

## *Mapping the European Administrative Space*

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‘Space’ is a common metaphor to describe integration phenomena in the European context: The ‘European constitutional space,’ has been described as the realm of shared constitutional values between the Member States and the EU.<sup>1</sup> Cooperation between courts, takes place within a European judicial space – and within an ‘area of Security, Freedom and Justice.’<sup>2</sup> In this tradition, the ‘European administrative space,’ is a term which has become is often used to describe the coordinated implementation of EU law and Europeanization of national administrative law.<sup>3</sup> But the European administrative space goes beyond forms of cooperation for implementation of EU law by Community institutions and Member States’ agencies. It contains aspects which affect the very nature of the EU’s system of shared sovereignty as well as the conditions for its accountability and legitimacy.

Mapping European administrative space is thus a basic task. To understand the peculiarities of its geography, I will firstly undertake a brief reconstruction of the development of European law’s influenced on the structure of its Member States. This will lay the basics for then, secondly, turning to the main actors – national, European and mixed - exercising public authority in the administrative space. This will be followed by a description of the main forms of interaction and the joint structures they have created. I will then analyse the state of Europe’s administrative integration developing towards an integrated administration. On this basis, I will then address

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<sup>1</sup> Especially in terms of general principles of law and the protection of fundamental rights. See for example: R. Bieber, P. Widmer (eds.) *L’espace constitutionnel européen* (Zürich 1995).

<sup>2</sup> Article 29 (1) EU, which in its French version refers to the area as ‘espace.’

<sup>3</sup> See for example OECD-PUMA, ‘Preparing Public Administration for the European Administrative Space’, *SIGMA Papers*, Paris, No 23 (1998).

some of the specific conditions for accountability of the exercise of public authority through integrated administration.

### **A. Phases of the Development of the Administrative Space and the Changing Parameters in the History of Integration**

The parameters which govern the shape of the European administrative space have developed over time. They have not been constant. The supranational legal order, established by the Member States of the E(E)C and EU, has grown accordingly. Insofar the role of the European administrative space is closely related to, and its importance has grown, with the expansion over time of the *aquis communautaire*. But there is not only a quantitative element to the increase in importance of the European administrative space. There is also a qualitative aspect, which can best be described by re-tracing the steps of development of sharing sovereignty between Member States and the creation of integrated administration.

The starting point of European integration creating a supranational legal system of shared sovereignty was the existence of territorially more or less sovereign states in Europe. Under the classic notion of territoriality, the *summa potestas* of a sovereign state is characterized by the dichotomy of, on one hand, the concentration of public power within the territory, and, on the other hand, independence of the state towards the outside.<sup>4</sup> Supranationality was innovative as it created an alternative to this classical differentiation between internal public law and external public international law. Within the supranational legal system, public power was jointly exercised through European and national institutions.<sup>5</sup> As a consequence, in areas of EU/EC

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<sup>4</sup> As a general principle of public international law, territoriality limited the right of a state to exercise its sovereign powers outside of its borders thereby limiting government activity on foreign territory. As principle of conflicts, it became a connecting point for the applicability of public law to a real-life situation. See: G. Ress, 'Souveränitätsverständnis in den Europäischen Gemeinschaften als Rechtsproblem' in: G. Ress (ed.) *Souveränitätsverständnis in den Europäischen Gemeinschaften* (Nomos, Baden-Baden 1980) 11-16.

<sup>5</sup> In this sense several authors have compared this development to the pre-*Westphalian* legal orders to find models of organisation of public power through non-territorially bound structures. See e.g. M. Wind, 'The European Union as a Polycentric Polity', in:

competences, public international law was no longer applicable in the relation between the Member States and national public law may be replaced or influenced by EU/EC law. With increasing integration, the distinction between the inner sphere of a state and its outer sphere as a state within the EU structure became less prominent. In European integration, states allowed public power to be exercised also from outside of their organisations under a condition – that of being able to participate in its creation and implementation. The consequence was a de-territorialization of the exercise of public power in the EU. This effect is the framework for modern EU administrative law. Formally ‘closed’ systems of public law of the territorial states opened up through the emergence and establishment of a supranational legal order. This opening took place in several distinct yet overlapping phases.<sup>6</sup>

The first phase was the establishment of the Community legal order. With the delegation of sovereign powers from the Member States to the ECSC and the E(E)C,<sup>7</sup> Member States opened up their legal systems vertically to the exercise of this power on the European level. The consequences of that delegation were explained in no uncertain terms by the ECJ since *Van Gend en Loos* and *Costa ENEL*. Readers do not need to be reminded that these cases laid out the basic principles such as the supremacy of EC law and the possibility of its direct effect in Member States vis-à-vis individuals.<sup>8</sup> It is however important to recall that European law was acceptable to Member States *inter alia* because it was not completely alien to the national systems.

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J.H.H.Weiler, M. Wind (eds.) *European Constitutionalism Beyond the State* (Cambridge University Press, Cambridge 2003) 103-131; M. Wind *Sovereignty and European Integration. Towards a Post-Hobbesian Order* (Palgrave, London 2001).

<sup>6</sup> Reconstructing EU integration through phase-models is a simplification of the far more complex reality, but helpful to illustrate the temporary and qualitative shift of the parameters of the exercise of public power in Europe. See e.g. J.H.H Weiler’s famous model published in 100 *Yale Law Journal* [1991] 2403-2483; C. Joerges, The Legitimacy of Supranational Decision-Making, 44 *JCMS* [2006], 779-802.

<sup>7</sup> J.H.H. Weiler, The transformation of Europe, 100 *Yale Law Journal* [1991] 2403-2483, at pp 2413-2423.

<sup>8</sup> Case 26/62 *Van Gend en Loos* [1962] ECR 1, paras 10, 12, 13; Case 6/64 *Costa v ENEL* [1964] ECR 1141, para 3. The vertical opening of the national legal systems of European law meant that the EU/EC law became part of the ‘legal heritage’ but also would override any provision of Member States’ law in case of conflict. Community law either primary treaty law or derived secondary law, even individual decisions of administrative nature, thus had the ability to override Member States law and have direct effect within their territory.

