 86–88.

⁶⁴ This notion derives from the concept of legitimate interest developed in Italian administrative law (Aldo Sandulli, *Manuale di Diritto Amministrativo*, XV edition, Jovene Editore (Naples, 1987), pp. 107–114).

particular, of the pertinent rules and, thus, should be taken into account in the exercise of the administrative function. This embraces holders of diffuse interests, who may be individuals who have a certain relation of proximity with the subject matter in issue, or, more frequently, collective persons who are statutorily representative of these interests.⁶⁵

Representatives of collective interests may be included in one or the other category, depending on their connection to the material situation: whether they intervene to represent the rights or to voice the interests of their associates who are directly implicated in the regulated matter,⁶⁶ or whether they intervene because the interests that they represent are concerned by the matter being decided and, by force of the relevant legal rules, should be taken into consideration in the decision or rule adopted. In this role, in current EU governance arrangements, they are often associated with decisional procedures, but their ability to intervene depends essentially on the volition of the deciding body, not on a procedural rule of action imposed grounded on their relation to the material situation.⁶⁷

4.2.3. Procedural status

The procedural status of participants or, more precisely, the procedural guarantees ancillary to their right to participate are different in the two

⁶⁵ In essence, these correspond to the doctrinal categories of legitimate interest and factual interest which have been developed in the Italian administrative doctrine. On this see Sandulli, *cit.*, pp. 104–114 and Giannini, *cit.*, pp. 74–87. There has been a long dispute on the boundaries between them (among others, Leonardo Ferrara, ‘Situazioni soggettive nei confronti della pubblica amministrazione’ in Cassese (ed), *Dizionario di Diritto Pubblico*, *cit.*, vol. VI, pp. 5376–5390; Mario Nigro, ‘Ma che cos’è questo interesse legittimo? Interrogativi vecchi e nuovi punti di riflessione’, [1987] *Il foro italiano*, 469–483) and, in particular, on where to place diffuse interests in this construction. It is not rarely that the Community Courts have resorted to categories of national law to develop European normative solutions. See, for example, Pierre Pescatore, ‘Le recours dans la jurisprudence de la Cour de Justice des Communautés Européennes a des normes déduites de la comparaison des droits des États membres’ (1980) 32 *Revue Internationale de Droit Comparé* 337. The author underlines that the Courts’ comparative approach leads sometimes to the absorption by Community law of legal conceptions of a single Member State, given ‘their evident utility or the judicial progress that they allow to accomplish’ (p. 353). In this case, it is submitted that the categories mentioned are useful to enhance the procedural protection of private parties. In addition, as will be argued below, they are not completely unknown in European law.

⁶⁶ By analogy with the conditions set by the Courts’ jurisprudence in order to consider an association directly and individually concerned, for the purposes of Article 230(4). See, among others, Case C-78/03 P, *Commission v. Aktionsgemeinschaft Recht und Eigentum eV* [2005] ECR I-10737, at para. 70.

⁶⁷ See Section 2, above.

cases. Abstracting from the formal structure of the administrative decision, and underpinning the analysis of this matter with the concept of administrative relationship, holders of legitimate interests, irrespective of their quality as addressees of a decision or as so-called 'third parties', should in principle have a procedural status analogous to the one recognised to those entitled with a right to be heard, as this has been developed so far in the jurisprudence, save where a different solution results from specific legislation or is required by the circumstances of the case. In a way, this has been acknowledged by the Courts' jurisprudence, in cases where the right to be heard was, as such, granted to persons other than the addressee of a Commission decision. Thus, as mentioned, in *Lisrestal* the argument that the applicable regulation established a direct link between the Commission and the recipient of the assistance, beyond the formal structure of the procedure, framed the recognition of the right to be heard to the latter.⁶⁸

Nevertheless, this principled claim is at odds with the current legal configuration of European competition law procedures under Regulation 1/2003. These are fundamentally bilateral procedures.⁶⁹ Complainants who, being holders of legitimate interests, are 'closely associated with the proceedings'⁷⁰ are not afforded the same procedural guarantees as those entitled to a right to be heard.⁷¹ In addition, the approximation

⁶⁸ *Lisrestal*, *cit.*, para. 47. See also Case T-102/00, *Vlaams Fonds voor de Sociale Integratie van Personen met een Handicap v. Commission* [2003] ECR II-2433, at para. 60.

⁶⁹ Article 27 of Council Regulation 1/2003, of 16 December 2002, on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ (2003) L 1/1), amended. Cf. Articles 6, 11 and 13 of Council Regulation 773/2004, of 7 April 2004, relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (OJ (2004) L 123/18), as amended.

⁷⁰ Article 27(1) of Regulation 1/2003, *cit.* On their qualification as holders of legitimate interests, see below.

⁷¹ The procedural rules defined are clear in this respect: the complainant has access only to the non-confidential part of the statement of objections and may, where the Commission finds it appropriate, participate in the oral hearing afforded to the parties against whom the procedure was initiated (Article 6 of Regulation 773/2004, *cit.*, n. 69). The rule that the procedural rights of the complainants are not 'as far-reaching as the right to a fair hearing of the companies which are the object of the Commission's investigation' has been stated in Joined Cases 142 and 156/84, *British-American Tobacco Company Ltd and R. J. Reynolds Industries Inc. v. Commission* [1987] ECR 4487, at para. 20 (where it is underlined that 'the limits of [rights of complainants] are reached where they begin to interfere with those companies' right to a fair hearing') and in Case T-17/93, *Matra Hachette SA v. Commission*, [1994] ECR II-595, at paras 34 and 35.

between the procedural rights of holders of legitimate interests – concretely, the complainant – and the right to be heard of the addressee of the decision, where admitted, has been carefully grounded on the specific circumstances of the case.⁷² The assimilation of the participation rights of interested parties to the right to be heard of the addressee of an administrative decision was notably attempted in *Sytraval*, where the Court of First Instance sought to extend the procedural guarantees ancillary to the right to be heard to complainants in a state aid procedure. The judgment, however, distorted the procedural design determined by the combination of Article 88(2) and (3) and took the view that the state aid decision at issue had been addressed to the complainant. This was an incorrect interpretation, based on the will to react against an opaque procedure (that of Article 88(3)), and was quashed on appeal.⁷³ To conclude this point, the ‘justice’ of the principled claim espoused above needs to be assessed in each case, in the light of the applicable rules and of the factual situation under valuation: either of these factors may hinder the extension of the procedural guarantees attached to the right to be heard to other parties to the proceedings.

As to holders of general interests, they may be afforded a weaker procedural position, given the predominance of the instrumental rationale underlying participation. In this sense, the deciding body may delimit the subject matter in relation to which it hears these interested parties, they may not be given access to the non-confidential part of the file and, while the statement of reasons must reveal the reasoning and the sources of information taken into account by the deciding body, the latter does not need to address the specific claims voiced by holders of general interests. The stronger procedural status of the holders of legitimate interests advocated above lies on the relevance of their personal position in relation to the subject matter being decided, since the final decision impinges upon their legal sphere, irrespective of its concrete addressee. The circles of interests which need to be considered by the decision-maker, the position of their holders and their corresponding degree of procedural protection result from the principles and norms which regulate the substance of the subject matter.

⁷² Case T-49/93, *Société Internationale de Diffusion et d'Édition (SIDE) v. Commission* [1995] ECR II-2501, at paras. 71 and 73. The Court considered that an exchange of views *inter partes* with the complainant would have been better suited to fully ensure the usefulness of the complainant's contribution to the procedure.

⁷³ Case C-367/95 P, *Commission v. Sytraval and Brink's France SARL* [1998] ECR I-1719.

4.2.4. Legitimate interests and general interests in EU law

Admittedly, these categories are not sufficiently developed in EU law (certainly not as general categories, independent of specific regulations and sector specificities), but they are also not unknown in this legal system. For example, according to Article 7(2) of Regulation 1/2003, other than Member States, only natural or legal persons demonstrating a legitimate interest are entitled to file a complaint in a competition law procedure. The Courts have accorded, for these purposes, a legitimate interest to competitors of the undertakings targeted by the procedure, to persons whose economic activities may suffer injuries or losses as a result of the alleged infringement (including final customers who show that their 'economic interests have been harmed or are likely to be harmed as a result of [a] restriction of competition'), to associations of undertakings when the interests or their associates may be harmed by the claimed unlawful conduct.⁷⁴ These correspond to the category of holders of legitimate interests defined above. It should be noted that the quality of complainant may also be recognised to interveners in an already initiated procedure: the Court of First Instance has held that a different solution would deprive holders of legitimate interests of exercising the procedural rights associated with the status of complainant.⁷⁵ This reveals that the underlying concern is not to protect the procedural position of the complainant as such, that is, the person who triggers the administrative procedure, but of holders of legitimate interests in general, whose protection is granted by affording them the status of complainants.

On the other hand, other persons showing a 'sufficient interest' may be admitted to the procedure, either upon their own initiative (provided that the Commission considers their intervention necessary) or by invitation of the Commission.⁷⁶ For example, 'consumer associations that apply to be heard should generally be regarded as having a sufficient interest, where the proceedings concern products or services used by the end-consumer or products or services that constitute a direct input into such products or

⁷⁴ Ignace Maselis and Hans M. Gilliams, 'Rights of Complainants in Community Law', [1997] *European Law Review* 103, at p. 108. The possibility of final customers being admitted as complainants was mooted in Joined Cases T-213/01 and 214/01, *Österreichische Postsparkasse v. Commission* [2006] ECR II-1601, at paras 114 to 119.

⁷⁵ *Österreichische Postsparkasse v. Commission* at para. 91 *cit.* (n.74). Joined Cases T-259-264 and 271/02, *Raiffeisen Zentralbank Österreich and Others v. Commission*, paras 95 to 103.

⁷⁶ Article 27(3) of Regulation 1/2003, *cit.* (n. 69), and Article 13 of Regulation 773/2004, *cit.* (n. 69).

services'.⁷⁷ These interested parties, unlike holders of legitimate interests, are not directly implicated in the material situation that gave rise to the administrative procedure (for example, their economic interests are not affected by the infringement of competition rules), but they voice interests that are legally relevant in so far as they are protected by the legal system and are touched by the administrative procedure at issue.⁷⁸ Therefore, even if the distinction between addressees and complainants is not necessarily defined along the lines espoused above, the proposed categorisation is grounded solidly in European competition law.

Likewise, the procedure to be followed for the registration of a Community trade mark entails, on the one hand, an opposition procedure which may be triggered by holders of legitimate interests whom the registration might harm (for example, proprietors of earlier trade marks that might be confused with the future trade mark).⁷⁹ On the other, 'any natural or legal person and any group or body representing manufacturers, producers, suppliers of services, traders or consumers' – holders of general interests that might be concerned by the registration of the trade mark – may submit written observations explaining why this registration does not comply with the legally defined requirements.⁸⁰ Their procedural status is different: in the first situation, opponents are parties to the proceedings before the Office for the Harmonisation of the Internal Market; in the second case, the observations are simply 'communicated to the applicant who may comment on them'.⁸¹

In a similar vein, in anti-dumping procedures, a privileged procedural position is accorded to the undertakings concerned that are 'directly and individually' affected by an anti-dumping regulation which entails 'adverse consequences' for them, and, to a lesser degree, to those demonstrating a 'sufficient interest as an "interested party"'.⁸² At the same time, the verification of the condition on which the Community intervention needs to

⁷⁷ Regulation 773/2004, *cit.*, recital 11.

⁷⁸ Cf. *Österreichische Postsparkasse, cit.* (n. 74), at paras 114 to 119, in particular para. 115.

⁷⁹ Articles 41, 42 and 8 of Council Regulation 207/2009, of 26 February 2009, on the Community trade mark (OJ (2009) L 78/1), as amended.

⁸⁰ Articles 40 and 7 of Regulation 207/2009, *cit.*

⁸¹ Article 40(2) and Article 42 of Regulation 207/2009, *cit.*, and Rule 19 of Commission Regulation 2868/95 of 13 December 1995 implementing Council Regulation 40/94 on the Community trade mark (OJ 1995 L 303/1).

⁸² *Al-Jubail, cit.* (n. 35), at para. 15; *Nölle, cit.* (n. 20), at para. 76; Articles 5(9) to (11), 6(5) to (7) and 20 of Regulation 384/96, of 22 December 1995, on protection against dumped imports from countries not members of the European Community, OJ (1996) L 56/1 (amended).

be based – whether or not the imposition of anti-dumping measures is in the Community interest – is determined on the basis of ‘an appreciation of all the various interests taken as a whole, including the interests of the domestic industry and users and consumers’.⁸³ For this purpose, interested parties, independently of a direct and individual concern, are given the opportunity to express their views on this issue (they may request a hearing upon justification).⁸⁴ This right to participate in order to determine Community interest corresponds to the rights of participation of holders of general interests espoused above.

Access to the decisional procedures of holders of legitimate and of general interests may be extended by analogy to other fields of European law, where the Community decision is such that it originates or affects an administrative relationship established between the European administration and the persons concerned, irrespective of the form it takes. This may occur both when the final decision results from a centralised administrative procedure (i.e. those where the final act is formally and substantively taken by a Community institution, irrespective of the collaboration and intervention of national administrative bodies and entities) and when it stems from a decentralised procedure (i.e. a procedure that is started and concluded by a national administration; this last is the face of a network which involves the other national administrations, the Commission and, possibly, other Community administrative bodies whose contributions are decisive for the final outcome).

While one may argue that this wide scope of rights of participation, as far as holders of legitimate interests are concerned, results from the broadest judicial formulation of the right to be heard (according to which it is granted to natural or legal persons in relation to measures adversely affecting them), as stated, this is very much embedded in an adversarial understanding of the administrative procedure. This leads to a narrower scope and meaning of rights of participation than the one propounded in this chapter, and to their denial in circumstances where they should in principle be recognised, in the light of a conception of participation rights grounded in the concept of administrative relationship, of the reality of public interference in subjective legal spheres, and of the legal relevance of participation when seen essentially from an instrumental perspective.

⁸³ Article 21(1) of Regulation 384/96, *cit.* (n. 82 above). Cf. Articles 7(1) and 9(4) of the same regulation.

⁸⁴ Article 21(2) and (3) of Regulation 384/96, *cit.* (n. 82). Case C-179/89, *Bureau Européen des Unions de Consommateurs v. Commission* [1991] ECR I-5709, at para. 28 (denying interested parties not directly and individually concerned access to the non-confidential file).

In addition, even in its broader formulation, the right to be heard, in its current state of development, does not entail the possibility of recognising procedural guarantees of intervention to holders of general interests.

In the light of the construction proposed in this chapter, in the administrative procedure which leads to the authorisation to use smoke flavourings in or on food, food business operators, other than the person who initiated the procedure and who will possibly hold the authorisation, should be granted a right to participate, since, under the applicable regulation, they will need to comply with the conditions and restrictions attached to the authorisation in question.⁸⁵ Their legitimate interests should, therefore, be taken into account by the deciding body. Similarly, where Community legislation determines that a public consultation should be held in a given decisional process, different procedural treatment should be given to holders of legitimate interests and to holders of general interests, along the lines espoused above, in so far as it is possible to distinguish them on the basis of the respective contributions and, in particular, of the arguments woven by those who claim a legitimate interest. This would thicken (or create) the procedural guarantees of interested parties, apparently unaccounted for under the vague wording of the norms providing for a public inquiry.⁸⁶

To be sure, participation rights are not unlimited. They cede before the need to respect fundamental rights upheld by the legal system (for example, professional secrecy) and the need to ensure prompt and effective action when this is required by the protection of the public interest (for example, emergency situations).⁸⁷ Both limits need to be justified and fettered by legal principles. For example, regarding the failure to observe the rights of the defence regarding measures adopted to control foot-and-mouth disease, the Court has held that eventual restrictions need to ‘correspond to objectives of general interest pursued by the measure in question’ and should not ‘constitute, with regard to the objectives pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed’.⁸⁸ This limit is certainly stricter

⁸⁵ Article 9(4) of Regulation 2065/2003, *cit.* (n. 40).

⁸⁶ E.g. ‘[t]he public may make comments to the Commission within 30 days from such publication’ (Article 6(7) of Regulation 1829/2003, of the European Parliament and of the Council of 22 September 2003, on genetically modified food and feed, OJ (2003) L 268/1).

⁸⁷ See, respectively Article 16 of Regulation 773/2004, *cit.* (n. 69), and Case C-28/05, *G.J. Dokter and others v. Minister van Landbouw, Natuur en Voedselkwaliteit*, [2006] ECR I-5431, paras 75–78.

⁸⁸ *Dokter*, *cit.* (n. 87 above), at para. 75. In particular, interested parties should be given a right to contest the adopted measure in subsequent proceedings (para. 76).

in the presence of fundamental rights (for example, measures affecting the liberty, the property or the good name of a person) than in the presence of legitimate interests, and is more meaningful in these cases than in relation to the participation rights of holders of general interests. In other words, the limits to the relative nature of participation rights are much stronger when the protection of fundamental rights is at stake.

As for the consequences of enlarging access to decisional procedures on the grounds defended in this chapter, although ideally holders of legitimate interests should be afforded *locus standi* to challenge decisions which, affecting them, have infringed rules of procedure and, in particular, their own procedural guarantees, it is well known that the requirement of direct and individual concern of Article 230(4), as it has been interpreted by the Courts, raises obstacles to this enlargement of *locus standi*. It could be argued that, despite the interconnections between access to procedure and access to judicial review, there is no need for the former to be conditioned by the latter. One could maintain that broader access to the decisional procedure, grounded in the enhancement of the procedural conditions for material justice, need not be matched by similar rules of standing directed at ensuring the observance of the law in the interpretation and application of the Treaty.⁸⁹ Admittedly, however, loosening the entitlement of participation rights would create a tension in the European legal system, straining the limits of standing. In this light, the Courts' stance can undoubtedly be said to have a formal justification. Nevertheless, in the face of the considerations put forward in this chapter, one may question whether that tension is not already a reality, adding to the widely discussed reasons for enlarging the access of non-privileged applicants.⁹⁰

5. CONCLUSION

Returning to the meanings of participation presented in this chapter, consideration for the dignity of the persons affected by Community action is perhaps the element which has had least attention in the midst of the European governance developments and, at the same time, the element which is capable of grounding stricter forms of participation rights in a

⁸⁹ Article 220 EC.

⁹⁰ Among others, Anthony Arnall, 'Private Applicants and the Action for Annulment under Article 173 of the EC Treaty', (1995) *Common Market Law Review*, vol. 32, Issue 1, 7; Albertina Albors-Llorens, 'The Standing of Private Parties to Challenge Community Measures: has the European Court Missed the Boat?', [2003] *Cambridge Law Journal* 72.

large segment of European decision-making. The increased resort to participation in European governance arrangements, grounded essentially on the instrumental advantages of participation, contrasts with the lack of concern for the position of the person affected in his rights and interests by the regulatory measures adopted by European institutions. On the other hand, the Courts' position in relation to participation rights is excessively restrictive to account for the procedural protection of the interests of the person touched by decisional processes.

A concept of participation underpinned, concomitantly, by the dignitarian (referring to the fundamental dignity of the person) and by the instrumental functions of the procedural intervention of persons concerned, and framed by the concept of the administrative relationship, has the advantages of extending the procedural protection of the persons whose legal sphere is affected by Community action and, consequently, of bridging the distance between the configuration of participation in the political realm, on the one hand, and legal realm, on the other. Consequently, the EU administrative legal system will better suit the requirements of the rule of law, in so far as the conditions for materially achieving just decisions are enhanced. In addition, this would enhance a paradigm of administrative law that is respectful of the rights and legitimate interests of the citizens and more consonant with constitutional features of the EU such as direct effect, respect for fundamental rights and the status of European citizenship.

While the Courts have grounded the right to be heard on the two rationales of participation mentioned, their approach has been inconsistent: on the one hand, they have been biased by an adversarial conception of procedures and process rights, and, on the other, limited by the limits to standing while, at the same time (on occasion, admittedly), they have been aware of both the moral imperative and instrumental usefulness of participation.

11. The effects of the principles of transparency and accountability on public procurement regulation

Christopher H. Bovis

INTRODUCTION

The regulation of public procurement has been an instrumental component of the EU common market, as it has provided a platform for economic, legal and policy justifications in order to eliminate non-tariff barriers.¹

Economic justifications for regulating public procurement aim at liberalizing and integrating the relevant markets of the Member States. Competitiveness in the relevant product and geographical markets will increase import penetration of products and services destined for the public sector, will enhance the tradability of public contracts across the common market, will result in significant savings and price convergence and finally will be the catalyst for the needed rationalization and industrial restructuring of the European industrial base. Alongside the economic justifications, legal imperatives have emerged positioning the regulation of public procurement as a necessary ingredient of the fundamental principles of the Treaties, such as the free movement of goods and services, the right of establishment and the prohibition of discrimination on nationality grounds.² Finally, policy justifications of public procurement regulation have revealed a *sui generis* market place where the mere existence and functioning of anti-trust and the influence of neo-classical economic theories³ are not sufficient to achieve the envisaged objectives of integration

¹ See C.H. Bovis, *EC Public Procurement: Case Law and Regulation*, OUP (Oxford, 2006).

² See C.H. Bovis, 'Recent Case Law Relating to Public Procurement: A Beacon for the Integration of Public Markets', 39 *CMLRev* (2002) 1025.

³ See M. Bazex, *Le droit public de la concurrence*, RFDA, 1998; L. Arcelin, *L'entreprise en droit interne et communautaire de la concurrence*, Litec (Paris, 2003); O. Guézou, *Droit de la concurrence et droit des marchés publics: vers une notion transversale de mise en libre concurrence*, Contrats Publics, March 2003, available at

and liberalization. The ECJ has eluded on the presence of the *sui generis* market and characteristics.⁴ This *sui generis* market place is often referred to as *marchés publics* (public markets) and draws intellectual support from ordo-liberal theories.⁵

1. PUBLIC PROCUREMENT REGULATION AND THE PRINCIPLE OF TRANSPARENCY

One of the most important and celebrated principles of the public procurement legal regime is the principle of transparency. The principle of transparency serves two main objectives: the first is to introduce a system of openness in the public purchasing of the Member States, so potential discrimination on grounds of nationality should be eliminated; secondly, transparency in public procurement represents a substantial component of a system of best practice for both the public and private sectors, a system which could introduce operational efficiencies within the relevant markets.

Transparency in public procurement is achieved through Community-wide publicity and advertisement of public contracts over certain thresholds by means of the publication of three types of notices in the Official Journal of the European Communities:

- i) Periodic Indicative Notices (PIN). Every contracting authority must notify its intentions for public procurement contracts within the forthcoming financial year.
- ii) Invitations to tender. All contracts above the relevant thresholds should be tendered and the notice containing the invitation to tender

www.legirama.com. See also A. Jacquemin and H.W. De Jong, *European Industrial Organization*, Macmillan (London, 1997); Möschel, 'Competition Law from an Ordo Point of View', in A. Peacock and H. Willgerodt, *German Neo-Liberals and the Social Market Economy*, Macmillan (London, 1989).

⁴ See Cases C-223/99, *Agora Srl v. Ente Autonomo Fiera Internazionale di Milano* and C-260/99 *Excelsior Snc di Pedrotti Runa & C v. Ente Autonomo Fiera Internazionale di Milano* [2001] ECR I-3605; C-360/96, *Gemeente Arnhem Gemeente Rheden v. BFI Holding BV* [1998] ECR I-6821; C-44/96, *Mannesmann Anlagenbau Austria AG et al. v. Strohal Rotationsdurck GesmbH* [1998] ECR I-73.

⁵ See C.H. Bovis, 'Public Procurement and the Internal Market of the 21st Century: Economic Exercise versus Policy Choice', Chapter 17 in P. Nebbia and T. Tridimas (eds), *EU Law for the 21st Century: Rethinking the New Legal Order*, Hart Publishing (Oxford, 2005).

must include the award procedures and the award criteria for the contract in question.

- iii) Contract Award Notices (CAN). There are a form of notification after the award of the contract of the successful tenderer and the price of its offer, as well as the reasons for its selection by the contracting authority.

The principle of transparency, which serves as the ignition of public procurement regulation, has imprinted some significant effects in the regime, namely the effect of flexibility of the regime and the effect of verification in the delivery of public services. These effects are examined below:

The Flexibility Effect

Transparency in public procurement is linked with the *flexibility* inherent in the regulatory regime, which is demonstrated through certain doctrines established by the ECJ. These include the doctrines of *functionality* and *dependency* in order to define the notion of contracting authorities, as well as the doctrines of *dualism*, *commercialism* and *competitiveness* in order to determine the remit and thrust of public procurement rules.