Member States' executives had become key figures in agenda setting, the legislative procedures as well as the creation of common rules for implementation. This form of 'vertical' opening of the Member States' legal systems towards EU/EC law with direct effect and supremacy did however not yet call into question the traditional model of territoriality. The effects of the exercise of public power from the European level remained limited to the state in which the legal order was established and the territorial reach of its sovereignty. The 'legal heritage', of which supranational law had become part of, was still exercised exclusively within the territory of each individual Member State. In administrative terms, this corresponded to the model of implementation and indirect administration of Community law in each and every Member State separately.<sup>9</sup>

The second major development was the 'horizontal' opening of Member States' legal systems. Since the mid nineteen seventies, the ECJ case-law increasingly focussed on the obligation of the Member States to mutually recognise administrative decisions of other Member States, especially where such was necessary to allow for the exercise of fundamental freedoms within the EC. The requirement for mutual recognition arose in parallel with the findings that the treaty provisions of EC including fundamental freedoms could develop direct horizontal effect in the Member States. If they could be relied on between individuals without implementation through Community secondary legislation or Member States intervention, individuals would necessarily be allowed to rely on them vis-à-vis other Member State administrations.<sup>10</sup> This horizontal opening is most closely associated with the case *Cassis de Dijon*, which required member States to mutually accept and enforce each others' administrative decisions in the absence of harmonising legislation from the European level.<sup>11</sup> Member States'

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<sup>9</sup> C. Joerges, The Legitimacy of Supranational Decision-Making, 44 *JCMS* [2006], 779-802 at 791-793.

<sup>10</sup> In Case 104/75 *de Peijper* [1976] ECR 613, for example the ECJ limited the possibilities of a Member State to undertake renewed investigations under the principle of proportionality, in Case 35/76 *Simmenthal* [1976] ECR 1871 then provided for the obligation of a Member State to accept the veterinary certificates of another Member State in the case of a investigation procedure harmonised by a directive. Other decisions expanding this approach to cases where there were similar requirements in two Member States but no harmonisation can be found for example in Case 251/78 *Denkavit* [1979] ECR 3369. There the ECJ went a step further and requested national administrations to enter into contact to establish the necessary information.

<sup>11</sup> Case 120/78 *Rewe Central AG (Cassis de Dijon)* [1979] ECR 649, paras 8, 14.

administrative and legislative decisions, through mutual recognition, could establish effects beyond the territorial reach of the issuing Member State. They thus had ‘trans-territorial’ effect throughout the EC. By this effect, EC law required Member States’ public law to penetrate the classical territorial reach of the legal system of the country of origin. This was in effect a more serious challenge to the notion of territoriality induced by Community law than the vertical opening of the Member States’ legal systems had brought through the establishment of direct effect and supremacy of Community law.

The third phase of development of integrating administrations and the conditions of the modern European administrative space, which I would like to suggest, can be closely linked to the evolution of the principle of ‘subsidiarity.’ Subsidiarity had long featured in the debate over the vertical distribution of legislative powers between the European and the national levels. But in reality, the practical impact of subsidiarity was stronger in political than in purely legal terms.<sup>12</sup> An especially important aspect is that it was a powerful *topos* in creating acts of legislative nature leading to few implementing powers being retained on the European level and maintaining a system of decentralised yet cooperative administrative structures. Since the single market programme in the late nineteen eighties and early nineteen nineties, an increasing diversification of forms of implementation of EU/EC law has been developed, mostly aimed at providing for joint administration of the single market and EU/EC policies. These forms of cooperation have mostly taken the form of administrative networks with participants from the Member States, the Community institutions and private parties.<sup>13</sup> The network character is the distinguishing feature of the ‘age of subsidiarity’ for implementation. No longer is there a clear distinction between the European and the national level in the policy phases of agenda setting, policy making and implementing. The originally more or less distinct vertical and horizontal relations between the European level and the Member States as well as between

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<sup>12</sup> The ECJ did not enter into an in-depth debate over the merits of subsidiarity related arguments – mainly due to respect for the legislative discretion of the Community legislator. See e.g. C-84/94 *working time directive* [1996] ECR I-5755; C-233/94 *deposit guarantee schemes* [1997] ECR I-2405; C- 376/98 *Germany v EP and Council (tobacco advertising)* [2000] ECR I-8419; C-377/98 *Biotechnological Inventions* [2001] ECR I-7079.

<sup>13</sup> See for further details the contributions to H.C.H. Hofmann and A. Türk (eds.) *EU Administrative Governance* (Edward Elgar, London 2006).

Member States law have been transformed into a network of complex relationships. Also, structures have been developed which link European networks with participants from non EU-Member States. Examples are the networks arising in the framework of the European patent system, the Århus Convention or the Schengen system.

As a result of these first considerations, it arises that European integration has led to an opening of the Member States to the exercise of public power from outside of their territory, be this from the European level or from other Member States. At the same time, their branches of government are involved in the creation, implementation and adjudication of European law and other Member States' Europeanised law. Member State and EU structures are not only subject to EU/EC law, they also jointly create and implement it. This network structure is the essence of the notion of shared sovereignty. The role of administrations therein is central to the creation and implementation of EU law. From this point of view, the European administrative space is a space of interaction for the creation and the implementation of EU/EC law.

## **B. Actors and Procedures in the European Administrative Space: The Internal and the External Point of View**

I would like to deepen this first notion of the European administrative space through analysing not only territoriality but also actors within the European administrative space who create and implement EU/EC law. Traditionally, administrative action is associated with implementation of policies defined in laws or other government programmes. This traditional approach to administrative activity is mostly analysed by what I would refer to as an 'external' point of view. In the EU, the range of administrative activity goes beyond such implementing activity. It also expands to administrative cooperation in agenda setting and policy making. In fact, the extent of administrative activity in the European administrative space can only be fully appreciated if that external point of view is supplemented with an 'internal' point of view, which allows looking behind the veil of administrations' implementation activity.

The external point of view is the more traditional, lawyerly perspective, describing the rules and procedures that lead to the creation of externally binding legal acts. The external point of view results from a focus on judicial review. It looks at the decision-making body which produced a final externally binding legal act – in other words, it

focuses on the outcome of an administrative procedure. Such acts are administrative rule-making by the Commission mostly in combination with comitology procedures as well as single-case decisions by the Commission in cooperation with agencies. They are equally implementing acts of varied nature both administrative rule-making and single-case decisions by Member State agencies and institutions acting within the ‘sphere’ of European law. The external view is more of a ‘black box’ approach, disregarding what takes place inside the administrative procedures and the cooperative activity leading to a final decision. Instead it focuses on the outcome and the judicial review thereof.<sup>14</sup>

In order to obtain a full picture of administrative activity and the role of administrations in the European administrative space, we need to adopt an ‘internal’ point of view. The problem with the external point of view is that despite its clarity and usefulness as an analytical tool for the understanding of forms of administrative law in Europe, it does not address the more hidden, often preparatory functions of administrations in Europe. They are essentially the coordinating and structuring roles which administrations play in all phases of the ‘policy cycle’ – the phases of agenda setting, policy formulation and finally implementation. These are the roles, which administrations have developed to a greater extent in the process of European integration leading to what now has evolved to an integrated administration. From an internal point of view, structures of integrated administration operate in large parts beyond the formally constituted rules of the treaties.<sup>15</sup> They have developed in an evolutionary way differing in each stage of the policy cycle and in each policy area, creating a rich diversity of administrative actors on the European levels and their and

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<sup>14</sup> It is often associated with an understanding of Member States’ vertical yet not horizontal opening towards joint administration in networks. G. Sydow *Verwaltungskooperation in der Europäischen Union* (Mohr Siebeck, Tübingen 2004) 2.

<sup>15</sup> See: G. De Búrca, ‘The Institutional Development of the EU: A Constitutional Analysis’, in: P. Craig, G. De Búrca *The Evolution of EU Law* (OUP, Oxford 1999). Instead, it is governed by general principles of law. General administrative legislation only exists in rudimentary beginnings for example in the form of the Comitology Decision (Council Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission, [1999] OJ L 184/23 amended by Council Decision 2006/512/EC of 17 July 2006, [2006] OJ L 200/11, Council Regulation 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), or the famous Regulation 1/58 on the language regime in the EC of 6 November 1958.

forms of interaction.<sup>16</sup> In the policy phase of agenda setting, national administrations play a central role in shaping the Commission's policy initiatives. This takes place mainly through expert groups which are generally composed of national civil servants, but also independent experts. These groups are used to test ideas, build coalitions of experts and pre-determine policy incentives later to be formally presented by the Commission as initiative.<sup>17</sup> Similarly, supranational and national administrative actors exercise influence in the EU's decision-making process. The presence of the national administrations is mostly felt within the Council working parties supporting COREPER. Here, the national civil servants have to balance their national mandate against the need to reach a consensus in pursuance of EU tasks.<sup>18</sup> Such interaction, albeit to a lesser extent, also exists through the 'Open Method of Co-ordination.'<sup>19</sup> The most intensive administrative cooperation and interaction, however, takes place in the implementation phase. In this phase, institutions' activities range from single case decisions and preparatory acts thereof to acts of administrative rule-making and the amendment of specific provisions in legislation where so authorised. The current constitutional framework in the EU and EC treaties only partially reflects

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<sup>16</sup> The following summary is taken from a compilation of the results of H.C.H. Hofmann and A. Türk (eds.), *EU Administrative Governance* (Edward Elgar, London 2006) published in H.C.H. Hofmann, A. Türk, *The Development of Integrated Administration in the EU and its Consequences*, 13 *ELJ* [2007].

<sup>17</sup> Expert groups are used as arenas for deliberation, brainstorming and intergovernmental conflict solving, developing and coalition building amongst national experts. See: T. Larsson, *Pre-Cooking - The World of Expert Groups* (ESO Report, Stockholm 2003); J. Trondal, *Re-Socialising Civil Servants: The Transformative Powers of EU Institutions*, 39 *Acta Politica. International Journal of Political Science* [2004] 4-30; T. Larsson and J. Trondal, 'Agenda Setting in the European Commission', in H.C.H. Hofmann and A. Türk (eds.) *EU Administrative Governance* (Edward Elgar, London 2006), 11-43.

<sup>18</sup> C. Neuhold and E. Radulova, 'The involvement of administrative players in the EU Decision Making Process', in H.C.H. Hofmann and A. Türk (eds.), *EU Administrative Governance* (Edward Elgar, London 2006), 44-73.

<sup>19</sup> See: D. Hodson and I. Maher, *The Open Method as a New Mode of Governance: The Case of Soft Economic Policy Co-ordination*, 39 *JCMS* [2001], 719; I. Linsenmann and C. Meyer, *Dritter Weg, Übergang oder Teststrecke?*, 25 *Integration* [2002], 285; C. de la Porte, *Is the Open Method of Coordination Appropriate for Organising Activities at European Level in Sensitive Policy Areas?*, 8 *ELJ* [2002], 38; S. Regent, *The Open Method of Coordination: A New Supranational Form of Governance?*, 9 *ELJ* [2003], 190. For a further overview see the conference papers published on the following website: <http://www.ces.fas.harvard.edu/conferences/omc.html>



the evolutionary development of EU policy implementation,<sup>20</sup> which has been driven by practical necessity and political arrangements. The classical distinction between forms of either direct or indirect administration has become less and less relevant. Instead, in many policy areas, the development of the integration of EU and national administrative proceedings has led to ‘composite proceedings’ to which both national and EU administrations contribute.<sup>21</sup>

Diverse structures undertake implementation decisions and undertake administrative rule-making in the various policy areas. Amongst these developments are ‘Comitology’-type and ‘Lamfalussy’-type committee procedures, agencies, administrative networks including private parties acting as recipients of limited delegation. The different forms of implementation structures are not mutually exclusive and are generally used in combination with each other in single policy areas.