The doctrine of functionality

Functionality depicts a flexible and pragmatic approach in the applicability of the Procurement Directives. Entities and bodies which have been set up by the state to carry out tasks entrusted to it by legislation, but are not formally part of the state's administrative structure, could not fall under the remit of the term contracting authorities, since they are not formally part of the state, nor are all criteria for the definition of bodies governed by public law present.⁶ The functional dimension of contracting authorities has earmarked the departure from the formality test, which has rigidly positioned an entity under state control on *stricto sensu* traditional public

⁶ This is particularly the case of non-governmental organizations (NGOs) which operate under the auspices of the central or local government and are responsible for public interest functions. See Article 9 of the Public Sector Directive 2004/18, OJ 2004, L134. In particular, bodies governed by public law i) must be established for the specific purpose of meeting needs in the general public interest not having an industrial or commercial character; ii) they must have legal personality; and iii) they must be financed, for the most part, by either the state, or regional or local authorities, or other bodies governed by public law; or subject to management supervision by these bodies, or having an administrative or supervisory board, more than half of whose members are appointed by the state, regional or local authorities or by other bodies governed by public law.

law grounds.⁷ Functionality, as an ingredient of assessing the relationship between an entity and the state demonstrates, in addition to the elements of management or financial control, the importance of constituent factors such as the intention and purpose of establishment of the entity in question.⁸ The doctrine of functionality supports the principle of transparency, as its application enhances the span and remit of the public procurement regulation.

The doctrine of dependency

The assessment of the third criterion of bodies governed by public law, namely that they ‘must be financed, for the most part, by either the state, or regional or local authorities, or other bodies governed by public law; or must be subject to management supervision by these bodies, or must have an administrative or supervisory board, more than half of whose members are appointed by the state, regional or local authorities or by other bodies governed by public law’, assumes that there is a close dependency of these bodies on the state, in terms of corporate governance, management supervision and financing.⁹ These dependency features are alternative; thus even the existence of one feature satisfies the entire third criterion and renders the public procurement rules applicable.

Management supervision by the state or other contracting authorities entails not only administrative verification of legality or appropriate use of funds or exceptional control measures, but the conferring of significant influence over management policy, such as the narrowly circumscribed remit of activities, the supervision of compliance, as well as the overall administrative supervision.¹⁰ Dependency, in terms of overall control of an entity by the state or another contracting authority, presupposes a control similar to that which the state or another contracting authority exercises over its own departments. However, the ‘similarity’ of control denotes lack of independence with regard to decision-making; thus a contract between

⁷ The formality test and the relation between the state and entities under its control was established in Cases C-249/81, *Commission v. Ireland* [1982] ECR 4005; C-36/74, *Walrave and Koch v. Association Union Cycliste Internationale et al.* [1974] ECR 1423.

⁸ See Case 31/87, *Gebroeders Beentjes B.V. v. State of Netherlands* [1988] ECR 4635; Cases C-353/96, *Commission v. Ireland* and C-306/97, *Connemara Machine Turf Co Ltd v. Coillte Teoranta* [1998] ECR I-08761; Case C-323/96, *Commission v. Kingdom of Belgium* [1998] ECR I-05063.

⁹ This type of dependency resembles the Court’s definition in its ruling on state controlled enterprises in Case 152/84 *Marshall v. Southampton and South West Hampshire Area Health Authority (Teaching)* [1986] ECR 723.

¹⁰ See Case C-237/99, *Commission v. France* [2001] ECR I-939.

a contracting authority and an entity, in which the former exercises a control similar to that which it exercises over its own departments and at the same time that entity carries out the essential part of its activities with the contracting authority, is not a public contract, irrespective of whether or not that entity is a contracting authority.¹¹ The similarity of control as a reflection of dependency reveals another facet of the thrust of contracting authorities: the non-applicability of the public procurement rules for in-house relationships.

The receipt of public funds from the state or a contracting authority is an indication that an entity could be a body governed by public law. However, this indication is not an absolute one.¹² Only specific payments made to an entity by the state or other public authorities have the effect of creating or reinforcing a specific relationship of subordination and dependency. The funding of an entity within a framework of general considerations indicates that the entity has close dependency links with the state or other contracting authorities.

If there is a specific consideration for the state to finance an entity, such as a contractual nexus, the dependency ties are not sufficiently close to allow the entity financed by the state to meet the third criterion of the term 'bodies governed by public law'. Such relationship is analogous to the dependency which exists in normal commercial relations formed by reciprocal contracts, which have been negotiated freely between the parties. The existence of a contract between the parties, apart from the specific considerations for funding, indicates strongly evidence of supply substitutability, in the sense that the entity receiving the funding faces competition in the relevant markets.

The doctrine of dependency brings entities which are dependent on public authorities within the remit of public procurement regulation, but exonerates in-house relationships.

The doctrine of dualism

The dual capacity of an entity as a public service provider and a commercial undertaking respectively and the weighting of the relevant activity

¹¹ See Case C-107/98, *Teckal Srl v. Comune di Viano* [1999] ECR I-8121.

¹² See Case C-380/98, *The Queen and H.M. Treasury, ex parte University of Cambridge* [2000] ECR 8035. The Court stipulated that the proportion of public finances received by an entity, as one of the alternative features of the third criterion of the term 'bodies governed by public law' must exceed 50% to enable it to meet that criterion. For assessment purposes of this feature, there must be an annual evaluation of the (financial) status of an entity for the purposes of being regarded as a contracting authority.

in relation to the proportion of its output should be the decisive factor in determining whether an entity is a body governed by public law. This argument appeared for the first time when it was suggested¹³ that only if the activities in pursuit of the 'public services obligations' of an entity supersede its commercial thrust, could it be considered as a body covered by public law and a contracting authority.

In practice, the suggestion implied a selective application of the Public Procurement Directives in the event of dual capacity entities. This is not entirely unjustified as, on a number of occasions,¹⁴ the Public Procurement Directives themselves utilize thresholds or proportions considerations in order to include or exclude certain contracts from their ambit. However, the ECJ ruled out a selective application of the directives in the case of dual capacity contracting authorities based on the principle of legal certainty. It substantiated its position on the fact that only the purpose for which an entity is established is relevant in order to classify it as a body governed by public law and not the division between public and private activities. Thus, the pursuit of commercial activities by contracting authorities is incorporated into their public interest orientation aims and objectives, without taking into account their proportion and weighting in relation to the total activities dispersed, and contracts awarded in pursuit of commercial purposes fall under the remit of the public procurement directives. The ECJ recognized the fact that by extending the application of public procurement rules to activities of a purely industrial or commercial character an onerous constraint would probably be imposed upon the relevant contracting authorities, which may also seem unjustified on the ground that public procurement law, in principle, does not apply to private bodies

¹³ See Case C-44/96, *Mannesmann Anlagenbau Austria v. Strohal Rotationsdurck GesmbH*, *op. cit.*; For a comprehensive analysis of the case see the annotation by C.H. Bovis 'Redefining Contracting Authorities under EC Public Procurement Directives: An Analysis of the Case C-44/96, *Mannesmann Anlagenbau Austria AG et al. v. Strohal Rotationsdurck GesmbH*', *Common Market Law Review*, 1999, Vol. 39, 205-225.

¹⁴ For example, the relevant provisions stipulating the thresholds for the applicability of the Public Procurement Directives (Article 3(1) of Directive 93/37; Article 5(1) of Directive 93/36; Article 14 of Directive 93/38; Article 7(1) of Directive 92/50); the provisions relating to the so-called 'mixed contracts' (Article 6(5) of Directive 93/37), where the proportion of the value of the works or the supplies element in a public contract determines the applicability of the relevant Directive; and finally the relevant provisions which embrace the award of works contracts subsidized *directly* by more than 50% by the state within the scope of the Directive (Article 2(1)(2) of Directive 93/37).

which carry out identical activities.¹⁵ The above situation represents a considerable disadvantage in delineating the distinction between private and public sector activities and their regulation, to the extent that the only determining factor appears to be the nature of the organization in question. The Court suggested that that disadvantage could be avoided by selecting the appropriate legal instrument or framework for the objectives envisaged or pursued by public authorities.

The doctrine of dualism specifically implied that contracting authorities may pursue a dual range of activities; to procure goods, works and services destined for the public, as well as participate in commercial activities. They can pursue other activities in addition to those which meet needs of general interest not having an industrial and commercial character. The proportion between activities pursued by an entity, which on the one hand aim to meet needs of general interest not having an industrial or commercial character and commercial activities on the other, is irrelevant for the characterization of that entity as a body governed by public law. What is relevant is the intention of establishment of the entity in question, which reflects on the 'specificity' requirement. Also, specificity does not mean exclusivity of purpose. Specificity indicates the intention of establishment to meet general needs. Along these lines, ownership or financing of an entity by a contracting authority does not guarantee the condition of establishment of that entity to meet needs of general interest not having industrial and commercial character.

There is considerable risk of circumventing the Public Procurement Directives if contracting authorities award their public contracts via private undertakings under their control, which cannot be covered by the framework of the Directives. Under the domestic laws of the Member States, there is little to prevent contracting authorities from acquiring private undertakings in an attempt to participate in market activities. In fact, in many jurisdictions the socio-economic climate is very much in favour of public-private sector partnerships, in the form of joint ventures or in the form of private financing of public projects. The default position is the connection between the nature of a project and the aims and objectives of the undertaking which awards it. If the realization of a project does not contribute to the aims and objectives of an undertaking, then it is assumed that the project in question is awarded 'on behalf' of another undertaking, and if the latter beneficiary is a contracting authority under the framework of public procurement law, then the relevant Directives

¹⁵ See C.H. Bovis, *The Liberalisation of Public Procurement in the European Union and its Effects on the Common Market*, Ashgate (Aldershot, 1998), pp. 16 ff.

should apply. The ECJ applied the *Strohal* lines of argument to *Teckal*,¹⁶ where the exercise of similar control over the management of an entity by a contracting authority prevents the applicability of the Directives.

The dual capacity of contracting authorities is irrelevant to the applicability of public procurement rules. If an entity is a contracting authority, it must apply public procurement rules irrespective of the pursuit of general interest needs or the pursuit of commercial activities. Also, if a contracting authority assigns the rights and obligations of a public contract to an entity which is not a contracting authority, that entity must follow public procurement rules. The contrary would be acceptable if the contract fell within the remit of the entity which is not a contracting authority, and the contract was entered into on its behalf by a contracting authority.

Dualism's irrelevance for the applicability of public procurement represents a safeguard for the *acquis communautaire*. Dualism could be viewed as recognition of contractualized governance, where the demarcation between public and private activities of the public sector has become difficult to define, as well as a counterbalance of commerciality. If commercialism might shield the activities of a contracting authority from the application of public procurement rules, dualism provides for the necessary inferences to subject dual capacity entities to the public procurement *acquis*.

The doctrines of commercialism and competitiveness

Commercialism and its relationship with needs in the general interest represents the most important link between profit-making and public interest, as features which underpin the activities of bodies governed by public law. The criterion of 'specific establishment of an entity to meet needs in the general interest having non-commercial or industrial character' has attracted the attention of the ECJ,¹⁷ where an analogy was drawn from public undertakings jurisprudence, as well as case law relating to public order to define the term *needs in the general interest*.¹⁸ The concept was approached through a direct link with that of 'general economic interest',

¹⁶ Case C-107/98, *Teckal Srl v. Comune di Viano*, *op. cit.*

¹⁷ See Cases C-223/99, *Agora Srl v. Ente Autonomo Fiera Internazionale di Milano*, and C-260/99, *Excelsior Snc di Pedrotti runa & C v. Ente Autonomo Fiera Internazionale di Milano* [2001] ECR 3605; C-360/96, *Gemeente Arnhem Gemeente Rheden v. BFI Holding BV* [1998] ECR 6821; C-44/96, *Mannesmann Anlagenbau Austria AG et al. v. Strohal Rotationsdurck GesmbH* [1998] ECR I-73.

¹⁸ See the Opinion of AG Léger, point 65 of the *Strohal* case, Case C-44/96, *Mannesmann Anlagenbau Austria AG et al. v. Strohal Rotationsdurck GesmbH* [1998] ECR 73.

as defined in Article 90(2) EC.¹⁹ The concept ‘general interest’ denotes the requirements of a community (local or national) in its entirety, which should not overlap with the specific or exclusive interest of a clearly determined person or group of persons.²⁰ However, the problematic requirement of the *specificity* of the establishment of the body in question was approached by reference to the reasons and the objectives behind its establishment. Specificity of the purpose of an establishment does not mean exclusivity, in the sense that other types of activities can be carried out without escaping classification as a body governed by public law.²¹

On the other hand, the requirement of the non-commercial or industrial character of needs in the general interest has raised some difficulties. The Court had recourse to case law and legal precedence relating to public undertakings, where the nature of industrial and commercial activities of private or public undertakings was defined.²² The industrial or commercial character of an organization depends heavily upon a number of criteria which reveal the thrust behind the organization’s participation in the relevant market. The state and its organs may act either by exercising public powers or by carrying out economic activities of an industrial or commercial nature by offering goods and services on the market. The key issue is the organization’s intention to achieve profitability and pursue its objectives through a spectrum of commercially motivated decisions. The distinction between the range of activities which relate to public authority and those which, although carried out by public persons, fall within the private domain is drawn most clearly from case law and judicial precedence of the Court concerning the applicability of the competition rules of the Treaty to the given activities.²³

The ECJ in *BFI*²⁴ had the opportunity to clarify the element of non-commercial or industrial character. It considered that the relationship of

¹⁹ See Case C-179/90, *Merci Convenzionali Porto di Genova SpA v. Siderurgica Gabrielli SpA* [1991] ECR I-05889; general economic interest as a concept represents ‘activities of direct benefit to the public’; point 27 of the Opinion of AG van Gerven.

²⁰ See P. Valadou, ‘La notion de pouvoir adjudicateur en matière de marchés de travaux’ [1991] *Semaine Juridique* Ed. E, No.3. p. 33.

²¹ See Case C-44/96, *Mannesmann Anlagenbau Austria, op. cit.*

²² For example see Case 118/85, *Commission v. Italy* [1987] ECR 2599, para. 7, where the Court had the opportunity to elaborate on the distinction of activities pursued by public authorities.

²³ See Case C-364/92, *SAT Fluggesellschaft v. Eurocontrol* [1994] ECR 542, 1-43; also Case C-343/95, *Diego Cali and Figli Srl v. Servizi Ecologici Porto di Genova SpA (SEPG)* [1997] ECR I-01547.

²⁴ See Case C-360/96, *Gemeente Arnhem Gemeente Rheden v. BFI Holding BV, op. cit.*

the first criterion of bodies governed by public law is an integral one. The non-commercial or industrial character is a criterion intended to clarify the term needs in the general interest. In fact, it is regarded as a category of needs of general interest. The Court recognized that there might be needs of general interest which have an industrial and commercial character, and it is possible that private undertakings can meet needs of general interest which do not have industrial and commercial character. The acid test for needs in the general interest not having an industrial or commercial character is that the state or other contracting authorities choose themselves to meet these needs or to have a decisive influence over their provision.

In the *Agora* case²⁵ the Court indicated that if an activity which meets general needs is pursued in a competitive environment, there is a strong indication that the entity which pursues it is not a body governed by public law. The reason can be found in the relationship between competitiveness and commerciality. Market forces reveal the commercial or industrial character of an activity, irrespective of whether or not the latter meet the needs of general interest. However, market competitiveness as well as profitability cannot be absolute determining factors for the commerciality or the industrial nature of an activity, as they are not sufficient to rule out the possibility that a body governed by public law may choose to be guided by considerations other than economic ones. The absence of competition is not a condition necessarily to be taken into account in order to define a body governed by public law, although the existence of significant competition in the market place may be indicative of the absence of a need in the general interest, which does not carry commercial or industrial elements. The Court reached this conclusion by analysing the nature of the bodies governed by public law contained in Annex 1 of the Works Directive 93/37²⁶ and verifying that the intention of the state to establish such bodies has been to retain decisive influence over the provision of the needs in question.

Certain activities which by their nature fall within the fundamental tasks of the public authorities cannot be subject to a requirement of profitability and therefore are not meant to generate profits. It is possible, therefore, that the reason, in drawing a distinction between bodies the activity of which is subject to the public procurement legislation and other bodies, could be attributed to the fact that the criterion of 'needs in the general interest not having an industrial or commercial character' indicates the lack of competitive forces in the relevant market place. The concept of

²⁵ See Case C-223/99, *Agora Srl v. Ente Autonomo Fiera Internazionale di Milano*, *op. cit.*

²⁶ OJ L 199, 9.8.1993.

the state encapsulates an entrepreneurial dimension to the extent that it exercises *dominium*. Although the state as entrepreneur enters into transactions with a view to providing goods, services and works for the public, this type of activities does not resemble the characteristics of entrepreneurship, in as much as the aim of the state's activities is not the maximization of profits but the observance of public interest. The relevant markets the state enters into can be described as public markets. Public markets are the *fora* where *public interest* substitutes *profit maximization*.²⁷

Competitive markets in utilities

Privatized utilities could, in principle, be excluded from the procurement rules when a genuinely competitive regime²⁸ within the relevant market structure would rule out purchasing patterns based on non-economic considerations. The new Utilities Directive should not apply to markets where the participants pursue an activity which is directly exposed to competition or markets to which access is not limited within the relevant Member State. The new Utilities Directive has therefore introduced a procedure, applicable to all sectors covered by its provisions, which will enable the effects of current or future opening up to competition to be taken into account. Such a procedure should provide legal certainty for the entities concerned, as well as an appropriate decision-making process, ensuring, within short time limits, uniform application of standards which result in the disengagement of the relevant procurement rules.

Direct exposure to competition should be assessed on the basis of objective criteria, taking account of the specific characteristics of the sector concerned. The implementation and application of appropriate Community legislation liberalizing a utility sector will be considered to provide sufficient grounds for determining whether there is free access to the market in question. Such appropriate legislation should be identified in an annex which will be provided by the Commission. The Commission will in particular take into account the possible adoption of measures entailing a genuine opening up to competition of sectors other than those for which legislation is already mentioned in Annex XI, such as that of railway

²⁷ M. Flamme and M. Flamme, 'Enfin l'Europe des Marchés Publics', *Actualité Juridique – Droit Administratif*, 20 November 1989, p. 653, argue along the same lines.

²⁸ The determination of a genuinely competitive regime is left to the utilities operators themselves. See Case C-392/93, *The Queen and H. M. Treasury, ex parte British Telecommunications plc*, [1996] ECR I-01631. This is perhaps a first step towards self-regulation which could lead to the disengagement of the relevant contracting authorities from the public procurement regime.

transport services. Where free access to a given market does not result from the implementation of appropriate Community legislation, it should be demonstrated that such access is uninhibited *de jure* and *de facto*.²⁹

The Verification Effect in the Delivery of Public Services

The interaction of public procurement with state aid assessment

The financing of public services has been examined under three approaches: the state aids approach, the compensation approach and the quid pro quo approach. The state aid approach³⁰ regards state funding granted to an undertaking for the performance of public services as state aid within the meaning of Article 87(1) EC, which may however be justified under Article 86(2) EC, provided that the conditions of that derogation are fulfilled and, in particular, if the funding complies with the principle of proportionality. The compensation approach³¹ reflects upon 'compensation' being intended to cover appropriate remuneration for the services provided or

²⁹ According to Article 68(2), for the adoption of a Decision the Commission shall be allowed a period of three months commencing on the first working day following the date on which it receives the notification or the request. However, this period may be extended once by a maximum of three months in duly justified cases, in particular if the information contained in the notification or the request or in the documents annexed thereto is incomplete. The disengagement of the utilities procurement regime as a result of the operation of the relevant entities in competitive markets by virtue of Article 30 of the new Utilities Directive does not apply to the WTO Government Procurement Agreement. This represents a legal *lacuna* as the procedural flexibility envisaged in the European procurement regulatory regime does not cover entities covered under the GPA. Rectification of the problem would require amendment to the GPA with the conferral of concessions and reciprocal access rights to the GPA signatories. See Directive 93/98, OJ 1993 L 199.

³⁰ See Case C-387/92, *Banco de Crédito Industrial SA, now Banco Exterior de España SA v Ayuntamiento de Valencia*, [1994] ECR 872; Case T-106/95, *FFSA and Others v. Commission* [1997] ECR II-229; Case C-174/97 P, *Fédération française des sociétés d'assurances, Union des sociétés étrangères d'assurances, Groupe des assurances mutuelles agricoles, Fédération nationale des syndicats d'agents généraux d'assurances, Fédération française des courtiers d'assurances et de réassurances and Bureau international des producteurs d'assurances et de réassurances v Commission of the European Communities* [1998] ECR I-01303; Case T-46/97, *SIC – Sociedade Independente de Comunicação SA v Commission of the European Communities*, [2000] ECR II-02125.

³¹ See Case 240/83, *Procureur de la République v. ADBHU* [1985] ECR 531; Case C-53/00, *Ferring SA v. Agence centrale des organismes de sécurité sociale (ACOSS)* [2001] ECR I-09067; Case C-280/00, *Altmark Trans GmbH and Regierungspräsidium Magdeburg v. Nahverkehrsgesellschaft Altmark GmbH and Oberbundesanwalt beim Bundesverwaltungsgericht* [2003] ECR I-1432.

the costs of providing those services. Under that approach, state funding of public services amounts to state aid, only if and to the extent that the economic advantage which it provides exceeds such appropriate remuneration or such additional costs. Finally, the *quid pro quo* approach distinguishes between two categories of state funding; in cases where there is a direct and manifest link between the state financing and clearly defined public services, any sums paid by the state would not constitute state aid. On the other hand, where there is no such link or the public service obligations are not clearly defined, the sums paid by the public authorities would constitute state aid.

The three approaches used by the Court to construct the premises upon which the funding of public service obligations, services of general interest, and services for the public at large could be regarded as state aid, utilize public procurement in different ways. On the one hand, under the state aid and compensation approaches, public procurement sanitizes public subsidies as legitimate contributions towards public service obligations and services of general interest. From procedural and substantive viewpoints, the existence of public procurement award procedures, as well as the existence of a public contract between the state and an undertaking, reveals the necessary links between the markets where the state intervenes in order to provide services of general interest. In fact, both approaches accept the *sui generis* characteristics of public markets and the role which the state and its organs play within such markets. On the other hand, the *quid pro quo* approach relies on public procurement to justify the clearly defined and manifest link between the funding and the delivery of a public service obligation. It assumes that without these procedural and substantive links between public services and their financing, the financing of public services is state aid.

Public procurement and the state aid approach

The application of the state aid approach leaves a void in state aid assessment with regard to the treatment of funding of public services. Such void is filled by the application of the public procurement regime, which assumes that public services emerge and are delivered in a different market, where the state and its emanations act in a public function. Such markets are not susceptible to the private operator principle which has been relied upon by the Commission and the Court³² to determine the borderline between market behaviour and state intervention. A convergence emerges between

³² See in particular Case 234/84, *Belgium v. Commission* [1986] ECR 2263, at para. 14; Case C-142/87, *Belgium v. Commission (Tubemeuse)* [1990] ECR I-959, at para. 26; and Case C-305/89, *Italy v. Commission (Alfa Romeo)* [1991] ECR I-1603, at para. 19.

public procurement jurisprudence and the state aid approach in the light of the reasoning behind the *BFI*³³ and *Agora*³⁴ cases. Public services are *sui generis*, having as main characteristics the lack of industrial and commercial character, where the absence of profitability and competitiveness are indicative of the relevant market within which they are procured and delivered. To avoid being classified as state aid, such services should be subject to the rigour and discipline of public procurement rules. In consequence, the application of the public procurement regime regards public funding as non-state aid and reinforces the character of public services as non-commercial or industrial. Of interest is *Chronopost*³⁵ which disengaged the private investor principle from state aid regulation, by indirectly accepting the state aid approach and therefore the existence of *sui generis* markets within which public services emerge.

Public procurement and the compensation approach

The compensation approach relies heavily upon the real advantage theory to determine the existence of any advantages conferred on undertakings through state financing. Public funds constitute aid only and to the extent that they exceed the value of the commitments the recipient has entered into. The compensation approach treats the costs offsetting the provision of public services as the base line over which state aid should be considered. That base line is determined by the market price, which corresponds to the given public/private contractual interface and is demonstrable through the application of public procurement award procedures. *Mannesmann*³⁶ provides an indication of the application of the compensation approach, where an undertaking could provide commercial services and services of general interest, without any relevance to the applicability of the public procurement rules. The rationale of the case runs parallel with the real

³³ See Case C-360/96, *Gemeente Arnhem Gemeente Rheden v. BFI Holding BV* [1998] ECR I-6821.

³⁴ See Cases C-223/99, *Agora Srl v. Ente Autonomo Fiera Internazionale di Milano* and C-260/99, *Excelstor Snc di Pedrotti Runa & C v. Ente Autonomo Fiera Internazionale di Milano* [2001] ECR I-3605.

³⁵ See Joined cases C-83/01 P, C-93/01 P and C-94/01, *Chronopost SA, La Paste and French Republic v. Ufex and Others* [2003] ECR I-6993; see also the earlier judgment of the CFI in Case T-613/97, *Ufex and Others v. Commission* [2000] ECR II-4055.

³⁶ See Case C-44/96, *Mannesmann Anlagenbau Austria AG et al. v. Strohal Rotationsdurck GesmbH*, [1998] ECR I-73. See also the analysis of the case by C.H. Bovis, 'Redefining Contracting Authorities under the EC Public Procurement Directives: An Analysis of the Case C-44/96, *Mannesmann Anlagenbau Austria AG et al. v. Strohal Rotationsdurck GesmbH*', *Common Market Law Review*, 1999, Vol. 39, 205-225.

advantage theory, up to the point of recognizing the different nature and characteristics of the markets under which normal (commercial) services and services of general interest are provided. The distinction begins where, for the principles of legal certainty and legitimate expectation, the activities of undertakings of dual capacity are equally covered by the public procurement regime and the undertaking in question is considered as *contracting authority* irrespective of any proportion or percentage between the delivery of commercial services and services of general interest.