Administrative cooperation between the national and the European levels is well documented in the relatively formalized process of comitology<sup>22</sup> - an institutional arrangement, which was developed in the 1960s and which has subsequently been

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<sup>20</sup> References can be found in Articles 10, 202 and 211 EC.

<sup>21</sup> See on the increasing importance of these composite administrative procedures: S. Cassese, European Administrative Proceedings, 68 *Law and Contemporary Problems* [2004] 21-36; G. della Cananea, The European Union’s Mixed Administrative Proceedings, 68 *Law and Contemporary Problems* [2004], 197-218; M. P. Chiti, Forms of European Administrative Action, 68 *Law and Contemporary Problems* [2004], 37-60; C. Franchini, European Principles Governing National Administrative Proceedings, 68 *Law and Contemporary Problems* [2004], 183-196; E. Schmidt-Aßmann, Verwaltungskooperation und Verwaltungskooperationsrecht in der Europäischen Gemeinschaft, *Europarecht* [1996], 270-301; G. Sydow, Die Vereinheitlichung des Mitgliedstaatlichen Vollzugs des Europarechts in Mehrstufigen Verwaltungsverfahren, *Die Verwaltung* [2001], 517-542; G. Sydow, *Verwaltungskooperation in der Europäischen Union* (Mohr, Tübingen 2004).

<sup>22</sup> There is a great amount of literature on comitology, see e.g. C. Joerges and J. Neyer, From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalization of Comitology, 3 *ELJ* [1997] 273-299; K. St. Bradley, The European Parliament and Comitology: On the Road to Nowhere?, 3 *ELJ* [1997] 230-254; C. Joerges, J. Falke (eds.), *Das Ausschusswesen der Europäischen Union* (Nomos Baden-Baden, 2000); M. Andenas and A. Tuerk (eds.), *Delegated Legislation and the Role of Committees in the EC* (Kluwer, The Hague 2000); A.E. Töller, *Komitologie* (Opladen, Leske & Budrich, 2002); C.F. Bergström, *Delegation of Powers in the European Union and the Committee System* (OUP, Oxford, 2005).

codified by the comitology decisions of 1987, 1999 and 2006.<sup>23</sup> Within comitology structures, the Commission's position as central implementation authority on the Community level (Article 202 third indent EC) results from its functional role as Community executive.<sup>24</sup> The Commission's margin of manoeuvre in exercise of these delegated powers is, however, limited by the involvement of comitology committees in the implementation process.<sup>25</sup> Especially the management and the regulatory type committees allow for a recourse of a matter to the Council under certain conditions. With the new 2006 'regulatory procedure with scrutiny,' increasingly also the European Parliament is involved in recourses.<sup>26</sup> The Commission's margin of discretion in the adoption of implementation acts is further reduced by its obligation, in certain cases, to secure the participation of affected third parties and must take

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<sup>23</sup> 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, Council Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission, [1999] OJ L 184/23 amended by Council Decision 2006/512/EC of 17 July 2006, [2006] OJ L 200/11. For a discussion of the pre-2006 development, see C.F Bergström, *Comitology: Delegation of Powers in the European Union and the Committee System* (OUP, Oxford 2005).

<sup>24</sup> See K. Lenaerts and A. Verhoeven, 'Institutional Balance and Democracy', in C. Joerges and R. Dehousse *Good Governance in Europe's Integrated Market* (OUP, Oxford 2002), 76. See also K. Lenaerts and A. Verhoeven, Towards a Legal Framework For Executive Rule-making in the EU? The Contribution of the New Comitology Decision, 37 *CMLRev.* [2000], 645, at p. 653.

<sup>25</sup> The interaction between the Commission and national representatives is mainly characterised by a consensual approach, in which the Commission attempts to accommodate Member States' interests as far as possible. The co-operation is therefore conducted mainly in the form of deliberation (C. Joerges and J. Neyer, From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalization of Comitology, 37 *ELJ* [1997] 273-299), although interest bargaining is not excluded. For a more general overview over the comitology discussion see e.g. ; M. Andenas and A. Türk (eds.) *Delegated Legislation and the Role of Committees in the EC* (Kluwer, The Hague 2000); C. Joerges and J. Falke (eds.) *Das Ausschusswesen der Europäischen Union* (Nomos Baden-Baden, 2000); C. Joerges and E. Vos *EU Committees: social regulation, law and politics*, (OUP, Oxford 1999); K. Lenaerts and A. Verhoeven *Towards a Legal Framework for Executive Rule-Making in the EU? The Contribution of the New Comitology Decision* 37 *CMLRev* [2000] 645-686; R. Pedler and G. Schaefer (eds.), *Shaping European Law and Policy: The Role of Committees and Comitology in the Political Process* (EIPA, Maastricht 1996).

<sup>26</sup> Article 2 and 5a of the Comitology decision. The regulatory procedure with scrutiny has been inspired by the distinctions between delegated acts and implementing acts by the Treaty establishing a Constitution for the European Union.

account of their opinions,<sup>27</sup> as well as scientific expertise in the adoption of implementing measures.<sup>28</sup> In reality, the Commission therefore does not only have to act as decision-maker, but also as manager of formal and informal networks in which Member States' representatives, experts and private parties participate.<sup>29</sup>

In the financial services sector, the comitology procedures were used as basis to develop an approach to fast and effective law-making and implementation in a cooperative procedure with Member State representation.<sup>30</sup> The Financial Services Action Plan<sup>31</sup> developed a four level approach known as the Lamfalussy structure.<sup>32</sup> Legislative acts, on level 1, are adopted by the Council and the European Parliament,<sup>33</sup> focussing on the core political principles. They also decide on the nature and extent of the implementing measures.<sup>34</sup> At Level 2, the implementing details of Level 1 are

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<sup>27</sup> In competition cases e.g., see Article 7(2) of Council Regulation 1/2003, [2003] OJ L 1/1.

<sup>28</sup> This is a requirement under the case law of the ECJ and CFI, see e.g. C-212/91 *Angelopharm v Hamburg* [1994] ECR I-171 and T-70/99 *Alpharma v Council* [2002] ECR II-3495.

<sup>29</sup> See C. Harlow, *Accountability in the European Union* (OUP, Oxford 2002), 182.

<sup>30</sup> See e.g. R. Lastra, The Governance Structure for Financial Regulation and Supervision in Europe, 10 *Columbia Journal of European Law* [2004], 49; N. Moloney, The Lamfalussy Legislative Model: A New Era for the EC Securities and Investment Services Regime,' 52 *International and Comparative Law Quarterly* [2003] 509-520.

<sup>31</sup> COM(1999) 232 set out an ambitious reform package to achieve a more integrated European capital market required for its implementation a new law-making structure.

<sup>32</sup> A Committee of 'Wise Men' under the chairmanship of Baron Alexandre Lamfalussy was asked to provide a report on the regulation of European securities markets. This report was delivered in February 2001.

<sup>33</sup> The legal basis of such acts is usually Article 95, which requires the co-decision procedure to be followed.

<sup>34</sup> Directives, which have been issued as level 1 measures deal with markets in financial instruments, market abuse, prospectus and transparency: Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC, [2004] OJ L 145/1–44; Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse), [2003] OJ L 96/16–25; Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC (Text with EEA relevance), [2003] OJ L 345/ 64–89; Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose

adopted by the Commission in co-operation with the EU Securities Committee (ESC) under the regulatory procedure provided in the 1999/2006 Comitology Decision.<sup>35</sup> At Level 3, the EU Securities Regulators Committee (ESRC) ensures the consistent transposition and implementation of Level 1 and 2 acts. At Level 4, the Commission, as guardian of the Treaties, pursues the enforcement of the adopted measures. Due to positive reviews, the Lamfalussy approach has been extended beyond the securities market to the banking, insurance and investment funds sectors.<sup>36</sup>

Similar to the matter of comitology, the recent growth in EU agencies does not so much constitute a move towards a federal executive on the European level, but shows all the characteristics of multilevel administrative interaction.<sup>37</sup> European agencies are decentralised forms of administration that integrate national administrative bodies into their operation by providing structures for co-operation between the supranational and national level and between the national authorities.<sup>38</sup> Agencies often pursue their tasks within a wider administrative setting,<sup>39</sup> which includes other patterns of EU implementation, such as comitology, but also providing a channel for the input of

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securities are admitted to trading on a regulated market and amending Directive 2001/34/EC, [2004] OJ L 390/38–57.

<sup>35</sup> The first acts, adopted in accordance with the level 1 of the Lamfalussy approach and the Commission, have led to the adoption of several implementing measures. See Directive 2003/124, [2003] OJ 339/70 and Directive 2003/125, [2003] OJ L 339/73 and Regulation 2273/2003, [2003] OJ L336/37; Directive 2004/72, [2004] OJ L162/70.

<sup>36</sup> See European Parliament and Council Directive 2005/1 to establish a new organisation structure for financial services committees, [2005] OJ L79/9. The Directive establishes two new comitology committees, the European Banking Committee (EBC) for the banking sector and the European Insurance and Occupational Pensions Committee (EIOPC), which would assist the Commission in the implementation of legislative acts. These committees will be supplemented by two new advisory committees, the Committee of European Banking Supervisors (CEBS) and the Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS), which the Commission has already set up.

<sup>37</sup> See: T. Groß, Die Kooperation zwischen europäischen Agenturen und nationalen Behörden, *Europarecht* [2005] 54-68.

<sup>38</sup> On the decentralised integration model, see E. Chiti, Decentralisation and Integration into the Community Administrations: A New Perspective on European Agencies, 10 *ELJ* [2004], 423-431; D. Geradin and N. Petit, The Development of Agencies at EU and National Levels: Conceptual Analysis and Proposals for Reform, *Jean Monnet Working Paper* 01/04, 33 ([www.jeanmonnetprogram.org/papers/04/040101.pdf](http://www.jeanmonnetprogram.org/papers/04/040101.pdf)).

<sup>39</sup> E. Chiti, Decentralisation and Integration into the Community Administrations: A New Perspective on European Agencies, 10 *ELJ* [2004], 419.

different public actors from the national and sub-national levels.<sup>40</sup> European agencies are therefore separate, but auxiliary to the Commission's implementing tasks.<sup>41</sup>

The phase of implementation is marked by the existence of multiple structures of administrative networks often but not exclusively created around comitology committees and agencies. Administrative networks, that have been created and adapted to the needs of each policy area, gather information, organize planning or coordinate the enforcement of Community law. They integrate the supranational and national administrative bodies within structures designed to conduct joint or coordinated action in the preparation for the conditions of implementation of EU policies through individual administrative decisions as well as in the decision-making process leading up to such measures themselves. Also, where implementation tasks are entrusted to private bodies, such as in the field of European standardization, the relevant national actors are integrated into a supranational framework.

In this sense, the administrative networks encompass various forms of cooperation both in the relation between the European Commission and agencies on the one hand and the Member States' agencies on the other. They also encompass cooperation directly between different national agencies. In practice, these forms of cooperation consist of obligations of different intensity. They range from obligations to exchange information either on an ad-hoc or on a permanent basis to network structures which have been developed to include forms of implementation such as individually binding decisions. A prominent example for the latter is enforcement networks in the area of competition law with the 'European Network of Competition Agencies.'<sup>42</sup> Network structures can also be created around the possibility of regulatory decisions with trans-territorial effect, i.e. where national administrations' decisions, due to Community law, have an effect beyond the territory of a member state.<sup>43</sup> A more intensive form is

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<sup>40</sup> Ibid., pp. 425-428

<sup>41</sup> Ibid., pp. 419-423. The Member States and the Commission can exercise control over the agencies through the management board, in which they are generally represented and which provides annual reports of the agency's work. Exceptions to this model exist most notably in the structure of the European Monitoring Centre on Racism and Xenophobia (Council Regulation 1035/97, [1997] OJ L 151/1) and the European Food Safety Agency (Regulation 178/2002 of the European Parliament and Council, [2002] OJ L 31/1).