Public procurement and the *quid pro quo* approach

The real advantage theory seems also to underpin the *quid pro quo* approach and it also creates some conceptual difficulties in reconciling jurisprudential precedent in state aid regulation. The *quid pro quo* approach appears to define state aid no longer by reference solely to the effects of the measure, but by reference to criteria of a purely formal or procedural nature. This means that the existence of a procedural or a substantive link between the state and the service in question lifts the prospect of state aid regulation, irrespective of any effect the state measure has on competition. However, the Court considers that to determine whether a state measure constitutes aid, only the effects of the measure are to be taken into consideration, whereas other elements³⁷ typifying a measure are not relevant during the stage of determining the existence of aid, because they are not liable to affect competition. Nevertheless, the relevance of these elements may appear when an assessment of the compatibility of the aid³⁸ with the derogating provisions of the Treaty takes place. The *quid pro quo* approach amounts to introducing such elements into the actual definition of aid. The presence of a direct and manifest link between the state funding and the public service obligations amounts to the existence of a public service contract awarded after a public procurement procedure. However, the borderline of the market price, which will form the conceptual base above which state aid would appear, is not always easy to determine, even with the presence of public procurement procedures, as contracting authorities may award public contracts to the most economically advantageous

³⁷ For example the form in which the aid is granted, the legal status of the measure in national law, the fact that the measure is part of an aid scheme, the reasons for the measure, the objectives of the measure and the intentions of the public authorities and the recipient undertaking.

³⁸ For example certain categories of aid are compatible with the common market on condition that they are employed through a specific format. See Commission notice 97/C 238/02 on Community guidelines on state aid for rescuing and restructuring firms in difficulty, OJ (1997) C 283, p. 2.

offer and not the lowest price. The *quid pro quo* approach relies on the existence of a direct and manifest link between state financing and public services, indicative through the presence of a public contract concluded in accordance with the provisions of the Public Procurement Directives. Apart from the criticism it has received concerning the introduction of elements into the assessment process of state aids, the interface of the *quid pro quo* approach with public procurement appears to be the most problematic facet of its application. The procurement of public services does not always reveal a public contract between a contracting authority and an undertaking. The existence of dependence, in terms of overall control of an entity by the state or another contracting authority, renders the public procurement regime inapplicable. Dependence presupposes a control similar to that which the state or another contracting authority exercises over its own departments. The ‘similarity’ of control denotes lack of independence with regard to decision-making.³⁹

Financing services of general interests and public procurement: the *Altmark* case

The Court in *Altmark*⁴⁰ followed a hybrid approach between the compensation and the *quid pro quo* approaches. It ruled that where subsidies are regarded as compensation for the services provided by the recipient undertakings in order to discharge public service obligations, they do not constitute state aid. Nevertheless for the purpose of applying that criterion, national courts should ascertain that four conditions are satisfied: first, the recipient undertaking is actually required to discharge public service obligations and those obligations have been clearly defined; second, the parameters on the basis of which the compensation is calculated have been established beforehand in an objective and transparent manner; third, the compensation does not exceed what is necessary to cover all or part of the costs incurred in discharging the public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations; fourth, where the undertaking which is to discharge public service obligations is not chosen in a public procurement procedure, the level of compensation needed has been determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with appropriate means to be able to meet the necessary public service requirements, would have incurred in discharging those

³⁹ See Case C-107/98, *Teckal Srl v. Comune di Viano* [1999] ECR I-8121.

⁴⁰ See Case C-280/00, *Altmark Trans GmbH, Regierungspräsidium Magdeburg and Nahverkehrsgesellschaft Altmark GmbH, Oberbundesanwalt beim Bundesverwaltungsgericht* [2003] ECR I-1432.

obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.

The first criterion, which requires the existence of a clear definition of the framework within which public service obligations and services of general interest have been entrusted to the beneficiary of compensatory payments, runs consistently with Article 86(2) EC jurisprudence, where an express act of the public authority to assign services of general economic interest⁴¹ is required. However, the second criterion, which requires the establishment of the parameters on the basis of which the compensation is calculated in an objective and transparent manner, departs from existing precedent,⁴² as it establishes an *ex post* control mechanism by the Member States and the European Commission. The third criterion, that the compensation must not exceed what is necessary to cover the costs incurred in discharging services of general interest or public service obligations, is compatible with the proportionality test applied in Article 86(2) EC. However, there is an inconsistency problem, as the European judiciary is rather unclear on the question whether any compensation for public service obligations may comprise a profit element.⁴³ Finally, the fourth criterion, which establishes a comparison of the cost structures of the recipient on the one hand and of a private undertaking, well run and adequately provided to fulfil the public service tasks, in the absence of a public procurement procedure, inserts elements

⁴¹ See Case 127/73, *BRT v. SABAM* [1974] ECR 313, at para. 20; Case 66/86, *Ahmed Saeed Flugreisen v. Commission* [1989] ECR 803, at para. 55.

⁴² The standard assessment criterion applied under Article 86(2) EC only requires the application of Article 87(1) EC to frustrate the performance of the particular public service task, allowing for the examination being conducted on an *ex post facto* basis. See also the reasoning behind the so-called ‘electricity judgments’ of the ECJ of 23 October 1997; Cases C-157/94, *Commission v. Netherlands* [1997] ECR I-5699; C-158/94, *Commission v. Italy* [1997] ECR I-5789; C-159/94, *Commission v. France* [1997] ECR I-5815 and C-160/94, *Commission v. Spain* [1997] ECR I-5851; a great deal of controversy exists as to whether the material standard of the frustration of a public service task under Article 86(2) EC had lost its strictness. See S. Magiera, ‘Gefährdung der öffentlichen Daseinsvorsorge durch das EG-Beihilfenrecht?’, FS für Dietrich Rauschnig (Carl Heymanns, 2000), 280.

⁴³ See Opinion of AG Lenz, delivered on 22 November 1984 in Case 240/83, *Procureur de la République v. ADBHU* [1985] ECR 531. AG Lenz in his Opinion held that the indemnities granted must not exceed annual uncovered costs actually recorded by the undertaking, taking into account a reasonable profit. However, the Court in the *ADBHU* case did not allow for the permissibility of taking such a profit element into account. Interestingly, the approach of the Court of First Instance on Article 86(2) EC has never allowed any profit element to be taken into account, but instead focused on whether without the compensation at issue being provided the fulfilment of the specific public service tasks would have been jeopardized.

of subjectivity and uncertainty which will inevitably fuel more controversy. The *Altmark* ruling is ambiguous. The Court appears to accept unequivocally the parameters of the compensation approach (*sui generis* markets, remuneration over and above normal market prices for services of general interest), although the link between the services of general interest and their legitimate financing requires the presence of public procurement, as procedural verification of competitiveness and cost authentication of market prices. However, the application of the public procurement regime cannot always depict the true status of the market. Furthermore, the condition relating to the clear definition of the nature of an undertaking which is in receipt of subsidies in order to discharge public services in accordance with an objective and transparent manner, in conjunction with the costs attached to the provision of the relevant services, could give rise to major arguments within the legal and political systems in the common market. The interface between public and private sectors in relation to the delivery of public services is in an evolutionary state across the common market. Finally, the concept of 'reasonable profit' over and above the costs associated with the provision of services of general interest could complicate matters more, since they appear to be subjective and uncertain concepts.

2. PUBLIC PROCUREMENT REGULATION AND THE PRINCIPLE OF ACCOUNTABILITY

The consequences of the principle of accountability on public procurement regulation have been felt through four main effects; the objectivity of the regime, the probity of procurement practices, the regime's contract compliance and finally the regime's judicial redress. These effects are examined in detail below:

The Effect of Objectivity

Standardization and the doctrine of equivalence

National technical standards, industrial product and service specifications and their harmonization have been considered priority areas for the common market. The ECJ has proactively approached the discriminatory use of specification requirements and standards.⁴⁴ It established the 'equivalent standard' doctrine, where contracting authorities are prohibited

⁴⁴ See Case 45/87, *Commission v. Ireland* [1988] ECR 4929; also Case C-359/93, *Commission v. The Netherlands* [1995] ECR I-00157.

from introducing technical specifications or trade marks which mention products of a certain make or source, or a particular process which favours or eliminates certain undertakings, unless these specifications are justified by the subject and nature of the contract and on condition that they are permitted only if they are accompanied by the words 'or equivalent'. The rules on technical standards and specifications have been brought into line with the new policy which is based on the mutual recognition of national requirements, where the objectives of national legislation are essentially equivalent, and on the process of legislative harmonization of technical standards through non-governmental standardization organizations (CEPT, CEN, CENELEC).⁴⁵

Standardization and specification can act as a non-tariff barrier in public procurement contracts in two ways: firstly, contracting authorities may use apparently different systems of standards and specifications as an excuse for the disqualification of tenderers. It should be stated here that the description of the intended supplies, works or services to be procured is made by reference to the Common Product Classification, the NACE (General Industrial Classification of Economic Activities within the European Communities) and the Common Procurement Vocabulary (CPV); however, this type of description is of a generic nature and does not cover industrial specifications and standardization requirements. Secondly, standardization and specification requirements can be restrictively defined in order to exclude products or services of a particular origin, or narrow the field of competition amongst tenderers. National standards are not only the subject of domestic legislation, which, of course, needs to be harmonized and mutually recognized across the common market. One of the most significant aspects of standardization and specification appears to be the operation of voluntary standards, which are mainly specified at industry level. The above category presents difficulties in the attempts to harmonize, as any approximation and mutual recognition of standards rely on the willingness of the industry in question. Voluntary standards and specifications are used quite often in the utilities sector, where the relevant procurement requirements are complex and cannot be specified solely by reference to 'statutory' standards, thus leaving a considerable margin of discretion in the hands of the contracting authorities, which may abuse it during the selection and qualification stages of the procurement process.

⁴⁵ See Article 7 of Directive 88/295. See the European Commission, White Paper for the Completion of the Internal Market (COM) 85 310 fin., 1985, paras. 61–79; also Council Resolution of 7 May 1985, OJ (1985) C 136, on a new approach in the field of technical harmonization and standards.

Selection and qualification

During the selection and qualification process of tenderers contracting authorities vet all candidates according to objectively defined criteria which aim at eliminating arbitrariness and discrimination. The selection criteria are determined through two major categories of qualification requirements: i) legal, and ii) technical/economic. Contracting authorities must strictly follow the homogeneously specified selection criteria for enterprises participating in the award procedures of public procurement contracts in an attempt to abolish potential grounds for discrimination on grounds of nationality and exclude technical specifications which are capable of favouring national undertakings.

The relevant provisions of the Procurement Directives relating to the criteria of a tenderer's good standing and qualification are directly effective.⁴⁶ These criteria comprise grounds for exclusion from participation in the award of public contracts, such as bankruptcy, professional misconduct, and failure to fulfil social security obligations and obligations relating to taxes. They also refer to the technical ability and knowledge of the contractor, where proof of them may be furnished by educational or professional qualifications, previous experience in performing public contracts and statements on the contractor's expertise.

In principle, there are automatic grounds for exclusion when a contractor, supplier or service provider: i) is bankrupt or is being wound up; ii) is the subject of proceedings for a declaration of bankruptcy or for an order for compulsory winding up; iii) has been convicted of an offence concerning his professional conduct; iv) has been guilty of grave professional misconduct; v) has not fulfilled obligations relating to social security contributions; and vi) has not fulfilled obligations relating to the payment of taxes.

However, for the purposes of assessing the financial and economic standing of contractors, an exception to the exhaustive list covering the contractors' eligibility and technical capacity is provided for, where, in particular, contracting entities may request references other than those expressly mentioned therein. Evidence of financial and economic standing may be provided by means of references including: i) appropriate statements from bankers; ii) the presentation of the firm's balance sheets or extracts from the balance sheets where these are published under company law provisions; and iii) a statement of the firm's annual turnover and the turnover on construction works for the three previous financial years. The non-exhaustive character of the list of references in relation to the

⁴⁶ See Case 76/81, *SA Transporoute et Travaux v. Minister of Public Works* [1982] ECR 457.

contractors' economic and financial standing was recognized by the ECJ,⁴⁷ where the value of the works which may be carried out at one time may constitute evidence of the contractors' economic and financial standing. The contracting authorities are allowed to fix such a limit, as the provisions of the Public Procurement Directives do not aim at delimiting the powers of Member States, but at determining the references or evidence which may be furnished in order to establish the contractors' financial and economic standing. The Court in another case referred by a Dutch court⁴⁸ maintained that the examination of a contractor's suitability based on its good standing and qualifications and its financial and economic standing may take place simultaneously with the award procedures of a contract.⁴⁹ However, the two procedures (the suitability evaluation and bid evaluation) are totally distinct processes which shall not be confused.⁵⁰

Award criteria

Throughout the evolution of public procurement *acquis*, the procedural phase in the procurement process culminated through the application of objectively determined criteria which demonstrated the logic behind the behaviour of contracting authorities. There are two criteria on which the contracting authorities must base the award of public contracts;⁵¹ (a) the most economically advantageous tender or (b) the lowest price.

The most economically advantageous tender

When the award is made to the most economically advantageous tender from the point of view of the contracting authority, various criteria linked to the subject-matter of the public contract in question, for example, quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost-effectiveness, after-sales service and technical assistance, delivery date and delivery period or period of completion, can be taken into consideration. The above listed criteria which constitute the parameters of the most economically advantageous offer are not exhaustive.⁵²

⁴⁷ See Joined Cases 27/86, 28/86, 29/86: Case C-27/86, *Constructions et Entreprises Industrielles S.A (CEI) v. Association Intercommunale pour les Autoroutes des Ardennes*; Case C-28/86, *Ing.A. Bellini & Co. S.p.A. v. Regie de Betiments*; Case C-29/86, *Ing.A. Bellini & Co. S.p.A. v. Belgian State* [1987] ECR 3347.

⁴⁸ See Case 31/87, *Gebroeders Beentjes B.V. v. State of Netherlands* [1988] ECR 4635.

⁴⁹ See Case 28/86, *Bellini* [1987] ECR 3347.

⁵⁰ See Case C-71/92, *Commission v. Spain* [1993] ECR I-05923.

⁵¹ Article 53 of the Public Sector Directive, EU Directive 2004/18, OJ 2004 L 134.

⁵² Article 53(1)(a) of *ibid.*

The Court reiterated the wide interpretation of the relevant award criterion⁵³ and had no difficulty in declaring that contracting authorities may use the most economically advantageous offer as an award criterion by choosing the factors which they want to apply in evaluating tenders,⁵⁴ provided that these factors are mentioned, in hierarchical order or descending sequence in the invitation to tender or the contract documents,⁵⁵ so tenderers and interested parties can clearly ascertain the relative weight of factors other than price for the evaluation process. However, factors which have no strict relevance in determining the most economically advantageous offer by reference to objective criteria do involve an element of arbitrary choice, and therefore should be considered as incompatible with the Directives.⁵⁶

Criteria related to the subject matter of the contract

A question arose whether a contracting authority can apply and under what conditions, in its assessment of the most economically advantageous tender for a contract for the supply of electricity, a criterion requiring that the electricity supplied be produced from renewable energy sources.⁵⁷ In principle, that question referred to the ability of a contracting authority to lay down criteria which pursue advantages which cannot be objectively assigned a direct economic value, such as advantages relating to the protection of the environment. The Court held that each of the award criteria used by the contracting authority to identify the most economically advantageous tender must not necessarily be of a purely economic nature.⁵⁸ The Court therefore accepted that where the contracting authority decides to award a contract to the tenderer who submits the most economically advantageous tender it may take into consideration ecological criteria, provided that they are linked to the subject-matter of the contract, do not confer unrestricted freedom of choice on the authority, are expressly mentioned in the contract documents or the tender notice, and comply

⁵³ Case 31/87, *Gebroeders Beentjes v. The Netherlands*, *op. cit.*, at para. 19.

⁵⁴ Case C-324/93, *R. v. The Secretary of State for the Home Department, ex parte Evans Medical Ltd and Macfarlan Smith Ltd* [1995] ECR I-00563, where the national court asked whether factors concerning continuity and reliability as well as security of supplies fell under the framework of the most economically advantageous offer, when the latter was being evaluated.

⁵⁵ See para. 22 of Case 31/87, *Gebroeders Beentjes v. The Netherlands* [1989] ECR 4365.

⁵⁶ See para. 37 of *ibid.*

⁵⁷ See Case C-448/01, *EVN AG, Wienstrom GmbH v. Republic of Austria* [2003] ECR I-14527.

⁵⁸ See Case C-513/99, *Concordia Bus Finland v. Helsingin Kaupunki and HKL-Bussiliikenne* [2002] ECR I-7123, at para. 55.

with all the fundamental principles of Community law, in particular the principle of non-discrimination.⁵⁹

The lowest price

When the lowest price has been selected as the award criterion, contracting authorities must not refer to any other qualitative consideration when deliberating on the award of a contract. The lowest price is a sole quantitative benchmark which is intended to differentiate between the offers made by tenderers.⁶⁰ However, contracting authorities can reject a tender if they regard the price attached to it as abnormally low.

Abnormally low tenders

In cases where tenders appear to be abnormally low in relation to the goods, works or services, the contracting authority must request in writing details of the constituent elements of the tender which it considers relevant before it rejects those tenders.⁶¹ The clarification details⁶² may relate in particular to: (a) the economics of the construction method, the manufacturing process or the services provided; (b) the technical solutions chosen and/or any exceptionally favourable conditions available to the tenderer for the execution of the work, for the supply of the goods or services; (c) the originality of the work, supplies or services proposed by the tenderer; (d) compliance with the provisions relating to employment protection and working conditions in force at the place where the work, service or supply is to be performed; (e) the possibility of the tenderer obtaining state aid.

Where a contracting authority establishes that a tender is abnormally low because the tenderer has obtained state aid, the tender can be rejected on that ground alone only after consultation with the tenderer where the latter is unable to prove, within a sufficient time limit fixed by the contracting authority, that the aid in question was granted legally.⁶³ Where the contracting authority rejects a tender in these circumstances, it must inform the Commission of their decision.

The debate over the terminology of ‘obviously abnormally low’ tenders

⁵⁹ See Case C-513/99, *Concordia Bus Finland v. Helsingin Kaupunki and HKL-Bussiliikenne* [2002] ECR I-7123, at para. 69.

⁶⁰ See Article 53(1)(b) of the Public Sector Directive, EU Directive 2004/18, OJ 2004 L 134.

⁶¹ Article 55 of *ibid.*

⁶² Article 55(1) of *ibid.*

⁶³ Article 55(3) of *ibid.*

surfaced when the Court held⁶⁴ that rejection of a contract based on mathematical criteria without giving the tenderer an opportunity to furnish information is inconsistent with the spirit of the Public Procurement Directives. The Court, following previous case law,⁶⁵ ruled that the contracting authorities must give an opportunity to tenderers to furnish explanations regarding the genuine nature of their tenders, when those tenders appear to be abnormally low. Unfortunately, the Court did not proceed to an analysis of the wording ‘obviously’. It rather seems that the term ‘obviously’ indicates the existence of precise and concrete evidence as to the abnormality of the low tender. On the other hand, the wording ‘abnormally’ implies a quantitative criterion left to the discretion of the contracting authority. However, if the tender is just ‘abnormally’ low, it could be argued that it is within the discretion of the contracting authority to investigate the genuine offer of a tender. *Impresa Lombardini*⁶⁶ followed the precedent established by *Transporoute* and maintained the unlawfulness of mathematical criteria used as an exclusion of a tender which appears abnormally low. Nevertheless, it held that such criteria may be lawful if used for determining the abnormality of a low tender, provided an *inter partes* procedure between the contracting authority and the tenderer which submitted the alleged abnormally low offer offers the opportunity to clarify the genuine nature of that offer. Contracting authorities must take into account all reasonable explanations furnished and avoid limiting the grounds on which justification of the genuine nature of a tender should be made. Both the wording and the aim of the Public Procurement Directives direct contracting authorities to seek explanation and reject unrealistic offers, informing the Advisory Committee.⁶⁷ In *ARGE*,⁶⁸ the rejection of a tender based on the abnormally low pricing attached to it got a different interpretation. Although the Court ruled that tenders directly or indirectly

⁶⁴ See Case C-103/88, *Fratelli Costanzo S.p.A. v. Comune di Milano* [1989] ECR 1839; Case 296/89, *Impresa Dona Alfonso di Dona Alfonso & Figli s.n.c. v. Consorzio per lo Sviluppo Industriale del Comune di Monfalcone* [1991] ECR I-2967.

⁶⁵ See Case C-76/81, *SA Transporoute et Travaux v. Minister of Public Works* [1982] ECR 417.

⁶⁶ See Cases C-285/99 & 286/99, *Impresa Lombardini SpA v. ANAS* [2001] ECR I-9233.

⁶⁷ The Advisory Committee for Public Procurement was set up by Decision 77/63 (OJ (1977) L 13/15) and is composed of representatives of the Member States belonging to the authorities of those States and has as its task to supervise the proper application of Public Procurement Directives by Member States.

⁶⁸ See Case C-94/99, *ARGE Gewässerschutz v. Bundesministerium für Land- und Forstwirtschaft* [2000] ECR-I 11037, *op. cit.*

subsidized by the state or other contracting authorities or even by the contracting authority itself can legitimately be part of the evaluation process, it did not elaborate on the possibility of rejection of an offer which is appreciably lower than those of unsubsidized tenderers, in accordance with the ground of abnormally low disqualification.⁶⁹

The Effect of Probity in Public Procurement

The award of public contracts to economic operators who have participated in a criminal organization or who have been found guilty of corruption or of fraud to the detriment of the financial interests of the European Communities or of money laundering should be avoided. Where appropriate, the contracting authorities should ask candidates or tenderers to supply relevant documents and, where they have doubts concerning the personal situation of a candidate or tenderer, they may seek the cooperation of the competent authorities of the Member State concerned. The exclusion of such economic operators should take place as soon as the contracting authority becomes aware of a judgment concerning such offences delivered in accordance with national law which has the force of *res judicata*. If national law contains provisions to this effect, non-compliance with environmental legislation or legislation on unlawful agreements in public contracts which has been the subject of a final judgment or a decision having equivalent effect may be considered an offence concerning the professional conduct of the economic operator concerned or grave misconduct. Non-observance of national provisions implementing Council Directives 2000/78/EC⁷⁰ and 76/207/EC⁷¹ concerning equal treatment of workers, which has been the subject of a final judgment or a

⁶⁹ In *ARGE* the Court adopted a literal interpretation of the Directives and concluded that if the legislature wanted to preclude subsidized entities from participating in tendering procedures for public contracts, it should have said so explicitly in the relevant Directives. See paras 26 ff. of the Court's judgment. Although the case has relevance in the fields of selection and qualification procedures and award criteria, the Court made no references to previous case law regarding state aids in public procurement, presumably because the *Dupont de Nemours* precedent is still highly relevant.

⁷⁰ See Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ (2000) L 303/16.

⁷¹ See Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ (1976) L 39/40. Directive amended by Directive 2002/73/EC of the European Parliament and of the Council, OJ (2002) L 269/15.

decision having equivalent effect may be considered an offence concerning the professional conduct of the economic operator concerned or grave misconduct.

Article 45 of the Public Sector Directive deals with the personal situation of the candidate or tenderer. It provides that any candidate or tenderer who has been the subject of a conviction by final judgment of which the contracting authority is aware for one or more of the reasons listed below must be excluded from participation in a public contract: (a) participation in a criminal organization, as defined in Article 2(1) of Council Joint Action 98/733/JHA;⁷² (b) corruption, as defined in Article 3 of the Council Act of 26 May 1997⁷³ and Article 3(1) of Council Joint Action 98/742/JHA⁷⁴ respectively; (c) fraud within the meaning of Article 1 of the Convention relating to the protection of the financial interests of the European Communities;⁷⁵ (d) money laundering, as defined in Article 1 of Council Directive 91/308 on prevention of the use of the financial system for the purpose of money laundering.⁷⁶

The Effect of Contract Compliance and the Rule of Reason

The most economically advantageous offer as an award criterion has provided the Court with the opportunity to balance the economic considerations of public procurement with policy choices. Although in numerous instances the Court has maintained the importance of the economic approach⁷⁷ to the regulation of public sector contracts, it has also recognized the relative discretion of contracting authorities to utilize non-economic considerations as award criteria.

The term *contract compliance*⁷⁸ could be best defined as the range of secondary policies relevant to public procurement, which aim at combating

⁷² See OJ (1998) L 351/1.

⁷³ See OJ (1997) C 195/1.

⁷⁴ See OJ (1998) L 358/2.

⁷⁵ See OJ (1995) C 316/48.

⁷⁶ See OJ (1991) L 166/77. Directive as amended by Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001, OJ (2001) L 344/76).