<sup>42</sup> See: Council Regulation 1/2003, [2003] OJ L 1/1 and the Commission Notice on cooperation within the Network of Competition Authorities, [2004] OJ C 101/43.

<sup>43</sup> The trans-territorial effect of administrative acts is born from obligations of mutual recognition of administrative acts. This is necessary, for instance, to coordinate the

the obligation to provide mutual administrative assistance or the creation joint planning networks. The result are composite administrative procedures, with input from several different administrative actors both from the Member States and the European level, tied together by EU law. Finally, administrative networks can reach as far as using Member States administrations as types of EU agencies, where the EU level decides on the type and scope of activities to be undertaken in individual cases on the national level in single cases.<sup>44</sup> Such network structures have as their task the effective enforcement of Community rules by integrating national regulators into a Community framework.<sup>45</sup> Such formalised administrative network structures function with or in addition to the comitology and Lamfalussy system and the establishment of agencies. They supplement the executive position of the Commission in the implementation of Community law.<sup>46</sup>

One of the main reasons for this development of network administration, which at first sight seems to run counter to a well-established understanding of administration as being either direct or indirect administration within Europe's multi-level legal system, may lie in the relatively small administrative capacities of the EU in relation

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administration of the single market by different national authorities. Prominent examples for this type of activity is the supervision of banking and insurance companies through host and home country administrations as well as the effects of the European arrest warrant.

<sup>44</sup> Increasingly common are joint planning structures, in which EU law organises the Commission (and sometimes European agencies) together with national agencies into 'planning networks'. A prominent example of such a network is 'Eionet' (Council Regulation 1210/90 of 7 May 1990, [1990] OJ L 120/1 and Council Regulation 933/99 of 29 April 1999, [1999] OJ L 117/1, amending Regulation 1210/90 on the establishment of the European Environment Agency and the European environment information and observation network). See for further reference: G. Sydow, *Strukturen europäischer Planungsverfahren*, 56 *Die Öffentliche Verwaltung* [2003], 605-613.

<sup>45</sup> See the 'European Regulators Group' in the telecommunications sector (Decision 2002/627), the 'Committee of European Securities Regulators' in the financial services sector (Decision 2001/527 [2001] OJ L191/43) and the 'European Competition Network' (Council Regulation 1/2003 [2003] OJ L1/1).

<sup>46</sup> Further types of measures have been established for example with respect to the 'open method of cooperation'. Here the Council decides on guidelines and establishes, where appropriate, quantitative and qualitative indicators and benchmarks - see No 37 of the Presidency Conclusions of the Lisbon European Council on 23 and 24 March 2000, [http://www.europarl.eu.int/summits/lis1\\_en.htm#c](http://www.europarl.eu.int/summits/lis1_en.htm#c).

to its duties.<sup>47</sup> Further, the great differences in the member states' legal systems, their administrative traditions and socio-cultural conditions require the involvement of member state administrations from the first stages of planning a joint action to the last stage of its implementation. In a sense, therefore, the notion of subsidiarity in implementation is a victim to its own success. Member states' administrations are now so extensively involved not only in the implementation of decisions made on the EU level but also in the development and framing of policies that there has been a movement towards a truly integrated administration in all areas with EU competencies.

Europe's system of integrated administration has characteristics, which make it difficult to establish common rules and principles. EU administrative structures and administrative law is evolutionary in nature. It is fluid in so far as it is permanently developing in the single policy areas. In addition, there is very little coordination between the policy areas. General EU administrative law exists mainly in the form of general principles of law. Few rules of general administrative law are applicable across several policy areas.<sup>48</sup> A further feature of integrated administration is its fragmented nature. Executive authority is spread within the EU over several institutions, most notably the Commission and the Council, increasingly supported by EU agencies. Additionally, executive functions are almost always undertaken in co-operation with administrative players and private parties from the member states and in some policy areas within networks with participants from outside the circle of EU member states.

### **C. Accountability of Integrated Administration in the European Administrative Space**

Understanding the full range of activities and functions for which Europe created its unique system of integrated administration, I have argued so far, requires adding an internal to the external point of view. Administrative activity cannot be limited to the equation of the role of administration with implementation of EU policies. Such

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<sup>47</sup> H. Kassim, 'The European Administration: Between Europeanization and Domestication', in: J. Hayward and A. Menon (eds.) *Governing Europe* (OUP, Oxford, 2003), 151.

<sup>48</sup> The Comitology Decision, being a rare exception to the rule.

would reflect a rather narrow functional understanding of administrative action. Adding the internal point of view corresponds to a more organisational definition of administrative activity in the European administrative space.

This leads to a view of the European administrative space not in the form of two superimposed territorial structures: One being the European level with the territorial reach of the EU as described in Article 299 EC and the other being the Member States each exercising public power only within their respective territories. Instead, The European administrative space has developed over time through, on one hand, a gradual de-territorialisation of the exercise of public power in the EU, and on the other hand, the establishment of a network of integrated administration for the creation and implementation of matters within the sphere of EU law. Combining the external with an internal point of view of administrative activities in Europe gives us a more three-dimensional understanding of the European administrative space. It is a space in which European, national and sub-national administrations and interested parties act together in the various policy phases of agenda setting, rule-making and implementation. This system of integrated administration, however, is not always visible to citizens because the final administrative decisions are generally undertaken by local administrations. Behind the façade of the external point of view, it appears that Member States' representatives and EU officials now work so closely together in all policy phases and policy areas that a relatively homogenous organisational phenomenon has emerged.<sup>49</sup>

The emergence of 'integrated administration' within the European administrative space has a considerable impact on criteria of accountability - most notably through designing structures of political, judicial and administrative supervision and control of administrative action. Additional challenges arise out of the fact that the framework within which such integrated administration is pursued, differs according to the policy area and the particular stage in the policy cycle. Criteria for accountability of administrative action in this field must reflect these many aspects of the nature of integrated administration within the European administrative space. This includes the

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<sup>49</sup> E. Chiti, *The Emergence of a Community Administration: The Case of European Agencies*, 37 *CMLR* [2000] 309-343, p. 328.



design of administrative procedural rules, which guarantee good administration in composite procedures with input from different levels and administrative actors. It also includes creating adequate forms of participation and equitable interest representation in integrated administration. In the following I will try to sketch some of the major issues of accountability within the three-dimensional European administrative space. Which are the models for developing criteria for accountability? How do these models work with respect to conditions in different policy phases and by which methods?

### I. Models

Models for accountability of the exercise of public power in the EU need to take into account the very specific nature of Europe's integrated administration acting within the European administrative and constitutional space. A parliamentary/government model,<sup>50</sup> for example, when applied to the EU legal system, would suggest accountability of the system of EU administrative governance through supervision by Parliaments and the Council similar to the system operating in federal states.<sup>51</sup> Under this model, EU administration draws a democratic mandate from the European Parliament with the Commission at the pinnacle of the EU's executive hierarchy.<sup>52</sup> In the context of integrated administration in the EU this model's effect on accountability is limited. Although the Commission, as the main institution of the Community executive must also be subject to political control at the European level, European administration extends far beyond the Commission. Commission representatives participate in most forms of administrative governance in the EU, but integrated administration in Europe encompasses more than the range of Commission

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<sup>50</sup> As a parliamentary/government model of European integration might suggest. See for an excellent summary of this model K. Lenaerts and A. Verhoeven, 'Institutional Balance and Democracy', in: C. Joerges, R. Dehousse, *Good Governance in Europe's Integrated Market* (OUP, Oxford 2002), 35-88, at p. 55.

<sup>51</sup> The federal ideas go all the way back to Altiero Spinelli's ideas and the federalists of the mid 20<sup>th</sup> century.

<sup>52</sup> See for an excellent summary of this model, K. Lenaerts, A. Verhoeven, 'Institutional Balance and Democracy', in: C. Joerges, R. Dehousse, *Good Governance in Europe's Integrated Market* (Oxford University Press, 2002), pp. 35-88, at p. 55.

duties. Political control of administrations thus must also be assured on the national and sub-national levels.

A regulatory model, on the other hand, viewing the Community as a special purpose organisation would establish accountability of the EU administration through control of delegation of regulatory powers.<sup>53</sup> Accountability for exercise of these powers would be undertaken by the EU and the Member States by way of the *ultra vires* test. The regulatory model with its basic focus on administrative activity is potentially relevant to a system of integrated administration. The fact that legitimacy and accountability of administrative actors needs to be also guaranteed by the national level is an important aspect.

Conditions for accountability of the exercise of integrated administration, especially through comitology, are further being discussed under the concept of ‘deliberative supranationalism.’<sup>54</sup> This model perceives the supremacy of the EU as based on its capability of cooperative problem solving through accommodating relevant interests by means of ‘persuasion, argument and discursive processes.’<sup>55</sup> The accountability requirements under this model are thus basically procedural – an important issue in the debate of integrated administration.

In this respect, given the heterarchical characteristics of the different networks of the integrated administration, it is difficult to imagine control of administrative actors exclusively through traditional ‘Weberian-style’ hierarchic accountability. The

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<sup>53</sup> For a mature description of this model by its main proponent, see e.g. H.P. Ipsen, ‘Zur Exekutivrechtsetzung in der Europäischen Gemeinschaft’, in: P. Badura, R. Scholz (eds.), *Wege und Verfahren des Verfassungslebens* (Beck Verlag, München, 1993), pp. 425-441. Also this model is very well summarized in, K. Lenaerts, A. Verhoeven, *supra* note 24, p. 51.

<sup>54</sup> C. Joerges, J. Neyer, From Intergovernmental Bargaining to Deliberative Political Process: The Constitutionalisation of Comitology, 3 *ELJ* [1997] 271.

<sup>55</sup> The outcome of this problem solving is essentially a distribution of responsibilities in the sense of a clearing house for conflicts-of-law-type questions. Often deliberative models look for guidance in criteria developed in discourse theory. C. Joerges, The Legitimacy of Supranational Decision-Making, 44 *JCMS* [2006], 779-802; C. Joerges and M. Everson, ‘Re-Conceptualising Europeanisation as a Public Law of Collisions: Comitology, Agencies and an Interactive Public Adjudication’, in: H.C.H. Hofmann, Alexander Türk (eds.) *EU Administrative Governance* (Edward Elgar, London 2006), 512-540.

different models of accountability each contain valuable considerations. However, no one of the above models can suffice in isolation, despite them all containing valuable aspects, useful in combination with each other.

## II. Policy Phases

Conditions for accountability differ at each policy phase. This requires the development of accountability structures which are adapted to integrated administration in each policy phase: *Agenda-setting* marks an important stage in the policy-making process, in that it sets the parameters for legislation and other policy-making procedures. Its accountability rests on the later rule-making process but also depends on factors prior to that stage like the transparency of its procedures, the integration of necessary expertise and the participation of interests from what is generally referred to as the ‘civil society’. Especially with respect to the latter aspects, difficulties arise as to the appropriate definition of the information and interests to be taken into account. The Commission, under the duty of consultation,<sup>56</sup> has to make many choices as to whom to consult, which opinions issued to take into account, whether to hear only stakeholders or also to open the debate beyond the parties directly interested in a topic.<sup>57</sup> These are factors should generally be subject to *ex post* judicial control by courts. In reality, difficulties as to the judicial enforcement of these rights arise, not least due to the discretion of the Commission and the nature of the review taking place only on the basis of a final legal act.

The accountability of the Community’s *policy-making* process, on the other hand, is mainly based on the institutional balance between the participating institutions, which

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<sup>56</sup> See paragraph 9 first indent of the Protocol on the Application of the Principles of Subsidiarity and Proportionality annexed to the Treaty of Amsterdam which states that ‘the Commission should: - except in cases of particular urgency or confidentiality, consult widely before proposing legislation and, wherever appropriate, publish consultation documents.’