⁷⁷ See Case C-380/98, *The Queen and H.M. Treasury, ex parte University of Cambridge* [2000] ECR I-8035, at para. 17; Cases C-44/96 and C-44/96, *Mannesmann Anlagenbau Austria AG et al. v. Strohal Rotationsdurck GesmbH* [1998] ECR I-73, at para. 33; Case C-360/96, *Gemeente Arnhem Gemeente Rheden v. BFI Holding BV* [1998] ECR I-6821, at para 42 and 43; Case C-237/99, *Commission v. France* [2001] ECR I-934, at para 41 and 42.

⁷⁸ See C.H. Bovis, 'The Compatibility of Compulsory Tendering with Transfer of Undertakings: the case of Contract Compliance and the Acquired Rights

discrimination on grounds of sex, race, religion or disability.⁷⁹ When utilized in public contracts, contract compliance is a system whereby, unless the supply side (the industry) complies with certain conditions relating to social policy measures, contracting authorities can lawfully exclude tenderers from selection, qualification and award procedures. The concept is well known and practised in North American jurisdictions and in particular in the United States,⁸⁰ as it has been in operation for some time in an attempt to reduce racial and ethnic minority inequalities in the market and to achieve equilibrium in the workforce market.

Apparently, the potential of public purchasing as a tool capable of promoting social policies has been met with considerable scepticism. Policies relevant to affirmative action or positive discrimination have caused a great deal of controversy, as they practically accomplish very little in rectifying labour market disequilibria. In addition to the practicality and effectiveness of such policies, serious reservations have been expressed with regard to their constitutionality,⁸¹ since they could limit, actually and potentially, the principles of economic freedom and freedom of transactions.⁸²

Contract compliance legislation and policy are familiar to most European Member States, although the enactment of public procurement directives has changed the situation dramatically.⁸³ The position of

Directive', in H. Collins, A. Davies and R. Rideout (eds), *Legal Regulation of the Employment Relations*, Kluwer (Deventer, 2000).

⁷⁹ See Contract Compliance, *Contract Compliance: A Brief History*, Equal Opportunities Unit, Inner London Educational Authority (London, 1990).

⁸⁰ For a detailed analysis see P.E. Morris, 'Legal Regulation of Contract Compliance: an Anglo-American Comparison', 19 *Anglo-American Law Review* (1990) 87.

⁸¹ In particular in the US: see Case 93-1841, *Adarand Constructors v. Peña* (93-1841), 515 US 200 (1995) Annual Volume of US Supreme Court. The United States Supreme Court questioned the constitutionality in the application of contract compliance as a potential violation of the equal protection component of the Fifth Amendment's Due Process Clause and ordered the Court of Appeal to re-consider the employment of socio-economic policy objectives in the award of federal public procurement contracts.

⁸² For an overview of the Social Policy in North American systems see C. L. Clossen and C. H. Bovis, 'The Framework of Social Policy in Federal States: An Analysis of the Law and Policy on Industrial Relations in USA and Canada', 12 *International Journal of Comparative Labour Law and Industrial Relations*, (1996) 7-23.

⁸³ For example, in the United Kingdom, every initiative relating to contract compliance has been outlawed by virtue of the Local Government Act 1988. Contract compliance from a public law perspective has been examined in T. Daintith, 'Regulation by Contract: the New Prerogative', 32 *Current Legal Problems* (1979) 41. For a comprehensive analysis of the issue of contract compliance in relation

European institutions on contract compliance has been addressed in three instances before the European Court of Justice.⁸⁴ The Court maintained that contract compliance with reference to domestic or local employment cannot be used as a selection criterion in tendering procedures for the award of public contracts. The selection of tenderers is a process which is based on an exhaustive list of technical and financial requirements expressly stipulated in the relevant directives and the insertion of contract compliance as a selection and qualification requirement would be considered *ultra vires*. The Court ruled that social policy considerations can only be part of award criteria in public procurement, and especially in cases where the most economically advantageous offer is selected, provided that they do not run counter to the basic principles of the Treaty and that they have been mentioned in the tender notice.

The Court's approach has also opened an interesting debate on the integral dimensions of contract compliance and the differentiation between the *positive* and *negative* approaches. The concept of positive approach within contract compliance encompasses all measures and policies imposed by contracting authorities on tenderers as suitability criteria for their selection in public procurement contracts. Such positive action measures and policies are intended to complement the actual objectives of public procurement which are confined in economic and financial parameters and are based on a transparent and predictable legal background. Although the complementarity of contract compliance with the actual aims and objectives of the public procurement regime was acknowledged, the Court (and the European Commission) was reluctant to accept such an over-flexible interpretation of the directives and based on the literal interpretation of the relevant provisions disallowed positive actions of a social policy dimension as part of the selection criteria for tendering procedures in public procurement.

However, contract compliance can not only incorporate unemployment considerations, but also promote equality of opportunities and eliminate sex or race discrimination in the relevant market.⁸⁵ Indeed, the directives

to public contracts across the European Community see C. McCrudden, *Contract Compliance and Equal Opportunities*, OUP (Oxford, 1997).

⁸⁴ See Case 31/87, *Gebroeders Beenjes B.V v. The Netherlands* [1989] ECR 4365. Also see Case 360/89, *Commission v. Italy* [1992] ECR 3401.

⁸⁵ There are a number of legal instruments relevant to social policy at Community level which may apply to public procurement. They include, in particular, directives on safety and health at work (for example, Council Directive 89/391 EEC of 12th June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work OJ (1989) L 183, and Directive 92/57 EEC of 24 June 1992 on the implementation of minimum safety and health requirements at temporary or mobile construction sites OJ (1992) L

on public procurement stipulate that the contracting authority may require tenderers to observe national provisions of employment legislation when they submit their offers. The failure to observe and conform to national employment laws in a Member State may constitute a ground of disqualification and exclusion of the defaulting firm from public procurement contracts.⁸⁶ In fact, under such interpretation, contract compliance may be a factor of selection criteria specified in the directives, as it contains a *negative approach* to legislation and measures relating to social policy.

There are arguments in favour and against incorporating social policy considerations in public procurement.⁸⁷ The most important argument in favour focuses on the ability of public procurement to promote parts of the Member States' social policy, with particular reference to long-term unemployment, equal distribution of income, social exclusion and the protection of minorities. Under such a positively oriented approach, public purchasing could be regarded as an instrument of policy in the hands of national administrations with a view to rectifying social disequilibria. Contract compliance in public procurement could also cancel the stipulated aims and objectives of the liberalization of the public sector. The regulation of public markets focuses on economic considerations and competition. Adherence to social policy factors could derail the whole process, as the public sector will pay more for its procurement by extra or hidden cost for the implementation of contract compliance in purchasing policies.⁸⁸

245), working conditions and the application of employment law (for example, Directive 96/71/EC of the European Parliament and of the Council concerning the posting of workers in the framework of the provision of services, OJ (1997) L 18/1, and Directive 2001/23 on the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, OJ (2001) L 82/16, codifying Directive 77/187/EEC), Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ (2000) L 180/22) and Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ (2000) L 303/16.

⁸⁶ It should be mentioned that adherence to health and safety laws has been considered by a British court as part of the technical requirements specified in the Works Directive for the process of selection of tenderers: see *General Building and Maintenance v. Greenwich Borough Council* [1993] IRLR 535. Along these lines see the Commission's Interpretative Communication on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement, COM(2001)566, 15 October 2001.

⁸⁷ See K. Kruger, R. Nielsen and N. Brunn, *European Public Contracts in a Labour Law Perspective*, DJOF Publishing (Copenhagen) 1997.

⁸⁸ See C.H. Bovis, 'A Social Policy Agenda in European Public Procurement Law and Policy', 14 *International Journal of Comparative Labour Law and Industrial Relations* (1998) 137.

A rule of reason in public procurement

In European Union law, the rule of reason serves as an expansion of the determined exemptions from a prohibition principle.⁸⁹ The rule of reason is a juridical development where the Court interprets the margins of discretion allotted to an executive authority (Member States and/or the Commission), as well as the grounds, the limits and the levels of deviation from a prohibition's exemptions. For public procurement, a rule of reason has emerged through the application of the most economically advantageous offer criterion. The Court, through a steady accumulation of case law, adopted a bi-focal stance: positive yet restrictive. Where the rules allowed for discretion, the Court did not claw back any margin of appreciation from Member States and their contracting authorities; in fact, in many instances, it gradually expanded the grounds of flexibility in the award procedures.

The meaning of the most economically advantageous offer includes a series of factors chosen by the contracting authority, including price, delivery or completion date, running costs, cost-effectiveness, profitability, technical merit, product or work quality, aesthetic and functional characteristics, after-sales service and technical assistance, commitment with regard to spare parts and components and maintenance costs, and security of supplies. The above list is not exhaustive and the factors listed therein serve as a guideline for contracting authorities in the weighted evaluation process of the contract award.

The Court reiterated the flexible and wide interpretation of the relevant award criterion⁹⁰ and had no difficulty in declaring that contracting authorities may use the most economically advantageous offer as an award criterion by choosing the factors which they want to apply in evaluating tenders,⁹¹ provided these factors are mentioned, in hierarchical order or descending sequence, in the invitation to tender or the contract documents,⁹² so tenderers and interested parties can clearly ascertain the relative weight of factors other than price for the

⁸⁹ See the application of the rule of reason to the principle of free movement of goods and also the competition law principle prohibiting cartels and collusive behaviour.

⁹⁰ See Case 31/87, *Gebroeders Beentjes v. The Netherlands*, *op. cit.*, at para. 19.

⁹¹ See Case C-324/93, *R. v. The Secretary of State for the Home Department, ex parte Evans Medical Ltd and Macfarlan Smith Ltd* [1995] ECR I-563, where the national court asked whether factors concerning continuity and reliability as well as security of supplies fall under the framework of the most economically advantageous offer, when the latter is being evaluated.

⁹² See para. 22 of *Gebroeders Beentjes v. The Netherlands* [1989] ECR 4365.

evaluation process. However, factors which have no strict relevance in determining the most economically advantageous offer by reference to objective criteria do involve an element of arbitrary choice, and therefore should be considered as incompatible with the Public Procurement Directives.⁹³

A debate has arisen whether, under the most economically advantageous offer, each individual award factor has to provide an economic advantage which directly benefits the contracting authority, or, alternatively, it is sufficient that each individual factor has to be measurable in economic terms, without the requirement that it directly provide an economic advantage for the contracting authority in the given contract.

This debate intends to shed light on the integral function of the factors which comprise the most economically advantageous offer for contracting authorities. Although there is wide discretion conferred on them in compiling the relevant factors, subject to the requirements of relevance to the contract in question and their publicity, their relative importance, in economic terms, remains somehow unknown. If the second alternative were accepted, the discretion conferred on contracting authorities would permit a wide range of factors to feature as part of award criteria in public contracts, without the need to demonstrate a direct economic advantage to a contracting authority which is attributable to each of these factors. On the contrary, if each individual factor has to establish a measurable (in quantifiable terms) economic advantage to the contracting authority, which is directly attributed to its inclusion as part of the award criterion, the discretion of contracting authorities is curtailed, since they would be required to undertake and publicize in the tender or contract documents a clear cost–benefit analysis of the relevant factors which in their view comprise the most economically advantageous offer.

There are two instances where the rule of reason as applied in public procurement brought the relevant regime in line with European policy. The first is the case of transfer of undertakings, where the Court expanded the remit of the Acquired Rights Directive to the public procurement contractual relations.⁹⁴ The second instance is the permissibility

⁹³ See para. 37 of *ibid.*

⁹⁴ See Directive 77/62, OJ (1977) C 61/26, as amended by Directive 98/50, OJ (1998) L 132 and consolidated by Directive 2001/23, OJ (2001) L 82/16. For a comprehensive analysis of the implications of transfer of undertakings in public procurement see Case 29/91, *Dr Sophie Redmond Stichting v. Bartol* [1992] ECR 3189; Case C–382/92, *Commission v. United Kingdom* [1994] ECR I–2435; Case 24/85, *Spijkers v. Gebroeders Benedik Abattoir CV* [1986] ECR 1123; Case C–209/91, *Rask v. ISS Kantinenservice*, [1993] ECR I–5735; Case C–392/92, *Schmidt v. Spar und Leihkasse der früherer Amter Bordersholm, Kiel und Cronshagen* [1994] ECR

of environmental factors⁹⁵ as part of the award criteria for public contracts and the explicit recognition of the environmental policy of the European Union as being complementary to all legal and policy activities of the common market.

The latter development also reveals the importance of public procurement in relation to the harmonization and even standardization of national policies. Public procurement in such cases serves as a conveyor belt for transferring homogeneous legal or policy standards across the common market. The protection of the environment as an award criterion in public contracts is a classic example of the potential of public procurement regulation as an instrument of public policy. There will be instances in the future where positive integration will be required by European institutions and Member States equally in areas such as social security, business ethics and anti-corruption policies. Harmonization of laws and policies within the common market has traditionally sought a common denominator amongst divergences and differences of national administrations. Under an *ordo-liberal* approach, the rule of reason seems an essential tool effectively to convey rights and obligations of Community law.

There has been no attempt yet to instil a type of European public policy in the common market. It is not only the legal and political differences between Member States which have dictated that such approach would face considerable resistance, the very need for a common denominator of public policy in the European Union has been questionable. However, if the European Union is to become a serious competitor to major trading forces in the world, perhaps the introduction of such a common denominator is something which requires further consideration. Productivity rises, competitiveness, industrial restructuring exercises, privatization, employment relations, taxation, and corporate governance are mere examples of the features which the European Union and its Member States will be facing in a post-enlargement era. Public procurement could play a role in carrying over the European legal and policy standards into national systems.

Judicial Redress and its Impact on Accountability

The inadequacy of existing remedies at national level to ensure compliance and enforcement of the public procurement *acquis* was highlighted by their

I-1320; Case C-48/94, *Rygaard v. Stro Molle Akustik* [1995] ECR I-2745; Case C-324/86, *Tellerup v. Daddy's Dance Hall* [1998] ECR 739.

⁹⁵ See Case C-513/99, *Concordia Bus Filandia Oy Ab v. Helsingin Kaupunki et HKL-Bussiliikenne* [2002] ECR I-7213.

inability to correct infringements and ensure the correct application of the substantive public procurement rules. The enactment of the Remedies Directives⁹⁶ has brought a decentralized dimension to the application of public procurement rules. The liberalization of public procurement to community-wide competition demands a substantial increase in the efficiency levels regarding the availability of redress measures introduced within national legal systems which provide interested parties, at least, with the same treatment in public procurement litigation as in other forms of litigation. The Remedies Directives have revealed three fundamental doctrines in public procurement regulation: the doctrine of procedural autonomy, the doctrine of effectiveness and the doctrine of procedural equality.

The doctrine of procedural autonomy

Member States have wide discretion to establish the procedural framework for review procedures and the logistics for its operation. The existence of national legislation which provides that any application for review of decisions of contracting authorities must be commenced within a specific time-limit and that any irregularity in the award procedure relied upon in support of such application must be raised within the same period is compatible with public procurement *acquis*,⁹⁷ provided that, in pursuit of fundamental principle of legal certainty, such specific time limits are reasonable.⁹⁸

The doctrine of effectiveness

Member States are required to provide for a review procedure so that an applicant may set aside a decision of a contracting authority to award a public contract to a third party prior to the conclusion of the contract.⁹⁹ That right of review for tenderers must be independent of the possibility for them to bring an action for damages once the contract has been concluded.¹⁰⁰ A national legal system which makes it impossible to contest the award decision because the award decision and the conclusion of the con-

⁹⁶ See the public sector Remedies Directive 89/665, OJ (1989) L 395/33, and the Utilities Directive 92/13, OJ (1992) L 76/14.

⁹⁷ See Case C-470/99, *Universale-Bau AG, Bietergemeinschaft* [2002] ECR I-11617;

⁹⁸ See Case C-261/95, *Palmisani* [1997] ECR I-4025, at para. 28, and Case C-78/98, *Preston and Others* [2000] ECR I-3201, at para. 33.

⁹⁹ See Case C-212/02, *Commission v. Austria*, judgment of 24 June 2004, unpublished.

¹⁰⁰ See Case C-81/98, *Alcatel Austria and Others* [1999] ECR I-7671, at para. 43.

tract take place at the same time deprives interested parties of any possible review in order to have an unlawful award decision set aside or to prevent the contract from being concluded. Complete legal protection requires that a reasonable period must elapse between the decision which awards a public contract and the conclusion of the contract itself, as well as a duty on the part of contracting authorities to inform all interested parties of an awarding decision.

The doctrine of procedural equality

Time limits and periods for contesting the legality of acts or decisions of contracting authorities¹⁰¹ remain within the discretion of Member States, subject to the requirement that the relevant national rules are no less favourable than those governing similar domestic actions.¹⁰²

3. CONCLUSIONS

The principles of transparency and accountability have guided the regulation of public procurement to reflect on two opposite dynamics: one of a community-wide orientation and one of national priorities. The role of the ECJ has been instrumental in shaping many concepts of the legal regime and in the future will be invaluable in interpreting the new Public Procurement Directives¹⁰³ and pronouncing on the compatibility of implementing national provisions with the *acquis communautaire*.¹⁰⁴

¹⁰¹ See Case C-92/00, *Hospital Ingenieure Krankenhaustechnik Planungs- GmbH (HI) and Stadt Wien* [2002] ECR I-5553.

¹⁰² See Case C-390/98, *Banks v. Coal Authority and Secretary of State for Trade and Industry* [2001] ECR I-6117, at para. 121; Case C-453/99, *Courage and Crehan* [2001] ECR I-6297, at para. 29.

¹⁰³ See Directive 2004/18, OJ (2004) L 134 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts and Directive 2004/17, OJ (2004) L 134, coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors.

¹⁰⁴ See C.H. Bovis, 'Developing Public Procurement Regulation: Jurisprudence and its Influence on Law Making', 43 *Common Market Law Review* (2006) 461.

12. Good administration as procedural right and/or general principle?

Hanns Peter Nehl¹

A. INTRODUCTION

In recent years, notably since the first proclamation on 7 December 2000 of the European Charter of Fundamental Rights,² academic debate turning on the notion of ‘good administration’ in EC law has increased considerably and given rise to a great number of doctrinal explanations.³ In particular, this is due to Article 41 of the above Charter which lists in its second paragraph, under the title ‘Right to good administration’, a number of procedural rights and principles of ‘good’ administrative conduct, i.e. the right to be heard, the right of access to one’s file and the obligation of the administration to give reasons for its decisions. In so doing, the Charter confers on these rights and principles the rank – though

¹ The opinions expressed in this chapter are purely personal. This chapter deals with the relationship between the EU citizen and the EC administration in respect of administering EC economic law and thus does not take into account the case law on EC staff matters which arguably follows a different rationale.

² Charter of Fundamental Rights of the European Union, OJ (2000) C 364/1.

³ See, e.g., L. Azoulay, ‘The Judge and the Community’s Administrative Governance’, in C. Joerges and R. Dehousse (eds), *Good Governance in Europe’s Integrated Market*, Oxford University Press (Oxford, 2002), p. 109; J. Ponce Solé, ‘Good Administration and European Public Law: The Fight for Quality in the Field of Administrative Decisions’ [2002] *European Review of Public Law*, 14(4), 1503; K. Kańska, ‘Towards Administrative Human Rights in the EU. Impact of the Charter of Fundamental Rights’ (2004) *European Law Journal*, 10(3), 296; T. Fortsakis, ‘Principles Governing Good Administration’ (2005) *European Public Law*, 11(2), 207; B. Grzeszick, ‘Das Grundrecht auf gute Verwaltung – Strukturen und Perspektiven des Charta-Grundrechts auf eine gute Verwaltung’ [2006] *Europarecht*, 41(2), 161; H. Goerlich, ‘Good Governance und Gute Verwaltung’ [2006] *Die Öffentliche Verwaltung*, 59(8), 313; K. Pfeffer, *Das Recht auf eine gute Verwaltung*, Nomos (Baden-Baden, 2006); D.-U. Galetta, ‘Inhalt und Bedeutung des europäischen Rechts auf eine gute Verwaltung’ [2007] *Europarecht*, 42(1), 57.

legally not yet binding⁴ – of fundamental rights within the meaning of the Charter's Preamble.⁵ In addition, it flows from previous discussions as well as from the 'Explanations' given by the Praesidium of the Convention, having elaborated the Charter and the European Constitution, that these rights and principles are designed essentially to reflect the legal procedural standards and guarantees shaped by the case law of the EC Courts, i.e. the Court of Justice of the European Communities (ECJ) and the Court of First Instance of the European Communities (CFI).⁶ This statement confirms that, from the perspective of EC law, the notion of 'good administration' is perceived to be essentially procedural rather than substantive in nature, a fact which is fully in line with assumptions I had put forward roughly ten years ago.⁷

Indeed, this evolution does not come as a surprise. The levelling up of a range of principles of administrative procedure in EC law on the high constitutional ground is the logical result of a long quest – by means of drawing, in particular, inspiration from the various legal traditions of the Member States⁸ – for developing and constitutionalising basic standards of administrative procedure and procedural justice in a heterogenic EC administrative system in order firmly to ground its actors vested with public power on the rule of law and to provide a sufficiently elaborate and reliable legal standard for judicial review.⁹ At the European level more generally, this can be traced back to Council of Europe Resolution No 77(31) which already recommended a number of procedural rights and standards aimed at setting constraints on the administration in the interest of individual

⁴ This will change with Article 6 of the Treaty on European Union as amended by the Lisbon Treaty, its Protocol on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom, OJ (2007) C 306/156, and the fresh proclamation of the Charter by the European Parliament, the Council and the Commission, OJ (2007) C 303/1.

⁵ See the last sentence of the Charter's Preamble: '[t]he Union therefore recognises the rights, freedoms and principles set out hereafter'. For the 'constitutional' character of the duty to state reasons see Article 253 of the EC Treaty.

⁶ See Kańska, n. 3 above, p. 300; CHARTE 4473/00 CONVENT 49.

⁷ H.P. Nehl, *Principles of Administrative Procedure in EC Law*, Hart Publishing (Oxford, 1999), p. 15 ff.

⁸ See the seminal comparative work by J. Schwarze, *European Administrative Law*, Sweet & Maxwell (London, 1992).

⁹ H.P. Nehl, n. 7 above, pp. 2–12; K. Kańska, n. 3 above, pp. 297–300 rightly points to the rule of law rationale and the *ex ante* and the *ex post* aspects of administrative justice in this sense, the former describing the legal constraints imposed on the administration and the latter concerning judicial review of the observance of these constraints.

protection.¹⁰ Like Article 41(2) of the Charter of Fundamental Rights, that Resolution already included, *inter alia*, the right to be heard, the right of access to information and the duty to state the reasons for an administrative act. Subsequently, with regard to the EC administration in particular, the European Ombudsman attempted to categorise the contents of the term ‘maladministration’ – the apparent opposite of ‘good administration’ – set out in Article 195(1) of the EC Treaty in his first Annual Report (1995)¹¹ and subsequently proposed a draft Code of Good Administrative Behaviour later endorsed by a European Parliament Resolution.¹² Other attempts, drawing notably on national experience, have followed.¹³ In all these instances, conceptual work has proven to be difficult, given the various national legal traditions and differences regarding the actual legal contents of ‘good administration’ or ‘administrative justice’ in general.¹⁴ It nonetheless remains that, grounded on comparative analysis, the case law of the EC Courts has greatly contributed to the establishment of such standards in EC law alongside the creation of a considerable body of EC fundamental rights.¹⁵ This case law therefore continues to be the focal

¹⁰ Council of Europe, Committee of Ministers, Resolution 77(31), of 28 September 1977, on the protection of the individual in relation to acts of administrative authorities; on this see J. Schwarze, ‘Der Beitrag des Europarates zur Entwicklung von Rechtsschutz und Verfahrensgarantien im Verwaltungsrecht’ [1999] *Europäische Grundrechte Zeitschrift*, 20(15–16), 377.

¹¹ See first Annual Report (1995) of the European Ombudsman, OJ (1996) C 234/1 at p. 3.

¹² European Parliament resolution of 6 September 2001 on the annual report on the activities of the European Ombudsman (C5–0302/2001 – 2001/2043(COS)), OJ (2002) C 72 E/329.

¹³ Cf., e.g., Swedish Agency for Public Management, *Principles of Good Administration in the Member States of the European Union* (2005), available at www.statkontoret.se/upload/Publikationer/2005/200504.pdf; at the national level see JUSTICE (ed.), *Administrative Justice. Some Necessary Reforms, Report of the Committee of the JUSTICE-All Souls Review of Administrative Law in the United Kingdom*, Clarendon Press (Oxford, 1988).

¹⁴ For the four main European administrative traditions – i.e. the administrative-centred, the individual-centred, the legislator-centred and the ombudsman-centred concepts – see Swedish Agency for Public Management, n. 13 above, pp. 74–75; see also H.P. Nehl, ‘Administrative Law’, in J.M. Smits (ed.), *Elgar Encyclopedia of Comparative Law*, Edward Elgar (Cheltenham, 2006), p. 18, at pp. 22–27. Some authors have attempted to derive a given concept of European ‘administrative justice’ from Article 6 of the ECHR, cf. A.W. Bradley, ‘Administrative Justice: A Developing Human Right?’ [1995] *European Public Law*, 1(3), 347; O. Jacot-Guillarmod, ‘Rights Related to Good Administration of Justice (Article 6)’, in R.St.J. Macdonald, F. Matscher and H.A. Petzold (eds), *The European System for the Protection of Human Rights*, Nijhoff (Dordrecht, 1993), p. 381.

¹⁵ Cf. H.P. Nehl, n. 14 above, pp. 22–24.

point of reference for all research into the meaning of the abstract notion of 'good administration' in EC law as well as for finding and interpreting the legal constraints and/or guarantees that it may imply in practice for both the administration and the individual.

In 1999, following an analysis of the EC Court's case law, I essentially argued that the indeterminate notion of 'good administration' cannot be said to reflect a specific procedural standard or guarantee in EC law.¹⁶ Arguably, this has not changed with the enactment of Article 41 of the Charter of Fundamental Rights which merely sets out a bundle of procedural principles and rights under the umbrella notion of a 'Right to good administration'¹⁷ (see B below). An analysis of the underpinnings of these principles and rights listed under this general notion, which seems to mirror some basic rationales of procedure or 'procedural justice' common to all European administrative systems, is nonetheless worth conducting. At least in this sense, 'good administration' can therefore be understood to convey a specific meaning of 'good' or at least 'legal' administrative behaviour in so far as it is amenable to judicial control by the EC Courts (see C below).

B. THE SO-CALLED 'PRINCIPLE OF GOOD ADMINISTRATION' IN THE CASE LAW OF THE EC COURTS

I. An Apparent Product of Litigation Discourse

The overall discussion on the existence of the 'principle of good administration' in the sense of a specific procedural principle and guarantee has not yet come to an end and, as it seems, is being continuously nourished by litigants and the EC Courts' case law. The particularities of access to justice and judicial review via the EC Courts have certainly contributed to this phenomenon. First, contrary to other systems of judicial control of administrative conduct, such as the German system, the EC system is built on the French legal tradition regarding the binding nature of the applicant's pleas for annulment (*'moyens d'annulation'*) that determine the subject-matter of the legal dispute.¹⁸ This means that the judges cannot

¹⁶ H.P. Nehl, n. 7 above, pp. 35–37.

¹⁷ In the same vein K. Kaňska, n. 3 above, p. 301; T. Fortsakis, n. 3 above, p. 211.

¹⁸ Cf. Case C–367/95 P, *Commission v. Sytraval and Brink's France* [1998] ECR I–1719, at para. 67.

depart from these pleas, the only exception being a public policy plea (*'moyen d'ordre public'*) pursuant to Articles 111 to 113 of the CFI's Rules of procedure that the CFI may raise of its own motion. Interestingly, it is settled case law that, in principle, essential procedural requirements within the meaning of Article 230(2) of the EC Treaty, such as the duty to state reasons pursuant to Article 253 of the EC Treaty, belong to this category of public policy pleas.¹⁹ Second, even after more than 40 years of intense judicial activism in building a coherent set of fundamental rights and principles, the EC legal order still continues to be incomplete and in the making. Indeed, new rights and principles of constitutional rank are due to be recognised by the EC Courts if a given case demands it in the interest of individual protection or to guarantee the EC administration's obedience to the rule of law as well as, ultimately, the EC's *rechtsstaatliche* legitimacy from the viewpoint of the Union citizens and the Member States.²⁰ In fact, before being recognised in the case law, all fundamental rights and principles forming at present an integral part of the EC legal order have once been pleaded before the EC Courts by reference, in particular, to the common constitutional traditions of the Member States and the European Convention for the Protection of Human Rights (ECHR).

Therefore, in the event that an applicant raises a breach of a superior rule of law, such as the 'principle of good administration' (*'principe de bonne administration'*), whatever its precise contents and functions may be and irrespective of whether that breach is purported to describe a specific procedural or substantive illegality, the EC Courts feel generally bound to give an express response to such a plea. Conversely, in a kind of chain reaction, litigants readily take up the judges' response – likewise shaped in 'constitutional' terms – in order to make use of it in subsequent litigation.²¹ It thus seems that the 'principle of good administration', sometimes also referred to as the principle of 'sound' or 'proper' administration, is nothing but a general 'constitutional' phrase strategically used in and resulting from litigation discourse and that its contents, if specified at all, may vary from one case to another. Unfortunately, rather than raising

¹⁹ Cf., e.g. Case T-318/00, *Freistaat Thüringen v. Commission* [2005] ECR II-4179, at para. 109 with further references to the case law.

²⁰ See, more generally, on the legitimising functions of principles of administrative procedure in EC law from the perspective of the rule of law, H.P. Nehl, *Europäisches Verwaltungsverfahren und Gemeinschaftsverfassung*, Duncker & Humblot (Berlin, 2002), p. 83 ff.

²¹ See for an earlier account of this chain reaction H.P. Nehl, n. 7 above, pp. 35–37. The EC Courts' language regime, i.e. the fact that all judgments are drafted in French and need to be translated, contributes further to the terminological difficulties.

criticism in that regard, academia also appears to be ‘infected’ by the lack of terminological and conceptual precision in the EC Courts’ approach.²² However, this does not necessarily mean that, in the case law, there is no specific meaning at all to be ascribed to the ‘principle of good administration’. As will be shown in the following, in most cases the EC Courts have a particular concept in mind the scope and legal effects of which are well established in EC administrative law since the ECJ’s landmark ruling in *Technische Universität München*.²³ Yet, it is submitted that this principle should rather be referred to as the principle of ‘care’ or ‘due diligence’ in order to prevent further terminological and conceptual confusion.²⁴

II. The ‘Principle of Good Administration’ in the Early Case Law of the ECJ

The origins of the appearance of the ‘principle of good administration’ in EC law litigation, in particular as a procedural principle, can be traced back to the *Tradax* case.²⁵ The applicant, a trader in agricultural products, had vainly requested the Commission to disclose figures on the basis of which the levies charged on certain imported products had been calculated or, at least, to grant it access to the relevant documents contained in the Commission’s file. Subsequently, before the ECJ, the applicant explicitly relied upon a breach of the general ‘principle of good administration’ in support of its claim that access to information had been unlawfully refused by the Commission.²⁶ Advocate General Slynn, in his Opinion, denied that the term ‘good administration’ embodied a general principle of law or had a specific legal and enforceable content in EC law. He pointed to

²² See, in particular, J.A. Usher, *General Principles of EC Law*, Longman (London and New York, 1998), p. 107 ff.; K. Kańska, n. 3 above, pp. 304–305; T. Tridimas, *The General Principles of EC Law*, 2nd edition, Oxford University Press (Oxford, 2007), p. 410 ff.

²³ Case C-269/90, *Hauptzollamt München-Mitte v. Technische Universität München* [1991] ECR I-5469, at para. 14.

²⁴ On this see H.P. Nehl, n. 7 above, p. 103 ff. Accordingly, the case law sometimes refers to the ‘duty of diligence and the principle of sound administration’ (Case T-317/02, *Fédération des industries condimentaires de France (FICF) and Others v. Commission* [2004] ECR II-4325, at para. 199), the ‘principle of sound administration and the duty of care’ (Case C-248/99 P, *French Republic v. Monsanto and Commission* [2002] ECR I-1, at para. 92), or the ‘principles of a duty of care and of sound administration’ (Case T-285/03, *Agraz and Others v. Commission* [2005] ECR II-1063, at paras. 49–54).

²⁵ Case 64/82, *Tradax Graanhandel BV v. Commission* [1984] ECR 1359; on this see H.P. Nehl, n. 7 above, pp. 28–31.

²⁶ Case 64/82, n. 25 above, pp. 1366–1370.

the indeterminate character of this notion which might overlap with a range of legal rules, but the scope of which strayed beyond the bounds drawn by the law. He further stated that '[t]he maintenance of an efficient filing system may be an essential part of good administration but is not a legally enforceable rule' and that 'when courts urge that something should be done as a matter of good administration, they do it because there is no precise rule which a litigant can enforce'. Nor did he accept the applicant's plea to have an enforceable right of access to information since no legal base or 'unwritten rule' providing for such a right existed. Nonetheless, the Advocate General invited the ECJ to create a new, albeit legally non-binding, rule of good administration by advocating that 'the Commission should, as a matter of good administrative practice, though not as a legal obligation', grant access to information in cases in which a trader questions the validity of the Commission's assessment with sufficient reason.²⁷ The ECJ, unlike its Advocate General, did not explicitly address the question whether a general 'principle of good administration' existed in EC law, and eventually rejected the plea. Yet, clearly drawing on the final part of the Advocate General's Opinion, it held that 'it would be consistent with good administration for the Commission periodically to publish for the information of the traders concerned the main data taken into account'. This however would not 'include a duty to reply to individual requests' or a right of access to the Commission's file.²⁸

It is submitted that the positions taken by the Advocate General and the ECJ respectively in the *Tradax* case are symptomatic of the difficulties inherent in any attempt at granting the indeterminate notion of 'good administration' a specific legal content and at drawing a clear line between legally binding 'hard-law' and 'soft-law' rules for administrative conduct which can possibly be derived from that notion.²⁹ This difficulty seems also to have influenced the subsequent case law and to be largely responsible for the EC Courts' widely felt reluctance to assign to the 'principle of good administration' a particular content and meaning. In any event, in the aftermath of *Tradax*, the right of access to information has seldom been linked to the 'principle of good administration'.³⁰ Nonetheless, litigants

²⁷ *Ibid.*, pp. 1386–1387.

²⁸ *Ibid.*, para. 22.

²⁹ As regards the dichotomy between 'hard' and 'soft law' rules flowing from the indeterminate notion of 'good administration' see below under C.I.

³⁰ See however for an unsuccessful plea in the context of antidumping proceedings Case C-170/89, *Bureau des Unions des Consommateurs (BEUC) v. Commission* [1991] ECR I-5709, at I-5723 (principle of 'sound' administration), I-5734 (principle of 'good' administration), I-5741–5742, especially at paras. 26–27.

have continuously attempted to rely on the ‘principle of good administration’ in order to have quashed administrative decisions adversely affecting them.³¹ Thus, it has often, albeit unsuccessfully, been argued that this principle encompasses a right to be heard, in particular in instances in which this was not expressly provided for by statutory texts.³²

Reference to the ‘principle of good administration’ has most frequently – and at a later stage also successfully – been made in conjunction with procedural failures which are today generally recognised as falling within the scope of application of the ‘principle of care’.³³ It is thus arguable that the ECJ had initially held these principles to have a synonymous meaning. This principle requires the EC administration, when conducting an inquiry, to collect and examine impartially and carefully the relevant facts and legal points of the individual case.³⁴ In the *IAZ* case,³⁵ the applicants, accused of infringing Article 85 of the EEC Treaty (now Article 81 of the EC Treaty), contended, *inter alia*, that the Commission had breached the ‘principles of good administration’ because it had failed to respond to attempts made by them to remedy the infringements complained of, as well as to react to a revised draft of a ‘special agreement’ which had been sent to the Commission long before the adoption of the final decision.³⁶ The ECJ agreed on this and blamed the Commission for not having shown more responsiveness in negotiating the settlement of the matter. It accordingly stated that it would be ‘regrettable and inconsistent with the requirements of good administration that the Commission did not react to the draft’.³⁷ Yet, it is submitted that the failure to react to substantive submissions made by interested parties or to consider essential facts of the case, which are capable of altering the

³¹ For a detailed analysis of the early case law see H.P. Nehl, n. 7 above, pp. 28–35; R. Bauer, *Das Recht auf eine gute Verwaltung im Europäischen Gemeinschaftsrecht*, Peter Lang (Frankfurt, 2001), p. 21 ff.

³² Case 46/85, *Manchester Steel Limited v. Commission* [1986] ECR 2351, at 2352, 2353, 2358–2359 (ECSC Treaty proceedings); Case C–198/91, *William Cook plc v. Commission* [1993] ECR I–2486, at para. 27; Case C–225/91, *Matra SA v. Commission* [1993] ECR I–3203, at paras. 51–53 (preliminary stage in EC state aid proceedings); see also, more recently, Case T–3/93, *Air France v. Commission*, [1994] ECR II–121, at paras. 115 and 119 (EC merger control proceedings); Case T–354/99, *Kuwait Petroleum (Nederland) v. Commission* [2006] ECR II–1475, at para. 82 (EC state aid proceedings); Case T–198/01, *Technische Glaswerke Ilmenau v. Commission* [2004] ECR II–2717, at para. 194 (EC state aid proceedings).

³³ See below under B. III.

³⁴ Case C–269/90, *Hauptzollamt München-Mitte v. Technische Universität München* [1991] ECR I–5469, at para. 14.

³⁵ Joined Cases 96 and Others/82, *IAZ v. Commission* [1983] ECR 3369.

³⁶ *Ibid.*, pp. 3408–3409.

³⁷ *Ibid.*, p. 3409, at para. 15.

outcome of the decision-making process, is to be regarded as a violation of the principle of care or due diligence.³⁸ Thus, the ECJ had chosen, as early as 1983, a different and somewhat ambiguous terminology in order to describe the duty of care. The ECJ made it clear, though indirectly, that non-compliance with this obligation leads, in principle, to illegality of the decision finally reached. It was only the lack of causality between the 'procedural defect' and the content of the final decision which eventually prevented the ECJ from annulling it, since the draft submitted by the applicant had not met all objections raised by the Commission.³⁹

In the early stages of its case law, the ECJ further linked the requirement of diligence or care to 'the rules of good administration' and to the EC institutions' duty to act in a timely fashion. In *RSV v. Commission*, the Commission was criticised for having unnecessarily protracted the investigative procedure for assessing the legality of a state aid granted to the applicant.⁴⁰ Interestingly, the ECJ did not invalidate the decision for lack of careful conduct of the investigation but for having frustrated the applicant's legitimate expectation which was such as ultimately to prevent the Commission from ordering the Member State to recover the aid.⁴¹

III. The 'Principle of Good Administration' in the Recent Case Law of the EC Courts

In two cases brought before the CFI, the applicants sought to revitalise 'the principle of good administration' relied on in the above *IAZ* precedent, yet without substantial success, by invoking a failure by the Commission to reply to allegations made and to examine documents produced by the applicants during competition investigation proceedings.⁴² In

³⁸ See also Case 179/82, *Lucchini Siderurgica Spa v. Commission* [1983] ECR 3083 (ECSC Treaty proceedings; failure of the Commission to reply to a fax from the applicant offering to cut its future production in order to compensate for having previously exceeded the quota).

³⁹ Joined Cases 96 and Others/82, *IAZ v. Commission* [1983] ECR 3369, p. 3409, at para. 15.

⁴⁰ Case 223/85, *RSV v. Commission* [1987] ECR 4617; see AG Slynn, pp. 4644–4645 and the judgment at p. 4658, para. 12. For the link between the requirement of proper diligence and the length of proceedings see also Case 120/73, *Gebrüder Lorenz GmbH v. Germany* [1973] ECR 1471, at para. 4 establishing a time-limit of two months for the preliminary review procedure under Article 93(3) of the EEC Treaty (now Article 88(3) of the EC Treaty).

⁴¹ Case 223/85, n. 40 above, p. 4659, at para. 17.

⁴² Case T-46/92, *Scottish Football Association v. Commission* [1994] ECR II-1039, at paras. 16 and 37; Case T-5/93, *Tremblay and Others v. Commission* [1995] ECR II-185, at paras. 77 and 83.

reality, the failures raised in these cases involved the allegation of breaches of the principle of care, a procedural principle to which the CFI seemed willing to attach great importance in competition investigations, irrespective of the fact that it ultimately rejected the pleas on grounds pertaining to the individual case. Subsequent case law of the CFI suggests indeed that this principle is gaining increasing importance in various (administrative) decision-making procedures and that there has been a tentative terminological shift towards the recognition of a principle of care in its own right which is capable of being successfully invoked by litigants.⁴³ Yet, this is not the place to deal extensively with this particular process standard.⁴⁴ Suffice it to say in the present context that, in recent years, the principle of care has played an important role as a procedural safeguard protecting the individual and in reviewing the procedural legality of the EC institutions' administrative and legislative decision making, not only in annulment cases⁴⁵ but also in respect of damages claims.⁴⁶ Moreover, Article 41(1) of

⁴³ Case T-167/94, *Detlef Nölle v. Council* [1995] ECR II-2589, at paras. 53 and 73-77, drawing the necessary consequences from Case C-16/90, *Eugen Nölle v. Hauptzollamt Bremen-Freihafen* [1991] ECR I-5163 (EC anti-dumping proceedings) as well as Case C-269/90, *Hauptzollamt München-Mitte v. Technische Universität München* [1991] ECR I-5469, at para. 14 (EC customs proceedings).

⁴⁴ For a detailed account of the legal foundations of the principle of care see H.P. Nehl, n. 7 above, p. 103 ff.

⁴⁵ More recently see, in particular, Case T-413/03, *Shandong Reipu Biochemicals v. Council* [2006] ECR II-2243, at paras. 63, 94, 96, 108, 119-120 and 128-130 (EC anti-dumping proceedings); judgment of 29 March 2007 in Case T-366/00, *Scott v. Commission* [2007] ECR II-797, at paras. 56, 59, 95-96, 132-136, 149 and 158 (EC state aid proceedings). Cf. also Case T-13/99, *Pfizer Animal Health v. Council* [2002] ECR II-3305, at para. 171; Case T-70/99, *Alpharma v. Council* [2002] ECR II-3495, at para. 182 (EC proceedings for the authorisation of certain additives in feedingstuffs); Joined Cases T-186 and Others/97 and T-147/99, *Kaufring and Others v. Commission* [2001] ECR II-1337, at paras. 257-273 (EC customs proceedings).

⁴⁶ Case T-167/94, *Detlef Nölle v. Council* [1995] ECR II-2589, at paras. 53 and 73-77 (EC anti-dumping proceedings); Case T-231/97, *New Europe Consulting and Brown v. Commission* [1999] ECR II-2403, at paras. 30-47 (EC public procurement proceedings); Case T-285/03, *Agraz and Others v. Commission* [2005] ECR II-1063, at paras. 49-54 (EC external trade proceedings); cf. also Case C-472/00 P, *Commission v. Fresh Marine* [2003] ECR I-7541, at paras. 29-31, upholding Case T-178/98, *Fresh Marine v. Commission* [2000] ECR II-3331, at paras. 57-82 (EC anti-dumping proceedings). See, however, Case T-196/99, *Area Cova and Others v. Council and Commission* [2001] ECR II-3597, at para. 43 and Case T-193/04, *Tillack v. Commission* [2006] ECR II-3995, at para. 127, which both appear to be in contradiction with the preceding case law in that they wrongly deny that the principle of 'sound administration' confers rights upon individuals; see also order of the CFI's President in Case T-193/04 R, *Tillack v. Commission* [2004]

the Charter of Fundamental Rights is supposed to mirror this principle in the form of the requirement that every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time.⁴⁷ It nevertheless appears that applicants are generally unable to derive from the principle of care standing to challenge acts of the EC institutions, in particular if these acts conclude proceedings pursuant to Article 86 of the EC Treaty,⁴⁸ or if they are of abstract and general application.⁴⁹ Irrespective of the established links with the principle of care, the case law continues to be ambiguous and it seems to be rather difficult definitively to ban the 'principle of good administration' from the EC Courts' discourse. This is not a purely terminological problem but entails important practical and legal consequences as regards the need clearly to delineate the scope of application of different process principles and to avoid blending issues of procedural and substantive legality.⁵⁰

In cases handed down in the last ten years, the principle of 'good', 'sound' or 'proper administration' is often mentioned in connection with the obligation of the EC administration timely to conclude proceedings or to act within a reasonable period of time.⁵¹ References to this principle,

ECR II–3575, at para. 60; cf. also the hesitant position taken by the CFI in Case T–283/02, *EnBW Kernkraft v. Commission* [2005] ECR II–913, at paras. 116–121.

⁴⁷ Cf. CHARTE 4473/00 CONVENT 49 referring to, *inter alia*, Case T–167/94, *Detlef Nölle v. Council* [1995] ECR II–2589 and Case T–231/97, *New Europe Consulting and Brown v. Commission* [1999] ECR II–2403.

⁴⁸ Case C–141/02 P, *Commission v. max.mobil* [2005] ECR I–1283, at para. 72, overruling Case T–54/99, *max.mobil v. Commission* [2002] ECR II–313, at paras. 48 ff.

⁴⁹ Order in Case T–369/03, *Arizona Chemical and Others v. Commission* [2005] ECR II–5839, at paras. 83–90 (EC procedure for the classification of dangerous substances). In these instances, the public policy rationale seems to outweigh the protective function of this principle, as generally recognised in administrative procedures leading to the adoption of individual acts; see below under C.II.

⁵⁰ On this see H.P. Nehl, n. 7 above, pp. 144–148.

⁵¹ Case C–282/95 P, *Guérin Automobiles v. Commission* [1997] ECR I–1503, at para. 37 (EC competition proceedings); Case C–501/00, *Spain v. Commission* [2004] ECR I–6717, at para. 52 (ECSC state aid proceedings); Case T–81/95, *Interhotel, Sociedade Internacional de Hotéis, SARL v. Commission* [1997] ECR II–1268, at paras. 63–67 (EC structural fund proceedings); Case T–209/00, *Lamberts v. Ombudsman* [2002] ECR II–2203, at para. 76 (proceedings before the EC Ombudsman); Joined Cases T–344/00 & T–345/00, *CEVA v. Commission* [2003] ECR II–229, at para. 103 (EC veterinary medicinal products classification proceedings); Case T–213/00, *CMA CGM and Others v. Commission* [2003] ECR II–913, at para. 317 (EC competition proceedings); Case T–132/01, *Euroalliances and Others v. Commission* [2003] ECR II–2359, at paras. 79 and 81 (EC anti-dumping proceedings); Order of the CFI's president in Case T–378/02 R, *Technische Glaswerke Ilmenau v. Commission* [2003] ECR II–2921, at para. 65 (EC state

including to its above time-related variant, can also be found in cases regarding the Commission's duty to examine impartially and diligently complaints brought to its attention in competition matters, i.e. in cases truly falling within the scope of application of the principle of care.⁵² Hence, by far the most cases dealing with the 'principle of good administration' actually concern the application of the principle of care or diligence.⁵³ While the preceding line of cases can be said to follow a relatively

aid proceedings); Case T-190/00, *Regione Siciliana v. Commission* [2003] ECR II-5015, at para. 136 however speaks of 'a principle of good administration' (EC state aid proceedings, formal stage); Case T-67/01, *JCB Service v. Commission* [2004] ECR II-49, at para. 36 (EC competition proceedings); Case T-176/01, *Ferriere Nord v. Commission* [2004] ECR II-3931, at paras. 62 and 101 (EC state aid proceedings, preliminary stage); Case T-317/02, *Fédération des industries condimentaires de France (FICF) and Others v. Commission* [2004] ECR II-4325, at para. 199 (EC external trade law proceedings); Case T-204/03, *Haladjian Frères v. Commission* [2006] ECR II-3779, at para. 195 (EC competition proceedings). Cf. also cases regarding EC state aid proceedings referring to the 'interests of sound administration', Case T-17/96, *TFI v. Commission* [1999] ECR II-1757, at para. 73; Case T-395/04, *Air One v. Commission* [2006] ECR II-1343, at para. 61; Case T-95/03, *Asociación de Estaciones de Servicio de Madrid and Federación Catalana de Estaciones de Servicio v. Commission* [2006] ECR II-4739, at para. 121; judgment of 11 July 2007 in Case T-167/04, *Asklepios Kliniken v. Commission*, not yet reported, at para. 81.

⁵² Case C-170/02 P, *Schlüssilverlag J.S. Moser and Others v. Commission* [2003] ECR I-9889, at para. 29 referring to the 'interests of sound administration' (EC merger control proceedings); Case T-17/96, *TFI v. Commission* [1999] ECR II-1757, at para. 73 (EC state aid proceedings); Case T-395/04, *Air One v. Commission* [2006] ECR II-1343, at para. 61 (EC state aid proceedings); Case T-417/05, *Endesa v. Commission* [2006] ECR II-2533, at para. 100 (EC merger control proceedings); judgment of 11 July 2007 in Case T-167/04, *Asklepios Kliniken v. Commission*, not yet reported, at para. 81 (EC state aid proceedings).

⁵³ See, in addition to the case law cited in n. 52 above, Case T-105/96, *Pharos v. Commission* [1998] ECR II-285, at paras 73-78 (EC veterinary medicinal products classification proceedings); Case T-231/97, *New Europe Consulting and Brown v. Commission* [1999] ECR II-2403, at paras. 39-47; Joined Cases T-186 and Others/97 and T-147/99, *Kaufring and Others v. Commission*, [2001] ECR II-1337, at paras. 257-273 (EC customs proceedings); Case T-31/99, *ABB Asea Brown Boveri v. Commission* [2002] ECR II-1881, at paras. 99-104 (EC competition proceedings); Case T-199/99, *Sgaravatti Mediterranea v. Commission* [2002] ECR II-3731, at para. 45 (EC structural funds proceedings); Case T-329/00, *Bonn Fleisch Ex- und Import v. Commission* [2003] ECR II-287, at para. 89 (EC customs proceedings); Joined Cases T-228/99 & T-233/99, *Westdeutsche Landesbank Girozentrale v. Commission* [2003] ECR II-435, at para. 167; Cases T-191/98, T-212/98 to T-214/98, *Atlantic Container Line and Others v. Commission* [2003] ECR II-3275, at paras. 122 and 404 (EC competition proceedings); Case T-180/01, *Euroagri v. Commission* [2004] ECR II-369, at para. 57 (EC structural fund proceedings); Case T-285/03, *Agraz and Others v. Commission* [2005] ECR II-1063,

consistent approach, this does not apply to some other cases in which, arguably, the terminological and conceptual confusion pertaining to the notion of ‘good administration’ has given rise to serious misunderstandings. This holds particularly true for cases in which the ‘principle of good administration’ was also held to be a standard of substantive legality,⁵⁴ alongside legal certainty⁵⁵ or the principle of equal treatment.⁵⁶ Yet, it is submitted that a blending of procedural and substantive legality needs to be avoided under all circumstances because of the distinct legal effects that a breach of a procedural or of a substantive rule may entail in judicial proceedings.⁵⁷ To the extent that the ‘principle of good administration’ is to be qualified as an essential procedural requirement – in that it is broadly concomitant with the principle of care – its violation may exceptionally be raised by the judge of his own motion.⁵⁸ On the contrary, this is generally

at paras. 49–54 (EC external trade proceedings); judgment of 6 February 2007 in Case T–23/03, *CAS v. Commission*, not yet reported, at para. 234 (EC customs proceedings); judgment of 26 April 2007 in Case T–109/02, *Bolloré v. Commission*, not yet reported, at paras. 92 and 99 (EC competition proceedings); judgment of 27 November 2007 in Joined Cases T–3/00 and T–337/04, *Pitsiorlas v. Council and ECB*, not yet reported, at para. 163 (access to documents).

⁵⁴ Case T–211/02, *Tideland Signal v. Commission* [2002] ECR II–3781, at para. 37, qualifying a breach of the ‘requirements of good administration’ (in the sense of the duty of care) as a ‘manifest error of assessment’ instead of a procedural illegality; similarly Case T–155/99, *Dieckmann & Hansen v. Commission* [2001] ECR II–3143, at para. 76 (‘misassessment of facts’); to the same effect, AG Poiares Maduro in his opinion in Case C–141/02 P, *Commission v. max.mobil* [2005] ECR I–1283, at paras. 84–85, who quite surprisingly opposes the duty to state reasons (in the sense of a formal/procedural requirement) to the principle of care (being allegedly of substantive nature): ‘[i]n contrast, the obligation of an impartial examination of a complaint forms part of the examination of the substantive legality of the contested measure’.

⁵⁵ Case T–392/02, *Solvay Pharmaceuticals v. Council* [2003] ECR II–4555, at para. 186.

⁵⁶ Case T–231/97, *New Europe Consulting and Brown v. Commission* [1999] ECR II–2403, at paras. 40 and 41; see for a criticism as regards the blending of the concepts of a fair hearing and care, on the one hand, and of the concept of care and principles of substantive legality, on the other, H.P. Nehl and W. Wurmnest, ‘Die verfahrens- und haftungsrechtliche Bedeutung der Sorgfaltspflicht der Verwaltung’ (2001) *Europarecht*, 36(1), 101, at 104–106; Case T–160/03, *AFCO Management Consultants and Others v. Commission* [2005] ECR II–981, at para. 75; Order of the CFI’s president in Case T–198/01 R, *Technische Glaswerke Ilmenau v. Commission* [2002] ECR II–2153, at para. 85.

⁵⁷ Cf. Case C–367/95 P, *Commission v. Sytraval and Brink’s France* [1998] ECR I–1719, at paras. 66–68.

⁵⁸ Thus far, this does not seem to have happened in relation to the principle of care; however, this is established case law in respect of a parallel procedural safeguard, i.e. the duty to state reasons pursuant to Article 253 of the EC Treaty;

impossible in respect of a plea of substantive illegality.⁵⁹ Moreover, while the annulment of an administrative act on substantive grounds generally definitively sets aside the act annulled, it is problematic whether and to what extent, following an annulment on procedural grounds, the EC administration is allowed under Article 233(1) of the EC Treaty to take, in its substance, the same decision again and/or at which point in time the administrative procedure needs to be resumed.⁶⁰

Finally, in the recent case law, the principle of ‘good administration’ seems to overlap with process principles other than the principle of care. It was thus held to be injurious to the duty of ‘good administration’ when the EC administration discloses, in breach of its obligation of professional secrecy under Article 287 of the EC Treaty, incriminating elements contained in a draft decision prior to its actual adoption by the competent Commission College.⁶¹ In other cases, the CFI inferred from the principle of ‘sound administration’ a record requirement in respect of statements made by a leniency applicant in competition matters⁶² or established the Commission’s duty to ensure the continuity of the function of the Hearing

cf. Case C-166/95 P, *Commission v. Daffix* [1997] ECR I-983, at paras. 22–24. For the parallelism between these procedural safeguards see H.P. Nehl, n. 7 above, p. 119 ff.; H.P. Nehl, n. 20, p. 323 ff.

⁵⁹ Case C-367/95 P, *Commission v. Sytraval and Brink’s France* [1998] ECR I-1719, at para. 67. In case the CFI raises a plea of its own motion which is not a matter of public policy or reinterprets the application in a way that entails reclassification of the subject-matter of the case, the judgment may be set aside by the ECJ on appeal, cf. Case C-78/03 P, *Commission v. Aktionsgemeinschaft Recht und Eigentum* [2005] ECR I-10737, at paras. 44–50.

⁶⁰ Thus, following annulment for a procedural defect, the administrative procedure for replacing the act annulled may, in principle, be resumed at the very point at which the defect occurred, cf. Case C-415/96, *Spain v. Commission* [1998] ECR I-6993, at paras. 33–34 (EC state aid proceedings); Case C-458/98 P, *Industrie des poudres sphériques v. Council* [2000] ECR I-8147, at paras. 80 ff. (EC anti-dumping proceedings); Joined Cases C-238 and Others/99 P, *Limburgse Vinyl Maatschappij and Others v. Commission* [2002] ECR I-8375, at paras. 70–76 (EC competition proceedings); Case C-417/06 P, *Italy v. Commission*, not yet published, at paras. 50–55 (EC structural fund proceedings). See however also Case T-73/95, *Oliveira v. Commission* [1997] ECR II-381, at para. 32, imposing on the Commission the obligation, flowing from a breach of the duty of diligence, to re-examine the file and take a fresh decision on the applicant’s application.

⁶¹ Case T-62/98, *Volkswagen v. Commission* [2000] ECR II-2707, at paras. 279–283; Case T-279/02, *Degussa v. Commission* [2006] ECR II-897, at paras. 409–426.

⁶² Case T-15/02, *BASF v. Commission* [2006] ECR II-497, at paras. 500–502; see, to the contrary, judgment of 12 December 2007 in Case T-101/05, *BASF v. Commission*, not yet reported, at para. 96.

Officer in accordance with the principle of ‘good administration’.⁶³ In state aid matters, the CFI seems to continue to derive from the duty of ‘good administration’ a ‘dialogue requirement’ with the Member State and third parties during the preliminary investigation procedure pursuant to Article 88(3) of the EC Treaty. This requirement is meant to counterbalance the Commission’s margin of discretion in identifying and evaluating the circumstances of the case in order to overcome any difficulties encountered in its preliminary assessment of the compatibility with the common market of the aid in question.⁶⁴

IV. The Absence of the ‘Principle of Good Administration’ in EC Law

It is submitted that the above analysis of the case law requires the same conclusion as the one I reached roughly ten years ago: Unless linked to the particular features of the principle of care, the ‘principle of good administration’ referred to in EC law litigation constitutes an empty phrase, shaped in ‘constitutional’ terms, which is capable of being used and misused in various contexts so as to describe a specific duty of the EC administration amenable to judicial review. The case law shows that the contours of this ‘principle’, if they are spelled out at all, vary considerably from one case to another and that it is susceptible of overlapping in its scope with a range of other process standards or even rules of substantive legality.⁶⁵ At least some judgments of the EC Courts correctly suggest that the term ‘good administration’ is to be understood merely as comprising a set of fundamental rules of proper administrative practice and that it has no specific legal content and purpose of its own.⁶⁶ This appears to be in

⁶³ Case T-210/01, *General Electric v. Commission* [2005] ECR II-5575, at paras. 719–720.

⁶⁴ Case T-426/04, *Tramarin v. Commission* [2005] ECR II-4765, at paras. 27–29. This seems to be at odds with Case C-367/95 P, *Commission v. Sytraval and Brink’s France* [1998] ECR I-1719, at paras. 58 ff., where the ECJ invalidated Case T-95/94, *Sytraval and Brink’s France v. Commission* [1995] ECR II-2651, at paras. 50 ff, in which it derived from the principle of care a ‘dialogue requirement’ with the complainant during the preliminary investigation procedure in state aid matters; however, in para. 45 the ECJ itself referred to the ‘duty of sound administration’ to inform complainants of decisions in state aid matters; on this see critically H.P. Nehl, n. 7 above, pp. 155–163.

⁶⁵ T. Fortsakis, n. 3 above, p. 213 seems to share this criticism; however, uncritically and too perfunctory Kańska, note 3 above, pp. 304–305.

⁶⁶ Cf. Case T-167/94, *Detlef Nölle v. Council* [1995] ECR II-2589; Case C-16/90, *Eugen Nölle v. Hauptzollamt Bremen-Freihafen* [1991] ECR I-5163 (EC anti-dumping proceedings), in particular, AG Van Gerven at I-5186, para. 28, where he places the ‘duty of care’ among the ‘principles of good administration’;

line with, on the one hand, the few national legal traditions in which the 'principles of good administration' are expressly recognised as reflecting a concept encompassing various procedural and substantive standards of administrative legality⁶⁷ and, on the other hand, with the similar, albeit merely procedural, 'umbrella' concept endorsed in Article 41 of the Charter of Fundamental Rights.⁶⁸

Therefore, on the whole, the case law discussed sketches a fairly puzzling picture of the possible meaning to be attached to the 'principle of good administration'. Litigants have repeatedly availed themselves of this principle as a sort of 'multifunctional weapon' in order to obtain a degree of procedural protection which, under the given circumstances and the available process standards, did not exist. These attempts quite naturally reflect a legitimate litigation strategy in any legal system – especially in common law systems – which consists of invoking precedents and their 'abstract' or 'legal' content in order to influence the outcome of the particular case. It seems plain that the ambiguous and rather terse reasoning style of the EC Courts in respect of the recognition of a 'principle of good administration' has considerably reinforced the tendency towards invoking unspecified 'principles' of EC administrative law in this manner. In so far, the EC Courts' inclination to spell out principled statements without building them on sufficiently transparent and deductive reasoning has proven to be rather counterproductive.⁶⁹ The relevant 'principles'

CFI Case T-190/00, *Regione Siciliana v. Commission* [2003] ECR II-5015, at para. 136 speaks of 'a principle of good administration' (EC state aid proceedings).

⁶⁷ For the '*algemene beginselen van behoorlijk bestuur*' in Belgian and Dutch administrative law cf. R. Andersen, 'Les principes généraux de la procédure d'élaboration de la décision administrative en droit administratif belge' [1993] *European Review of Public Law*, Special Number: vol. 5, 138, at 142; G.F. Van der Tang, 'The Constitutional Perspective of Administrative Decision-Making' [1993] *European Review of Public Law*, Special Number: vol. 5, 227, at 232; P.L. De Vos and C.J. Bax, 'The Procedure of Administrative Decisions in the Netherlands' [1993] *European Review of Public Law*, Special Number: vol. 5, 239, at 244; cf. also R. Bauer, n. 31 above, pp. 115–120 with further references. For a general survey on the 'principles of good administration' in the administrative laws of the Member States cf. Swedish Agency for Public Management, n. 13 above, p. 16 ff. On the common law cf. the proposal for administrative reform in JUSTICE (ed.), n. 13 above, p. 12 ff. referring to the 'Principles of Good Administration'.

⁶⁸ Kańska, note 3 above, p. 305, in essence, qualifies the notion of 'good administration' as an umbrella principle, comprising an open-ended source of various separate procedural rights and obligations gradually acknowledged in the case law, which is mirrored in Article 41 of the Charter in the form of a 'compilation'.

⁶⁹ The EC Courts' general approach to laying down principles of EC administrative law 'in broad, even absolute terms', but to leaving their concrete elaboration to subsequent case law is underlined by M. Chiti, 'The Role of the European

are continuously being reproduced in litigation by the sole reason of their derivation from a few ambiguous precedents and, in turn, induce the judges, unwilling to modify succinct or to overrule erroneous earlier statements, to deal with them, at least cursorily. The chain reaction resulting from this however needs to be cut. This is only possible through building a consistent body of case law which makes use of unequivocal terminology, endorses a clear-cut categorisation of different process principles and, ultimately, bans the ‘principle of good administration’ from its reasoning. However, irrespective of the fact that the ‘principle of good administration’ does not mirror a specific process principle, the indeterminate notion of ‘good administration’ as such continues to play its part in the debate on the development of a coherent supranational administrative system in which this notion purports to reflect a set of meaningful basic principles of procedural legality.

C. THE POSSIBLE SIGNIFICANCE OF ‘GOOD ADMINISTRATION’ WITH REGARD TO PROCEDURAL RULES

I. An Indeterminate and Open-ended Notion

Generally speaking, the notion ‘good administration’ in the broad sense is nothing but an aid to describing the corpus of the continuously evolving – legally enforceable and unenforceable – procedural and substantive requirements with which a modern administration has to comply.⁷⁰ It is often used to denote a standard of practice serving the attainment of ‘administrative justice’,⁷¹ transparency, openness or even the democratic

Court of Justice in the Development of General Principles and their Possible Codification’ [1995] *Rivista Italiana di Diritto Pubblico Comunitario*, V(3–4) 661, at 664. In the case of the notion of ‘good administration’ it appears however that this technique has not promoted the development of a coherent procedural concept but, on the contrary, contributed to legal uncertainty.

⁷⁰ Cf. AG Slynn in Case 64/82, *Tradax Graanhandel BV v. Commission* [1984] ECR 1359, at 1385–1386.

⁷¹ Cf. the title chosen by JUSTICE (ed.), n. 13 above, in its 1988 report on proposals for administrative reform – including the setting up of a range of ‘principles of good administration’ – in the United Kingdom; see also A.W. Bradley, n. 14 above, pp. 351–353, who pleads for a ‘human right to administrative justice’ based on three pillars, namely, the right to judicial review; the requirement of an open, fair and impartial procedure; and full factual and substantive judicial control of the correctness of an administrative measure in instances of major importance to the individual.

nature of decision-making processes,⁷² or the improvement of the relationship between public authorities and citizens.⁷³ These aspirations furthermore are ranged among the values commonly recognised by any modern democratic system of governance committed to the rule of law.⁷⁴ Surely, this very abstract and somewhat tautological description, which seeks to illustrate an extremely vague expression by means of no less obscure notions, does not shed much light on what 'good administration' might imply in actual instances. It gives no information on what particular type of rule ought to be subsumed under 'good administration', nor does it enlighten the reader to what purpose, scope of application and legal force, if any, such rules shall possess. This holds all the more true in the context of the EC in which, as opposed to the national realm, the abovementioned parameters are neither firmly rooted in legal traditions nor sufficiently specified and elaborated by legal doctrine in order to provide a reliable and useful yardstick for administrative conduct and, subsequently, judicial review.

In actual fact, a comprehensive doctrinal explanation and categorisation of the implications to be associated with 'good administration' in EC law seems hardly possible. On a more general level, this is due to the dynamic character of the evolution of the EC legal order as a whole; more specifically, it is the no less dynamically evolving structure of the EC administrative system which renders any conceptualisation of particular features of sound executive practice extremely difficult. The difficulty becomes even

⁷² This argument has been repeatedly developed by L. Azoulay, e.g., n. 3 above, p. 119 ff.; cf. also J. Rideau, 'La transparence administrative dans la CEE', in C. Debbasch (ed.), *La Transparence Administrative en Europe, Actes du colloque tenu à Aix en octobre 1989*, Centre de recherches administratives d'Aix-Marseille (Paris, 1999), p. 237 ff.

⁷³ See the first Annual Report (1995) of the European Ombudsman, OJ (1996) C 234/1, at 3. The aspect of citizenship has been emphasised by G. Braibant, 'Droits vis-à-vis de l'administration', in A. Cassese, A. Clapham and J.H.H. Weiler (eds), *European Union: The Human Rights Challenge. Human Rights and the European Community: Methods of Protection*, Nomos (Baden-Baden, 1991), vol. II p. 427, who maintains, from the perspective of development of the European public law systems: '[a]insi s'est constitué un "statut de l'administré", ou plus exactement un statut du citoyen vis-à-vis de l'administration, qui est une partie intégrante de la citoyenneté moderne'.

⁷⁴ In this vein see J. Schwarze, n. 8 above, pp. 1173–1174; M. Hilf, G. Ciesla and E. Pache, 'Rights vis-à-vis the Administration at the Community Level', in A. Cassese, A. Clapham and J.H.H. Weiler (eds), *European Union: The Human Rights Challenge. Human Rights and the European Community: Methods of Protection*, Nomos (Baden-Baden, 1991), p. 455, 459 and, as regards the European Convention on Human Rights, A.W. Bradley, n. 14 above, p. 355.

more acute when taking into account that the EC administrative system is 'hybrid' in nature and modelled in various 'vertical' and 'horizontal' layers in so far as it needs to interact in manifold ways with the Member States' administrations, some of which are strongly rooted in distinct legal traditions. The question thus arises what could be the, at least basic and possibly uniform, standard of 'good' administrative practice to be observed throughout the composite or multi-level administrative system. This seems to presuppose that the national administrators, in as much as they are obliged to implement EC law, should also be legally bound, alongside the EC institutions, by a common basic standard of procedural justice. It is submitted that, as regards fundamental principles of administrative procedure, a theoretical solution to this problem is not only necessary but also possible, not least in the interest of safeguarding the *rechtsstaatliche* legitimacy of the EC administrative system as a whole.⁷⁵ In that regard, judicially shaped standards of 'good', i.e. lawful, administrative practice appear to constitute the primary, and – in the face of manifold *lacunae* in the statutory framework of the EC – perhaps most reliable point of reference for both legal doctrine and jurisprudence when dealing with the legality of the EC institutions' executive conduct. Likewise, the activity of the EC Courts is widely seen as the focal driving force in establishing or 'juridifying' standards of 'good administrative practice' at the EC level.⁷⁶ This eventually leads to the somewhat unsatisfactory conclusion that 'good administration' in the strict legal sense is essentially what the EC Courts say it is.

This view is obviously shared by the European Ombudsman. In order to define the scope of his action, he attempted to categorise the contents of the term 'maladministration' set out in Article 195(1) of the EC Treaty⁷⁷ in his first Annual Report (1995)⁷⁸ and, subsequently, in his

⁷⁵ See H.P. Nehl, n. 7 above, pp. 80–81 and 87–91; for a profound analysis of 'federalising' EC administrative process, drawing on the concepts of 'unity' and 'imputability' see H.P. Nehl, n. 20 above, pp. 315–321, 387–389 and 413–477.

⁷⁶ Cf., e.g., J. Schwarze, 'Developing Principles of European Administrative Law' [1993] *Public Law*, 229 and 'Sources of European Administrative Law', in S. Martin (ed.), *The Construction of Europe: Essays in Honour of Emile Noël* Kluwer (Dordrecht, 1994), p. 183; M. Chiti, 'Are there Universal Principles of Good Governance?' [1995] *European Public Law*, 4(1), 241 and n. 69 above.

⁷⁷ See also Article 2 of the European Ombudsman's Statute (Decision of 12 July 1995 of the European Parliament on the Regulation and General Conditions Governing the Performance of the Ombudsman's Duties, OJ (1994) L 113/15), laying down that the Ombudsman 'shall help to uncover maladministration in the activities of the [EC] institutions and bodies'.

⁷⁸ For a general comment on this Report as well as the functions and powers of the European Ombudsman see S. Tierney, 'European Citizenship in Practice? The First Annual Report of the European Ombudsman' [1996] *European Public Law*,

Annual Report for 1997 as well as in the Code of Good Administrative Behaviour (1999).⁷⁹ To that effect, he set up a list of instances deemed to constitute maladministration,⁸⁰ such as breaches of Treaty provisions, of rules and principles of law established by the EC Courts,⁸¹ violations of fundamental rights as prohibited by Article 6 of the Treaty on European Union as well as a non-exhaustive list of other failures, including irregularities not amenable to judicial review.⁸² This exercise culminated in the following, no less open-ended definition adopted by the Ombudsman in his Annual Report for 1997: '[m]aladministration occurs when a public body fails to act in accordance with a rule or principle which is binding upon it'. The Ombudsman thus refrains from establishing a rigid concept of bad administrative practice but views the list of failures amounting to 'maladministration' as non-exhaustive, thus leaving the door open for a future expansion, in particular, by way of legally binding judicial interpretation and his own – legally non-binding – decision-making.⁸³ Therefore, this list covers not only unlawful and, in principle, justiciable administrative behaviour but also mere improper – as opposed to illegal – and unjusticiable conduct.⁸⁴ This approach suggests, conversely, that the measure of good or proper administrative activity is not necessarily the same as that of lawful administration.⁸⁵ Indeed, it hardly needs mentioning that the legally valid exercise of executive power does not altogether exclude socially relevant irregularities, such as indecent behaviour and undue or 'unjust' encroachments upon individual interests. The comprehensive and open-ended character of this concept thereby takes account of the Ombudsman's non-judicial office⁸⁶ and, at the same time, implicitly recognises the strongly dynamic character of the notion of

5(4), pp. 517–529. On the Ombudsman's case law on 'good administration' cf. T. Fortsakis, n. 3 above, pp. 214–215.

⁷⁹ Cf. n. 12 above.

⁸⁰ Annual Report (1995), n. 11 above, p. 6.

⁸¹ See also *ibid.*, p. 2, where the Ombudsman refers to the judge-made principles of European administrative law, such as the duty to give reasons, procedural fairness, proportionality, legitimate expectations.

⁸² Annual Report (1995), n. 11 above, p. 6: 'administrative irregularities and omissions, abuse of power, negligence, unlawful procedures, unfairness, malfunction or incompetence, discrimination, avoidable delay, lack or refusal of information'.

⁸³ *Ibid.*, p. 6, and S. Tierney, n. 78 above, p. 519.

⁸⁴ See also *ibid.*, pp. 525–526.

⁸⁵ In the same vein see AG Slynn, n. 70 above, p. 1386: '[l]egal rules and good administration may overlap; the requirements of the latter may be a factor in the elucidation of the former. The two are not necessarily synonymous'.

⁸⁶ See Annual Report (1995), n. 11 above, p. 6.

maladministration in the face of the continuous quest for reliable legal and non-legal parameters for EC administrative action. In this context, it is submitted, the creation of the Ombudsman's office in conjunction with the continuing discussion of what 'maladministration' may imply has opened up another essential 'non-legislative' avenue alongside the traditional role of the EC Courts,⁸⁷ capable of contributing to the shaping of the legal foundations of the EC legal order and its administrative system.

If it is true that the term 'maladministration' should not be subjected to a rigid definition one can hardly assume that the notion of 'good administration' could be handled differently. This, however, does not necessarily mean that attempts at exploring the procedural rationales of good administrative practice are vain or doomed to failure from the outset. To be more concrete, it would seem that the task of conceptualising basic features of procedural principles in EC administrative law is not as hazardous as is the case for substantive principles of good administration. Indeed, certain fundamental characteristics and functions of process rules which may be equated with 'good administration' appear to stem from a common heritage of the European public law systems. It is therefore quite safe to assume that the EC Courts, when dealing with the problem of procedural justice or 'good administration' in a procedural sense, also – at least implicitly – operate on the basis of a pre-existing rationale of process law. In that context, it should be recalled that the 'right to good administration' pursuant to Article 41 of the Charter of Fundamental Rights is essentially procedural in character. Drawing on a thesis developed a few years ago, I would still contend that, as regards specifically procedural rules such as those referred to in Article 41 of the Charter, the term 'good administration' can be said to embody some basic features generally underlying procedural constraints on administrative decision-making the existence of which can be justified with a view to the fundamental values enshrined in all modern legal systems adhering to the rule of law. In fact, in modern administrative systems, procedural rules in general are governed by two potentially conflicting rationales which will be considered more closely in the following.

⁸⁷ On the ECJ's creative role in constitutionalising the EC system cf., e.g., G.F. Mancini, 'The Making of a Constitution for Europe' (1989) *Common Market Law Review*, 26(4), 595; J.H.H. Weiler, 'The Transformation of Europe' (1991) *Yale Law Journal*, 100(8), 2403.

II. The Dichotomy of Functions Underlying Procedural Rules

The significance of 'good administration' in a procedural sense is necessarily predetermined by the philosophy generally governing (administrative) process rules. Comparative analysis of the most elaborate national traditions of administrative law⁸⁸ teaches us that in modern legal orders governed by the 'rule of law'⁸⁹ formalised procedures – i.e. the way in which administrative decision-making is to be carried out according to constitutional principles, statutes or judge-made law – are essentially determined by two fundamental rationales, namely rationality and efficiency on the one hand and individual protection on the other.⁹⁰

The first is an instrumental or utilitarian justification for the existence of process rules, the granting of procedural rights included. It is assumed that the observance of those rules renders it more likely that the substantive policy which is to be implemented by the administration will be

⁸⁸ Cf. H.P. Nehl, n. 14 above, pp. 18–20.

⁸⁹ For a general outline of the implications of the 'rule of law' in European public law systems see J. Schwarze, n. 8 above, Chapter 7 ('Principles of administrative procedure under the rule of law'), p. 1173 ff. See also the comparative overview (Germany, France and the UK) given by C. Starck, 'Droits fondamentaux, Etat de droit et principe démocratique en tant que fondements de la procédure administrative non-contentieuse – approche comparative' [1993] *European Review of Public Law*, Special Number: vol. 5, 31, who highlights the complex interaction between three 'constitutional' parameters, namely, the protection of basic rights, the rule of law and the principle of democracy; see also E. Schmidt-Assmann, 'Verwaltungslegitimation als Rechtsbegriff' [1991] *Archiv des öffentlichen Rechts*, 116(3), p. 329 (331 et seq.).

⁹⁰ For the following distinction, in particular, with respect to the common law see D.J. Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedures*, Clarendon Press (Oxford, 1996), p. 128 ff. ('outcome' and 'non-outcome' values); P.P. Craig, 'Procedures and Administrative Decisionmaking: A Common Law Perspective' [1993] *European Review of Public Law*, Special Number: vol. 5, 55 ff. As regards US public law cf. R.L. Rabin, 'Some Thoughts on the Relationship Between Fundamental Values and Procedural Safeguards in Constitutional Right to Hearing Cases' [1979] *San Diego Law Review*, 16, 301 at 302–303 who adds 'accountability' (in the sense of ensuring 'good governance') as a third value of 'procedural due process'; J.L. Mashaw, *Due Process in the Administrative State*, Yale University Press (New Haven, 1985), 104 ff. and 183 ff.; L.H. Tribe, *American Constitutional Law*, 2nd edition, The Foundation Press (New York, 1988), p. 666 ff.; regarding specifically US civil adjudication see L.B. Solum, 'Procedural Justice' [2004] *Southern California Law Review*, 78, 181 ff. For a full outline of procedural rationality with a view to EC administrative law see H.P. Nehl, n. 20 above, p. 173 ff.; see also E. Barbier de la Serre, 'Procedural Justice in the European Community Case-law concerning the Rights of the Defence: Essentialist and Instrumental Trends' [2006] *European Public Law*, 12(2), 225.

accurately and efficiently attained.⁹¹ From this perspective, the formality of the administrative decision-making process combined with the opportunity for the participation of individual parties – who adduce important information either by making use of their procedural rights or by fulfilling their duty to co-operate – are considered necessary preconditions for administrative efficiency as well as the rationality and, eventually, albeit to a lesser extent, the legitimacy and acceptance⁹² of the final outcome. Under this concept, procedural law thus operates in a subsidiary capacity to the substantive law and merely provides effective means in order correctly and efficiently to attain the latter's object. In that respect, L.H. Tribe's definition continues to be a valid point of reference for all modern legal orders committed to the rule of law:⁹³ [the] instrumental approach views the

⁹¹ Cf. with respect to the common law P.P. Craig, n. 90 above, p. 56; for the German perspective see E. Schmidt-Assmann and C. Röhl, 'Verfahren und Sanktionen im Wirtschaftsverwaltungsrecht' in *Procedures and Sanctions in Economic Administrative Law*, FIDE, 17th Congress, vol. III, Nomos (Baden-Baden, 1996), p. 51, at 73–74 who stress the close relationship between efficiency, rationality and fairness; F. Schoch, 'Der Verfahrensgedanke im Allgemeinen Verwaltungsrecht (Anspruch und Wirklichkeit nach 15 Jahren VwVfG)' [1992] *Die Verwaltung* 21, at 24–25; F. Ossenbühl, 'Verwaltungsverfahren zwischen Verwaltungseffizienz und Rechtsschutzauftrag' [1982] *Neue Zeitschrift für Verwaltungsrecht*, 1(9), 465 at 466 ('optimising the administrative output').

⁹² This is often considered a positive side-effect rather than an inherent tenet of the instrumental justification; see for German public law F. Schoch, n. 91 above, pp. 31–32 who states that legitimacy and acceptance are ancillary objects of administrative procedures. W. Schmitt Glaeser, 'Die Position des Bürgers als Beteiligte im Entscheidungsverfahren gestaltender Verwaltung', in S. Lerche, W. Schmitt Glaeser and E. Schmidt-Assmann (eds), *Verfahren als staats- und verwaltungsrechtliche Kategorie*, Decker & Müller (Heidelberg, 1984), 35, at 48–49 even denies any legitimising function of participation in administrative proceedings and rather stresses the individual's responsibility as an informant of the administration (p. 70 ff.). This view is inspired by the idea that democratic legitimacy is exclusively provided by statutory rules enacted by Parliament which set out the substantive policy goals (the 'decision-making programme') to be reached by the executive, cf. for Germany E. Schmidt-Assmann, 'Verwaltungsverfahren' in J. Isensee and S. Kirchhof (eds.), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, C.F. Müller (Heidelberg, 1988), vol. III, p. 642; see however for a plea in favour of recognising the democratic dimension of participation and its legitimising effects T. Würtenberger, 'Akzeptanz durch Verwaltungsverfahren' [1991] *Neue Juristische Wochenschrift*, 44(5), 257 at 263. Regarding the US 'transmission-belt model' cf. R. Stewart, 'The Reformation of American Administrative Law' (1975) *Harvard Law Review*, 88, 1669 at 1671 ff. M. Everson, 'Administering Europe?' (1998) *Journal of Common Market Studies*, 1(2), 195 at 200 ff, convincingly points to the paradox that EC administrative law continues to be influenced by this rationale even in the absence of a fully fledged democratic legitimacy of the EC polity.

⁹³ L.H. Tribe, n. 90 above, pp. 666–667 (emphases omitted).

requirements of due process as constitutionally identified and valued . . . as means of assuring that the society's agreed-upon rules of conduct, and its rules for distributing various benefits, are in fact accurately and consistently followed. Rather than expressing the rule of law, procedural due process in this sense implements law's rules . . . ; its point is less to assure participation than to use participation to assure accuracy'.

The instrumental rationale needs to be completed by – and opposed to – a somewhat overlapping dignitary or protective justification of process rules in general and procedural rights in particular. This concept essentially takes into account the impact of administrative decisions on the individual who is subject to the exercise of public power. The recognition of personal dignity, autonomy and freedom as inalienable fundamental values has as its corollary the need effectively to protect them against arbitrary and unlawful encroachments on the part of the public bodies.⁹⁴ Within administrative decision-making procedures this protection is provided, in a more general sense, by the concept of formality⁹⁵ and, in particular, by the granting and the observance of individual procedural safeguards.⁹⁶ The dignitary rationale thus corresponds to the insights achieved by modern constitutional and human rights theory, which rejects the thesis of the subordinated individual to be treated as a mere 'object' of state activity.⁹⁷ The duty to protect individual fundamental rights not only binds the state when taking substantive policy decisions but also refers to the processes by which these decisions are being reached and implemented under concrete circumstances.⁹⁸ The more the protective justification is emphasised

⁹⁴ J.L. Mashaw, n. 90 above, p. 102 ff., 158 ff., 189 ff., who has developed an independent 'dignitary' theory of procedural justice; L.H. Tribe, n. 90 above, p. 666; see also L.B. Solum, n. 90 above, pp. 262–264; E. Barbier de la Serre, n. 90 above, p. 225 ff. who also speaks of an 'essentialist rationale'.

⁹⁵ See the famous words of Rudolf Jhering: '[f]ormality [is] the sworn enemy of the arbitrary, and the twin sister of freedom', cited in J. Schwarze, n. 8 above, p. 1178.

⁹⁶ Cf. P.P. Craig, n. 90 above, pp. 57–58. The aspect of protection of (substantive) fundamental rights by procedural safeguards has been emphasised by the German Federal Constitutional Court in Case 1 BvR 385/77, *Mülheim-Kärlich*, BVerfGE 53, 30; cf. G. Nolte, 'General Principles of German and European Administrative Law – A Comparison in Historical Perspective' (1994) *Modern Law Review*, 57(2), 191 at 204; Schwarze, n. 8 above, pp. 1176–1177.

⁹⁷ Cf. L.H. Tribe, n. 90 above, p. 666 ('[t]hese rights to interchange express the elementary idea that to be a person, rather than a thing, is at least to be consulted about what is done with one'; emphases omitted); M. Hilf, G. Ciesla and E. Pache, n. 74 above, pp. 457 and 459; F. Ossenbühl, n. 91 above, p. 466.

⁹⁸ Cf., e.g., the German Federal Constitutional Court's case law, n. 96 above.

the more it grants procedural law a value of its own⁹⁹ and, accordingly, increases its legitimising function from the standpoint of the citizen.¹⁰⁰ Thus far, the dignitary aspect clearly reaches beyond the instrumental rationale of process rules which perceive individual protection as a mere 'by-product' of the need for accurate and efficient policy implementation.

Both fundamental purposes, i.e. administrative performance and rationality on the one hand and individual protection on the other, are closely entwined and may be combined in many instances without entailing appreciable costs. However, administrative practice and debates on administrative efficiency have shown that a considerable potential for conflict exists which fosters the need for a proper balancing between individual and administrative costs.¹⁰¹ Clearly, too heavy an emphasis on procedural safeguards and individual participation may go beyond what is required in order to attain a correct and transparent decision in its substance. It is furthermore submitted that severe constraints on the decision-making process, such as the duty to respond to each and every argument put forward by interested parties, are capable of doing more harm than good and endanger the proper and timely implementation of the substantive policy goals.¹⁰² Moreover,

⁹⁹ Cf., e.g., drawing on the philosophy of I. Kant, E. L. Pincoffs, 'Due Process, Fraternity, and a Kantian Injunction', in J.R. Pennock and J.W. Chapman (eds.), *Due Process*, New York University Press (New York, 1977), p. 172, 175 ff.

¹⁰⁰ For an excellent overview from the viewpoint of legal sociology cf. A. Tschentscher, 'The Function of Procedural Justice in Theories of Justice', in K.F. Röhl and S. Machura (eds), *Procedural Justice*, Ashgate (Aldershot, 1997), p. 104 ff. and K.F. Röhl, 'Verfahrensgerechtigkeit (Procedural Justice). Einführung in den Themenbereich und Überblick' [1993] *Zeitschrift für Rechtssoziologie*, 13(1), 1. These aspects also underlie system-theory starting with the work of N. Luhmann, *Legitimation durch Verfahren*, 3rd edition, Luchterhand (Darmstadt, 1978), who provides for a 'functionalist' explanation of legitimising effects of procedures and, with a completely different thrust, discourse-theory which grants an ideal-type of decision-making process an autonomous, ethically underpinned, participatory or deliberative object; see the work of J. Habermas, e.g., *Faktizität und Geltung (Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats)*, Suhrkamp (Frankfurt, 1992). For a useful synthesis of these theories and those building on them with a view to conferring legitimacy on EC administrative decision-making processes see M. Everson, n. 92 above, p. 195 ff.

¹⁰¹ On this see the analysis by E. Barbier de la Serre, n. 90 above, pp. 227–229 and 245 ff. who draws on a balancing between moral costs (i.e. moral harm resulting from the denial of individual protection or participation in the procedure) and material costs (i.e. procedural/administrative costs entailed through the granting of process rights).

¹⁰² See for the development in US administrative law M. Shapiro, 'The Giving Reasons Requirement' [1992] *University of Chicago Legal Forum*, 2(1) 179 and

experience in sensitive areas, such as environmental law, shows that the granting and use of process rights is a double-edged sword. At the worst, if participation does not merely pursue the aim of protecting one's legitimate interests or rights but of preventing the administration from taking an unwelcome decision at all process rights are likely to be strategically misused in order to obstruct and delay the administrative procedure.¹⁰³ On the other hand, attempts at bringing about a high degree of administrative efficiency and rationality automatically bear the risk of unreasonably limiting the scope of procedural protection by simply subjecting the latter to the former rationale.¹⁰⁴ The correct balancing is thus a delicate task and involves a policy decision which, in general, lies with the legislator and in some instances, if no clear-cut statutory guidelines or no guidelines at all are provided, with the courts when reviewing administrative decisions. Unsurprisingly, European public law systems tend to make different choices with respect to the weight to be accorded respectively to the underlying rationales of

'Codification of Administrative Law: The US and the Union' [1996] *European Law Journal*, 2(1), 26 at 38, as well as R.L. Rabin, n. 90 above, p. 304 ff. who both stress the excessive costs of administrative decision-making in terms of agency decisional resources and delay which an exaggerated emphasis on the protective and participatory rationale of 'due process' may entail.

¹⁰³ E. Schmidt-Assmann and H. Krämer, 'Das Verwaltungsverfahren und seine Folgen (Insbesondere zu den Systemgedanken einer Lehre von den Verfahrensfehlerfolgen im deutschen Recht unter Einbeziehung rechtsvergleichender Aspekte)' [1993] *European Review of Public Law*, Special Number: vol. 5, 98 at 104 use the expression '*Verfahren als Verhinderungsstrategie*' (procedure as strategic obstruction).

¹⁰⁴ In legal orders giving preference to the instrumental rationale process rights are granted only 'up to the point at which the cost entailed is balanced by the likely improvement in the substantive outcome', cf. P.P. Craig, n. 90 above, p. 57; from this perspective administrative efficiency or correctness is always capable of outweighing individual protection. The US Supreme Court has often been criticised for having endorsed such a biased balancing approach in favour of a utilitarian concept, cf. *Mathews v Eldridge*, 424 U.S. 319 (1976); cf. L.H. Tribe, n. 90 above, p. 671 ff.; E. Barbier de la Serre, n. 90 above, p. 249. For the discussion in Germany following the case law of the Federal Constitutional Court, n. 96 above, p. 53, see R. Wahl and J. Pietzcker, 'Verwaltungsverfahren zwischen Verwaltungseffizienz und Rechtsschutzauftrag' (1983) 41 *Veröffentlichungen der Vereinigung Deutscher Staatsrechtslehrer* 151 and 193 respectively, as well as J. Schwarze, n. 8 above, p. 1177 with further references. On the difficulty of shaping a *ius commune* of administrative process on EC level on account of the diverging needs for balancing administrative efficiency and individual protection in different fields of policy implementation cf. critically I. Pernice and S. Kadelbach, 'Verfahren und Sanktionen im Wirtschaftsverwaltungsrecht' [1996] *Deutsches Verwaltungsblatt*, 2(19), 1100 at 1101–1102.

administrative procedures. Some of them, such as the German¹⁰⁵ and French systems,¹⁰⁶ seem generally to give priority to the instrumental rationale, whereas others, such as the common law systems,¹⁰⁷ put more emphasis on the protective justification of administrative process. This balancing has important consequences with regard to the effectiveness of judicial review of procedural legality and grants important insights into the very reasons guiding the judges in either annulling or maintaining the administrative act challenged.¹⁰⁸

In summary, the above-highlighted purposes of administrative process rules constitute, irrespective of their potential weight in particular instances, the very essence of what can be described as the philosophy of the law governing administrative process or as ‘good administration’ in a procedural sense. Indeed, seen from the perspective of the prerequisite of

¹⁰⁵ This seems somewhat inconsistent with the above statement of principle given by the Federal Constitutional Court on the protective function of procedural law, n. 96 above, but is still the prevalent doctrine which also governs the Federal Administrative Procedure Act (Bundes-Verwaltungsverfahrensgesetz of 25 January 1976, Bundesgesetzblatt I 1976, p. 1253). The key term is ‘serving function’ of the administrative procedure (*‘dienende Funktion’*) and means that procedural law functions as a law of an auxiliary nature, alongside the correct operation of substantive law: see E. Schmidt-Assmann and H. Krämer, n. 103 above, pp. 101–102. The legal concept that procedural protection is not an end in itself is furthermore reflected in the rather relaxed standard of review applied by German administrative courts with respect to breaches of process rights; for a critical view see F. Schoch, n. 91 above, pp. 24–25 and 37 ff with further references.

¹⁰⁶ See, e.g., C. Debbasch and J.-C. Ricci, *Contentieux administratif*, 5th edition, Dalloz (Paris, 1990), p. 804: ‘[1]a forme n’est qu’un moyen au service d’une fin’. This is certainly true for consultative procedures (*procédure consultative*) involving co-operation between different public entities. On the other hand, in adversarial procedures (*procédure contradictoire*) strong emphasis is put on the rights of defence (*droits de la défense*) recognised as a general principle of law (*principe général du droit*): cf. J. Moreau, ‘Les conséquences des illégalités procédurales en droit administratif français’ [1993] *European Review of Public Law*, Special Number: vol. 5, 89; E. Riedel, ‘Europäische Verwaltungsverfahrenssysteme im Vergleich’, in J. Schwarze and C. Starck (eds.), *Vereinheitlichung des Verwaltungsverfahrensrechts in der EG* [1995] *Europarecht*, 30 (Beiheft 1), p. 49 at 63 ff.

¹⁰⁷ Concerning the principles of ‘natural justice’ and ‘procedural fairness’ see, e.g., P.P. Craig, *Administrative Law*, 3rd edition Sweet & Maxwell (London, 1994), p. 281 ff; D.J. Galligan, n. 90 above, p. 52 ff. and 165 ff; E. Riedel, n. 106 above, p. 52 ff.

¹⁰⁸ As regards the application of the so-called ‘harmless error principle’, which allows the judge to refrain from annulling the act even in the presence of a procedural illegality, in particular, in cases in which the administration could not have reached a different decision on the substance, cf. E. Barbier de la Serre, n. 90 above, p. 243 ff.; H.P. Nehl, n. 20 above, p. 195 ff.

a modern, efficient, accountable and legitimate executive which is bound by the rule of law, administrative procedures which completely lack one of the above components can hardly be regarded as fulfilling the requirement of good administrative practice. In fact, all fundamental procedural safeguards recognised in EC administrative law appear to reflect the above rationales the respective weight of which is also dependent on the subjective or objective nature of the process standard at issue. Thus, the right to be heard and the right to access to the file clearly emphasise the protective function, whereas the principle of care and the duty to state reasons constitute process standards involving both the need for individual protection and the public interest in ensuring the rationality of the procedure's final outcome.¹⁰⁹ In view of their 'universal character', it is thus quite safe to assume that both of the above rationales of procedural law also constitute basic features or minimum requirements of the EC administrative process.¹¹⁰ It however remains doubtful whether, in the light of the EC Courts' case law, which is almost exclusively influenced by rule of law considerations, administrative procedures can also be held to embody a 'participatory democracy' rationale in a similar manner as the one fostered by the US courts in respect of agency rule-making.¹¹¹ Indeed, although it might appear tempting, with a view to the 'democratic deficit' of the European Union, to interpret some of the EC Court's jurisprudence in a sense that it also promotes accountability, transparency and participation for the sake of enhancing democratic legitimacy,¹¹² one should bear in mind that the EC Courts' primary concern in reviewing the legality of administrative decision-making is still aimed at protecting the individual against illegal encroachments upon his or her rights and interests.¹¹³ This

¹⁰⁹ See H.P. Nehl, n. 20 above, p. 323 ff., drawing furthermore the distinction between process standards ensuring an 'ex ante dialogue' and an 'ex post dialogue' between the individual and the administration.

¹¹⁰ This hypothesis is confirmed by Case T-134/94, *NMH Stahlwerke GmbH and Others v. Commission* [1996] ECR II-537, at para. 74: 'the Court has to resolve a conflict between, on the one hand, the principle of the effectiveness of administrative action and, on the other, the principle of judicial supervision of administrative acts, while respecting the rights of the defence and the principle *audi alteram partem*'.

¹¹¹ Cf. M. Shapiro, *Who Guards the Guardians? Judicial Control of Administration*, The University of Georgia Press (Athens and London, 1988); R. Stewart, n. 92 above, p. 1711 ff.

¹¹² Cf. L. Azoulay, n. 3 above, p. 119 ff.; M. Everson, n. 92 above, p. 214; see also P.P. Craig, 'Democracy and Rule-making Within the EC: An Empirical and Normative Assessment' [1997] *European Law Journal*, 3(2), 105 at 120 ff.

¹¹³ On this see the criticism by H.P. Nehl, n. 20 above, p. 143 who emphasises that Case C-269/90, *Hauptzollamt München-Mitte v. Technische Universität*

is not to say that these parameters of democratic legitimacy are completely absent from the case law in so far as they deal with process rights clearly governed by a ‘public accountability’ rationale, such as the right to access to documents under Article 255 of the EC Treaty and Article 42 of the Charter of Fundamental Rights or environmental information rights.¹¹⁴ Yet, the latter rights clearly fall outside the rule of law paradigm and the scope of the ‘right of good administration’ pursuant to Article 41 of the Charter.¹¹⁵

D. CONCLUSIONS

In conclusion, it seems useful to recall the central issues addressed above:

First, Article 41 of the Charter of Fundamental Rights has established an umbrella concept which, although it is called ‘right to good administration’, encompasses a number of different procedural rights and principles previously recognised in the EC Courts’ case law. In fact, although the notion of ‘good administration’ in a broad sense could also be viewed as covering principles of substantive legality, in the context of Article 41 of the Charter the emphasis is clearly put on procedural law.

Second, in EC administrative law, the ‘principle of good administration’ as it is sometimes referred to in litigation before the EC Courts, does not denote a specific procedural principle with a particular content and legal effect of its own. In the case law, it is often tautological of the principle of care, and to a lesser extent it overlaps with the functions of other procedural principles, sometimes even with principles of substantive legality. In the latter case, having regard to the distinct legal consequences to be drawn in EC law litigation from either procedural or substantive legality, the EC Courts’ approach is even more worrying. Given the terminological and conceptual confusion, it is argued that this ‘principle’ should be definitively banned from the EC Courts’ reasoning.

Third, the abstract notion of ‘good administration’ encompasses a wide range of legally binding and ‘soft law’ rules regarding which the

München [1991] ECR I-5469, at para. 14 is built on a rule of law rationale and should, therefore, not be misinterpreted as being a first step towards fostering a pluralist deliberation model.

¹¹⁴ On this see H.P. Nehl, n. 7 above, p. 57 ff., and n. 20 above, p. 213 ff. with further references.

¹¹⁵ Also K. Kańska, n. 3 above, pp. 299–302 rightly points to the rule of law concept underlying the rights and principles enshrined in Article 41 of the Charter of Fundamental Rights.

European Ombudsman has established a first important categorisation. It is submitted that this categorisation provides a useful yardstick for further consolidating and developing principles of 'good administration' in both a strictly legal and a non-legal sense within the EC administrative system while taking account of the different functions conferred upon the various institutional actors in this context, i.e., in particular, the EC Courts on the one hand (judicial office) and the European Ombudsman and the European Parliament on the other (non-judicial office).

Fourth, in a strictly legal and procedural sense, the notion of 'good administration' can be said to embody two distinct essential functions of procedural law in general and procedural rights and principles, such as those listed in Article 41(1) and (2) of the Charter, in particular. The first is an instrumental or utilitarian function and the second a dignitary or protective function of process rules, the two of which need to be balanced by the EC Courts when reviewing the procedural legality of the EC administration's conduct. In that regard, the legitimising effects of process rules resulting from the EC Courts' case law flow almost exclusively from rule of law considerations. Yet, even in the absence of any 'participatory democracy' rationale, I have argued elsewhere that, also from a rule of law perspective, the procedural principles and guarantees laid down in Article 41 of the Charter are particularly well suited to fill gaps of individual protection and to solve problems of legitimacy in multilevel or composite EC administration which involves executive activity shared by both the EC institutions and the national authorities.¹¹⁶

¹¹⁶ See on the concepts of 'unity' – i.e. the binding nature of basic procedural standards for both the EC and the national administration – and 'imputability' – i.e. the possibility of imputing procedural failures made at national level in particular to the EC administration – H.P. Nehl, n. 20 above, pp. 315–321, 387–389 and 413–477; n. 7 above, pp. 80–81 and 87–91.

PART IV

Conclusions

13. Legal challenges in EU administrative law by the move to an integrated administration

Herwig C.H. Hofmann and Alexander H. Türk

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

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

¹ See the introductory chapter of this book.

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

³ Council Regulation 58/2003 of 19 December 2002 laying down the statute for executive agencies to be entrusted with certain tasks in the management of Community programmes, OJ 2003 L 11/1.

as the development of general principles of law.⁴ Only recently has there been an interest in research with respect to a more general approach to EU administrative law, through publications either directly or indirectly concerning the topic.⁵

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

A) MODELS OF UNDERSTANDING INTEGRATED ADMINISTRATION

Part one of the book presents different models of explaining the phenomenon of integrated administration in the EU as well as the challenges which the authors perceive such integration entails. Edoardo Chiti's contribution attempts to classify the modalities of integrated administration for administrative implementation of EU policies. He identifies four main

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

⁵ See e.g. Mario P. Chiti and G. Greco (eds), *Trattato di diritto amministrativo comunitario*, Vol. I, II, Giuffrè, 2nd ed. (Milano 2007); Paul Craig, *EU Administrative Law*, Oxford University Press (Oxford, 2006); Jean-Bernard Auby and Jacqueline Duteil de la Rochere (eds.), *Droit Administratif Européen*, Bruylant (Brussels, 2007); Herwig C.H. Hofmann and Alexander Türk (eds.), *EU Administrative Governance*, Edward Elgar Publishing (Cheltenham, 2006); Matthias Ruffert (ed.), *The Transformation of Administrative Law in Europe*, Sellier (Munich, 2007); Eberhard Schmidt-Assmann and Bettina Schöndorf-Haubold (eds.), *Der Europäische Verwaltungsverbund*, Mohr (Tübingen, 2005).

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

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

These contributions to the discussion of the models of integrated administration show that there are many approaches and ways to describe

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

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

B) THE FUTURE OF PROCEDURES AND STRUCTURES OF INTEGRATED ADMINISTRATION IN THE EU

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

(i) Comitology

Comitology and its developments since the draft Constitutional Treaty, the 2006 reform and the Treaty of Lisbon are the topics of the contributions by Christine Neuhold and Manuel Szapiro. Neuhold, while focusing on the 2006 comitology reform, looks at various forms of enlarging supervision and accountability of administrative rule-making in the EU through comitology. The solutions she explores include the potential for the European Parliament to use external experts to create a sort of civil society and parliamentary network of control and transparency. Szapiro is rather critical on this point, fearing the strengthening of special interests going hand in hand with undue lobbying powers. His contribution focuses on the open questions after the 2006 comitology reform and the adoption of the Treaty of Lisbon. When the latter enters into force, it will substantially change the parameters of the use of comitology committees as well

as the conditions for their supervision and accountability. Adapting the comitology structures to these new realities will require some creativity on the side of the institutions.

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

Szapiro shows that the development of the Treaty of Lisbon's typology of acts will have a large influence on the future of comitology. Comitology is a fundamental structure of integrated administration. But supervision of implementing powers delegated to the Commission with the help of comitology procedures has also to date been one of the major sources of inter-institutional conflict. The differences of the new Articles 290 and 291 of the Treaty on the Functioning of the European Union (TFEU) with respect to political supervision of delegated and implementing acts can thus be interpreted as a reaction to the underlying developments of Europe's increasingly integrating administration.⁹

This is the context of attempts to establish judicial and political supervision of comitology.¹⁰ Despite continuous reform efforts, the EP had in the past gained only very limited rights in the comitology procedure.

⁷ Articles 289, 290 and 291 of the Treaty on the Functioning of the European Union (TFEU).

⁸ Article 291(3) TFEU.

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

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

With the introduction of the regulatory procedure with scrutiny, introduced in 2006,¹¹ the EP gained genuine participation rights with the possibility of opposing the entry into force of an implementation measure of ‘general scope designed to amend non-essential elements’ of a legislative act adopted under the co-decision procedure.¹² The procedure had been introduced mainly as a result of the impasse in the ratification procedure of the Treaty establishing a Constitution for Europe in order to implement certain elements of its Article I–36. In this context it is interesting to note that Article 291(3) TFEU, unlike Article 202 third indent EC, explicitly refers for implementing acts to comitology only as ‘mechanism for control by Member States’. This raises the question of the future of political supervision of comitology by the EP. We would suggest that the Treaty of Lisbon does not rule out the EP having certain supervisory powers. These can be provided for in the new comitology decision which according to Article 291(3) TFEU would have to be taken in the regular legislative procedure, i.e. by co-decision.¹³ That will allow the EP to influence the future structure of comitology procedures to a much larger extent than has so far been possible.

We also submit that a specific problem might arise from the possibility of sub-delegation of implementing powers, which will be an additional result of the distinction between the two categories of delegated and implementing acts in Articles 290 and 291 TFEU. Sub-delegation of implementing powers may arise especially in areas of broad delegation of legislative powers to the Commission under Article 290 TFEU. The Commission may then be obliged (under Article 291 TFEU) to sub-delegate implementing

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

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

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

powers to itself or to an agency.¹⁴ This combination of provisions may thus result in a cascade of delegation of powers, which risks subverting the possibilities of political supervision of the exercise of these delegated powers as the Commission might escape well established review procedures such as the comitology procedures. Under the current Comitology Decision, this would be possible, since the application of one of the comitology procedures for the delegation of implementation powers is a decision within the discretion of the legislator.¹⁵ When undertaking whether to choose one of the committee procedures under the criteria which are laid down in Article 2 of the Comitology Decision the legislator must under the current Comitology Decision merely 'state the reasons for that choice'.¹⁶ It would therefore be possible or even likely that in the subject area of delegated acts the Commission will decide that it will itself have the power to issue implementing acts in the form of implementing regulations or implementing decisions without being bound by comitology. Such approach could be vetoed by the EP or Council only in cases where such veto power has been provided for in the basic act.¹⁷ The possibility of sub-delegation of implementing powers can therefore be counter-balanced by a strict application of time limits for delegation to the Commission with sunset clauses and limitation of delegation of powers to adopt delegated acts under Article 290 TFEU. Sub-delegation therefore should be addressed in a new post-Lisbon comitology decision. Overall, using comitology in order to maintain political supervision over executive exercise of public powers will be

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

¹⁵ Case law since Case 30/70, *Otto Scheer v Einfuhr und Vorrastsselle für Getreide und Futtermittel* [1970] ECR 1197, at para. 18.

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

¹⁷ The use of the possibility of sub-delegation would fit into the explicitly stated critical approach of the Commission towards comitology. In the recent past the Commission had suggested comitology structures be replaced with agency networks. See the European Commission, *European Governance: A White Paper*, COM(2001)428 of 25 July 2001, in which it suggested restricting the role of Committees to a mere advisory function. For further discussion see Paul Craig, *EU Administrative Law*, Oxford University Press (Oxford, 2006) 112, 113 and 126, 127; Michelle Everson, 'Agencies: the "dark hour" of the executive?' in this volume. The very negative stance of the Commission towards comitology has in the past few years however been softened in public. Even in policy areas in which the Commission has proposed legislation to create new agencies, comitology procedures continue to play an important role.

possible only if the EP manages to contain and control delegation cascades from delegated to implementing acts.

(ii) Agencies

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

The debate about agencies has only just begun and the expansion of the role of agencies in the future is a difficult task. Under the current EC and EU Treaties, there is a continuously growing gap between the prolific creation of agencies in the EU and conferment of powers on them, on the one hand, and their recognition in EU primary treaty law, on the other hand.¹⁸ It is a fact that EU legislation transfers functions directly to agencies without the intermediary of the European Commission.¹⁹ The gap

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

¹⁹ Examples of agencies which have been delegated powers for single case and restricted regulatory decision-making are the Office for the Harmonisation of the Internal Market (OHIM), which is empowered to take legally binding decisions on the registration of Community trade marks and other intellectual property rights (see Articles 43(5) and 45(6) of the Council Regulation 40/94 of 20 December 1993 (OJ 1994 L 11/1) on the Community trade mark (as amended in OJ 1994 L 349/1, OJ 1995 L 303/1). The Community Plant Variety Office (CPVO) has been

between the silence of primary law and their recognition in secondary law will remain under the Treaty of Lisbon.²⁰ The Treaty of Lisbon does not recognize the reality of the implementation of European law through administrative networks made up of European and Member States' public bodies as well as private parties. The Treaty of Lisbon ignores the development of using agencies for implementation. In this respect, the typology of acts is not conclusive, even though the list in Article 253(3) TFEU would indicate comprehensiveness.

As a consequence, agencies whose acts are expressly declared subject to judicial review in Article 263(1) last sentence TFEU are not mentioned as recipients of delegation of powers to issue implementing acts. This is explicitly reserved to the Commission or, exceptionally, to the Council. The limitation to the delegation of implementing powers exclusively to the Commission constitutionalizes a strict understanding of what is known as the 'Meroni doctrine' – a limitation to delegation established in the early days of European integration within the framework of the ECSC Treaty.²¹ The practical reality of executive structures and the legal

delegated the power to adopt legally binding decisions in relation to the registration of plant variety rights (Article 62 of Council Regulation 2100/94 of 22 July 1994 on Community plant varieties, OJ 1994 L 227/1, amended in OJ 1995 L 258/1). Powers akin to regulatory powers have been granted to the European Air Safety Agency (EASA) to adopt decisions with regard to criteria for type certification and continued airworthiness of products, parts and appliances, and the environmental approval of products (Regulation (EC) 1592/2002 of the European Parliament and of the Council of 15 July 2002 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency, OJ 2002 L 240/1).

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

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

situation under EU law are now however far more complex than in the 1950s when *Meroni* was decided under very specific circumstances under the law of the ECSC Treaty. An increasing number of agencies undertake administrative functions and have been created effectively to carry out complex tasks in the network of administrative structures between the European and the Member States' levels. Especially regulatory agencies prepare or issue externally binding decisions. Most types of agencies are involved in contractual relationships with private bodies and Member States' administrations.

The EU's constitutional reality, reflected in the case law of the ECJ, is therefore out of step with the actual development which has largely overcome the *Meroni* doctrine. With the exclusion of delegation of powers to agencies, under the Treaty of Lisbon (as well as already provided for in the Treaty establishing a Constitution for Europe) the *Meroni* doctrine has been reiterated in primary law. The divide between the constitutional provisions and the requirements of the architecture of the emerging European network administration, which includes European agencies, will increase. This gap between the institutional reality and the legal framework may be narrowed by secondary legislation on what the Commission refers to as EU regulatory agencies.²² If in addition the case law of the Community Courts could come to clarify the competences of agencies, a big step ahead towards more legal certainty and possibilities of effective judicial control of agency activity could be made. Unfortunately, so far the ECJ's case law on agencies has restricted itself to reviewing the legality of agency activity with respect to the basic legislative acts establishing the agency and their competences. The ECJ and CFI interpret their *ex officio* review obligations in a very limited sense.²³ Thus the review of the constitutional basis of agency activity is almost missing in the case law. The Courts would be well advised, especially when first confronted with a case relating to an agency where there has been no prior case law clarifying its constitutional status, to review also the range of delegation to an agency in the secondary act.

Further challenges with respect to agencies have been outlined by a report on what the Commission refers to as 'regulatory agencies'. Their

(Berlin, 1999); Michelle Everson, 'Independent Agencies: Hierarchy Beaters?', 2 *European Law Journal* (1995) 180.

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

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

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

(iii) Composite Procedures

Problems of integrated administration for the implementation of EU policies have traditionally been discussed in the context of comitology structures and European agencies and administrative networks. A well-rounded understanding of the legal problems which administrative integration poses however requires an understanding of what we refer to in this book as composite procedures, addressed in the contribution by Herwig Hofmann. Composite procedures are multi-stage procedures with input from administrative actors from different jurisdictions. They cooperate in a vertical relationship between EU institutions and bodies and Member States’ institutions and bodies, as well as horizontally between various Member States’ institutions and bodies. Procedural cooperation also takes place in triangular settings with different Member States’ and EU institutions and bodies involved. The final acts or decisions will then be issued either by a Member State²⁶ or an EU institution or body, but are based on procedures with more or less formalized input from different levels. Member State law defines most of the elements of the Member

²⁴ Council Regulation 58/2003 of 19 December 2002 laying down the statute for executive agencies to be entrusted with certain tasks in the management of Community programmes, OJ 2003 L 11/1.

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

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

States' authorities' contribution to a composite procedure. This generally includes the consequences of errors during the Member State element of the procedure, the applicable language regime of the administrative procedure,²⁷ and, last but not least, the criteria and conditions for judicial review of an act adopted by a Member State authority.

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

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

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

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

coping with the fact that the substance of administrative cooperation in composite procedures is the joint gathering and subsequent sharing of information.

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

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

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

Considering the shortcomings of this situation, the most convincing remedy would be to create a form of 'declaratory relief' as a distinct form of action before the ECJ and CFI. Short of this rather far reaching step involving treaty amendments or at least legislative enabling provisions, however, there might be a possibility to imagine a creative interpretation by the ECJ and CFI of the damages remedy under Article 288(2) EC resulting in an adapted solution to the problem. First, it is hard to see

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

Next to furthering the possibilities of judicial review before the ECJ and CFI problems of composite procedures can also be addressed by broadening the possibilities of cooperation between courts. The idea presented in Chapter 6 of this book is to build on the exceptional success of the preliminary reference procedure for establishing integration in the EU.

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

³⁰ For further details, see Chapter 6 of this book.

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

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

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

The more complicated case arises where the national input into a final decision on the European level was generated by application of national law. Here the ECJ and CFI cannot review the legality of the national administration's activity under national law. A solution to this problem might be to create a procedure under which the European Courts had the right to refer questions governed by national law to national courts. The ECJ or CFI could stay its proceedings and refer a question to a national

court for interpretation and/or review of national law. In order to avoid the obvious disadvantage of such a proposal – the increase in the duration of judicial review procedures before the European Courts – national point of contact courts could be named to deal with the requests for review by the European Courts. The legislative basis for such a procedure does not necessarily require a treaty amendment. It can be introduced through an amendment to the statutes of the ECJ and CFI. This proposal would expand the possibilities of a request for preliminary reference to become a two-way instrument in the relationship between the European and the Member States' courts.

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

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

With respect to administrative supervision of composite procedures, the proposals which might be made to develop the law follow the approach discussed for judicial supervision. Both parliamentary supervision through ombudsmen and administrative forms of supervision of administrative activity need to adapt to the reality of the network structure of integrated administration. From this point of view, the key is to develop supervision tools apt for composite activity with multi-

jurisdictional input into single administrative procedures. In this respect, the networks of ombudsmen and the network of data protection supervisors are a good step in order to re-construct supervisory instruments analogous to the developments of the policy areas themselves. We would submit that a possibly more effective solution to these problems of parliamentary and administrative supervision, however, could be the creation of an independent agency in charge of handling complaints by individuals even during an on-going procedure, investigation and decision. Similar to the powers of the European Data Protection Supervisor (EDPS), this agency could investigate cases of maladministration by national or European agencies in integrated procedures and take decisions before even a final decision is taken in order to prevent the need for judicial review. Importantly, inspiration should be drawn from the powers of the EDPS. Unlike the European Ombudsman, the EDPS not only can issue recommendations but also has the power to issue binding decisions *vis-à-vis* other administrations. Such an agency or integrated network of agencies would be a potential network solution for a network problem. If such a procedure were structured to allow for one single review of the contributions to a composite procedure from administrations of different jurisdictions by the supervisory agencies of these jurisdictions, a real step towards developing supervisory procedures fit to the reality of integrated administrative procedures would be achieved.

(iv) International Regulatory Cooperation

An important additional aspect of integrated administration in the EU is also the international dimension of administrative cooperation. George Bermann's contribution on the international dimension of administrative cooperation describes the multi-level dimensions of modern administrative structures and the necessary approach for their accountability and supervision mechanisms. The international regulatory cooperation between the US and the EU/EC is described in Bermann's contribution to this book and constitutes a prime example of non-hierarchic administrative networks. This observation is underlined by the fact that the main impulses for international regulatory cooperation according to Bermann come from private actors who have much to profit from a more harmonized regulatory environment in different markets, not excluding however the creation of an overarching framework. Issues which loom large on the agenda for such dialogue are not surprisingly related to substantive and procedural issues of good regulatory practice and of good procedure. Bermann notes here such matters as the role and form of impact assessment and cost-benefit analysis, the role and inclusion of science

and scientific evidence into regulatory activity and other aspects reflecting different regulatory philosophies and attitudes to risk. The essential element of Bermann's inquiry into the workings of international regulatory cooperation are thus questions of democratic oversight, transparency of the process and accountability of the actors for the outcome of regulatory decisions. Here the discussions in other chapters of the book on the control of comitology and the role of epistemic communities might provide some answers.

Additionally to the findings in Bermann's chapter, we might briefly add that in the EU context international regulatory cooperation has caused several problems with respect to the internal distribution of competencies. Despite clear case law from the ECJ as to the non-existence of international administrative agreements,³¹ many agencies have entered into a very active role in the international sphere. Agencies in all pillars have to date concluded an undisclosed number of international agreements with third countries. The substance of these agreements reaches from soft law obligations to exchange views and to discuss policy approaches on one side of the spectrum, all the way to cooperation agreements containing obligations mutually to assist third non-EU parties with the supply of documents and information. These international activities of agencies are an indicator of the lack of definition of the limits and nature of agency competences as well as of the uncertainty about their role within the EU system of governance. The matter is complex, not least due to the network structure of agencies and the fact that in many EU agencies there is a membership also of non-EU Member States. This shows that the boundaries of what is EU internal and what is international can be blurred. Altogether the external competences of the institutions and bodies of the EU/EC require more attention from EU law and administrative law expert communities than has been granted thus far.

C) MODELS OF SUPERVISION AND ACCOUNTABILITY

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

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

(i) Administrative Supervision

Gerard Rowe addresses forms of administrative supervision of administrative activity. Internal forms of supervision and control are manifold, not only on the European but also on the Member State level. Administrative supervision of administrative activity in the sphere of EU law however has to cope with the integrated nature of many administrative procedures both for administrative rule-making and for single-case decision-making. In all of these activities, as has become evident from the various analyses in this book, administrative actors from various jurisdictions often work together, either in joint bodies such as comitology committees or in composite administrative procedures. Forms of administrative supervision are mostly oriented to supervision of the activity on one level – the EU level or the national level – the administrative activity however is integrated and therefore transcends these levels. Against this background, Rowe develops proposals for the improvement of administrative supervision. He suggests exploring the potential and need for greater standardization of control measures, to give more concern to the cost-effectiveness and efficiency of control, to find solutions for the supervision of cooperative or transnational administrative acts, which in his opinion should lie centrally with the Commission, and to pay more attention to the distinction between the supervision of the legality and the expediency of decisions.

(ii) Judicial Review

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

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

to all intermediate steps, even where they constitute non-binding acts, in the proceedings allocating jurisdiction according to the author of the contested act. This has the advantage that contested measures can be reviewed in close temporary proximity to their adoption by the judicial body best suited for their review. The disadvantage consists in a considerable loss of efficiency due to the possibility of considerable delays in the procedure, which ultimately make this option unattractive even from the view of the individuals concerned. The second approach, which is currently adopted by the Community Courts, focuses on the review of the final act.³² The judicial forum for a challenge to such acts is under the current system of judicial review unproblematic; actions against Community acts are brought in the Community Courts and those against national acts in the national courts. The problem in this scenario is, however, whether the relevant courts are entitled to review intermediate measures adopted at a different level. The current position for national courts is that, while they are allowed to review intermediate measures adopted by Community institutions, they are precluded from setting unlawful measures aside, and in case of doubt as to its validity need to refer the contested measure to the ECJ under Article 234 EC. While therefore a mechanism exists for national courts to have intermediate measures reviewed by the ECJ, no provision is made where national authorities in other Member States have contributed to the procedure. In this case a horizontal reference to the competent court of another Member State could be a solution.³³ Where the Community Courts review a final act of a Community institution, they have shown a willingness to probe the lawfulness of intermediate measures,³⁴ albeit only where they emanate from Community bodies. As the *Borelli* case shows, contributions by national administrations in the proceedings are beyond the jurisdiction of the Community Courts. In this case two solutions are possible. The Community Courts can abandon their position to refuse the review of national measures. In a procedure determined by Community law in which national administrations participate, national authorities operate under the rules and principles of Community law and therefore within the scope of Community law. While the Community Courts would still be precluded from assessing the legality of national administrative measures against national law, it is difficult to see why they should not

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

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

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

be allowed to review such measures against Community law. A second option would be to provide a reverse preliminary procedure allowing the Community Courts to refer the question of the validity of a national measure to a national court.

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

(iii) Participation, Transparency and Good Administration

After these general considerations on administrative and judicial supervision of administrative action, the chapter by Joana Mendes touches upon the very difficult and always contested matter of participation. Much has been written in the legal and political science literature since the Single European Act about whether in different phases of development EC legislative procedures suffered from a democratic deficit. Much less thought has been contributed to considerations of participation in administrative procedures beyond the development of the general principle of the right to a fair hearing. Mendes's contribution confronts this lack of understanding by analysing the probably best understood field of integrated administration – that of state aid procedures – and carefully expands the picture obtained therein to a more generalized view. She argues that the substantive relation of interested parties to the procedure is the basis for a claim for participation rights. Much needs to be done in the way of developing impact assessment and notice and comment procedures in order to develop the possibilities of participation not only in single-case acts but also in more generally applicable types of act. Mendes shows ways to achieve this both for the decision-making phase and through means of expanding judicial review of an act. However this needs to be undertaken carefully in order to avoid

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

regulatory capturing and other developments readily observable in other legal systems with strong participatory traditions. Key to the approach of increasing participatory elements in European administrative law is therefore the creation of participation rights for individuals. These must be transparent and judicially enforceable, through effective legal procedures.

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

Hanns Peter Nehl's contribution then turns to an attempt to generalize approaches of good administrative law and practice as general principles of law. His contribution addresses one of the central notions for the developing European administrative law – the right and principle of good administration. This concept has increasingly been employed in the case law of the ECJ and the CFI in the past years as an umbrella notion of a general principle addressing a host of sub-elements ranging from the right to a fair hearing to access to documents and other important procedural rights. Their common element is that they are basic rationales of procedural justice and legality of administrative behaviour of any institution or body acting within the sphere of EU law. Nehl shows that good administration, despite having been defined to a certain degree in the EU Charter of Fundamental Rights, continues to be shaped in the case

law of the CFI and ECJ. But he is highly critical of the lack of precise definition which the necessarily vague generic umbrella term of good administration has received. He suggests, in order further to develop European administrative law, that the courts should focus on their obligation to control legality in order to uphold the rule of law. This protects individual rights in the procedure as a protective function which needs to be weighed against the more utilitarian function of ensuring effective and legitimate decision-making. He submits that procedural principles summarized under the title of good administration understood in this way 'are particularly well suited to fill gaps of individual protection and to solve problems of legitimacy in multilevel or composite EC administration which involves executive activity shared by both EC institutions and the national authorities'.

These remarks need in our view to be reviewed in the context of an integrated administrative system. The procedural rights enshrined under the umbrella of Good Administration need to take account of the integrated nature of European administrative action. The involvement of administrative actors from the European as well as the national level makes it necessary that procedural rights be provided at both levels. This is most important for the rights of defence, which have to be granted not only at the European level but also at the national level, where national administrations operate under the rules of a Community procedure. Similarly, where the procedure is initiated at national level but is concluded at European level, hearing rights granted at national level are sufficient only where the Community institution which adopts the final act does not substantially deviate from the national measure. While rights of defence are available as general principles of law, legal certainty would best be served if they were to be enshrined in Community rules as enforceable rights. The violation of such rights, whether at national or European level, would then constitute a breach of an essential procedural requirement which can be sanctioned by the courts.

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

D) THE FUTURE OF INTEGRATED ADMINISTRATION – TOWARDS A LEGAL FRAMEWORK?

This book has highlighted the legal challenges arising from the move towards an ever more integrated administration in the area of implementation of EU policies. Integrated administration in essence means the joining of administrative actors from different jurisdictions – i.e. the Member States and the EU as well as, in some cases, outside the EU – in joint procedures for both administrative rule-making and single-case decision-making. These structures arise across policy areas in the EU. In summary many of the problems a modern EU administrative law faces are problems arising from outdated conceptions of the nature of European integration. We find that European integration is not leading to a multi-level legal system with distinct procedures on different levels. Instead the procedural cooperation in administrative rule-making and single-case decision-making has led to a high degree of integration through joint structures such as comitology and agency networks, as well as procedurally through the creation of various types of composite procedures in various policy fields.

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

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

³⁷ Article 12 of Regulation 1/2003, for example, clarifies that the 'transmitting authority' defines the purpose for which information may generally be used. This results from the transferring authority's power to define the subject matter of the data collection. Also, the transmitting authorities' law is applicable to determine whether the information may be used as evidence in a procedure to inflict sanctions on natural persons. The receiving authorities' laws on the other hand will govern

In view of the problems discussed in this book, it might therefore be time to re-examine the considerations for establishing an administrative code for administrative procedures in the sphere of EU law. Harmonized legislations could contain rules and principles for issuing an act, participation rights and consequences of errors in the procedure. Thereby, an individual could gauge far more precisely the chances and possibilities of protesting an act or decision with EU-wide trans-territorial effect. Additionally, review of administrative procedures by review of a final decision can be made possible by any court in Europe. Harmonizing procedural methods and approaches as well as the judicial interpretation of a common procedural provision is an essential element of increasing legal certainty in a complex networked administration using composite procedures to achieve decision-making.

the question whether information may be used (see Article 12(2), (3) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003 L 1/1). In tax matters similarly, the applicable law for the collection and transfer of data generally is the law applicable to the transferring authority (Articles 40, 41(3), (4) of Council Regulation (EC) No 1798/2003 of 7 October 2003 on administrative cooperation in the field of value added tax, OJ 2003 L 264/1).

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