<sup>57</sup> See with many references D. Obradovic, J.M. Alonso Vizcaino, Good Governance Requirements Concerning the Participation of Interest Groups in EU Consultations, 43 *CMLRev* [2006], 1049-1085.

in a system of functional representation, allows the various interests to contribute to the law-making process. The two major players channelling diffuse interest representation are the European Parliament and the Council.<sup>58</sup> The intervention of national administrations in the Council of Ministers helps to reinforce the efficiency of the Council, but creates problems for the transparency of the Council as legislator.

Finally, in the *implementation* phase, the mandate by the legislative instrument cannot be considered sufficient to control a rather more ‘political administration’ with far reaching regulatory powers e.g. in the area of risk regulation.<sup>59</sup> Moreover, it is in this phase that individuals are most likely to be directly affected by administrative action. Hence, input by scientific expertise and participation rights in the creation of administrative rule-making and single case decisions are important factors. Judicial review of administrative decisions gains greater importance. Transparency concerns as to administrative activity arise, but need to be balanced against the efficiency of the administrative process and private and public interests.<sup>60</sup> These concerns are all the more important, as political control of implementation by the European Parliament and national parliaments, remains weak.<sup>61</sup>

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<sup>58</sup> In this respect the corporatist model of interest representation in the European Economic and Social Committee is problematic. Rightly therefore, the EESC input is being channelled towards the Commission’s consultations in the agenda setting phase. See the protocol governing arrangements for co-operation between the European Commission and the Economic and Social Committee of 24 September 2001, CES 1253/2001.

<sup>59</sup> C. Joerges, “‘Good governance’ Through Comitology ?” in: C. Joerges and E. Vos (eds.), *EU Committees: Social Regulation, Law and Politics* (Hart, Oxford 1999), 309-338.

<sup>60</sup> See A. Türk, ‘Transparency and Comitology’, in: C. Demmke, C. Engels (eds.), *Continuity and Change in the European Integration Process* (EIPA, Maastricht, 2003), 175-198.

<sup>61</sup> However, despite criticism (e.g. from C. Harlow, *Accountability in the European Union* (OUP, Oxford 2002), 79-107), studies show that parliaments throughout Europe are developing and have developed approaches to supervision of EU policies. For an analysis with respect to UK parliaments, see: The UK House of Commons, *European Scrutiny Thirty Third Report on Democracy and Accountability and the Role of National Parliaments*, at: <http://www.publications.parliament.uk/>. For Germany see: H.C.H. Hofmann, *Parliamentary Representation in a System of a Multi-Layer-Constitutions: Case Study of Germany*, 10 *Maastricht Journal of European and Comparative Law* [2003] 1-27. For studies of Ireland, Denmark and the Netherlands, see the papers published as contributions to the Irish Centre for European Law’s second annual conference on “The Role of National Parliaments in EU Affairs”, 25-26 Mai 2001, at: [http://www.icel.ie/annualCongress\\_two.htm](http://www.icel.ie/annualCongress_two.htm).

### III. Methods

Methods of accountability contain traditional and less traditional means. Traditional modes of control of administrative activity include holding administrative activity politically accountable through parliamentary supervision or by judicial accountability by controlling administrative action in courts. Naturally, political control of administrations plays a stronger role in the phases of legislation than in the phase of implementation. On the other hand, the courts will usually grant a larger discretion when reviewing legislative acts than in the review of discretion in administrative single-case implementing decisions.

With respect to political accountability integrated administration, the European parliament, as well as parliaments on the national and, where they exist, also sub-national level, are capable of wielding both *ex-post* and *ex-ante* control.<sup>62</sup> A precondition for successful parliamentary control is an understanding of the integrated nature of the EU executive. Such understanding will help the different levels of parliaments to hold ‘their’ administrations to account for their role in integrated administration in the different policy phases and policy fields. In that way, the various parliamentary levels could mirror the nature of administrative co-operation.<sup>63</sup> This

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<sup>62</sup> Despite criticism (e.g. from C. Harlow, *Accountability in the European Union* (OUP, 2002), pp. 79-107), studies show that parliaments throughout Europe are developing and have developed approaches to supervision of EU policies. For an analysis with respect to UK parliaments, see: The UK House of Commons, European Scrutiny Thirty Third Report on Democracy and Accountability and the Role of National Parliaments, at: <http://www.publications.parliament.uk/>. For Germany see: H.C.H. Hofmann, ‘Parliamentary Representation in a System of a Multi-Layer-Constitutions: Case Study of Germany’, 10 *Maastricht Journal of European and Comparative Law* (2003) 1-27. For studies of Ireland, Denmark and the Netherlands, see the papers published as contributions to the Irish Centre for European Law’s second annual conference on “The Role of National Parliaments in EU Affairs”, 25-26 Mai 2001, at: [http://www.icel.ie/annualCongress\\_two.htm](http://www.icel.ie/annualCongress_two.htm).

<sup>63</sup> The core problems for political supervision and control through parliaments are, however, information-gathering, timing of decision-making and resources to respond to the complexity and fluidity of the system, making it difficult for parliaments to obtain sufficient knowledge about the procedures and to react with sufficient speed. These constraints need to be overcome in the frameworks of resource sharing and intelligent use

type of parliamentary control, however, on the national and sub-national levels is limited by a certain fragmentation of responsibilities. On the Community level, additionally, this method is weakened by the somewhat limited political control by the EP of the Commission.<sup>64</sup>

The main traditional approach is judicial control of supervision of administrative activity. Although from the outset this mode is limited to *ex-post* control, the establishment of rules and principles for good governance in the area of Europe's integrated administration also has effect in respect of the future conduct of administrative activity. Judicial control of structures of administrative governance includes basic forms of control such as the review of legality inter alia with the test of compliance with ultra vires rules. But beyond this basic notion of legality it guarantees certain substantial and procedural rights. Most often the judicial role will consist of balancing the discretionary power of administrative action on the one hand with upholding the general principles of law such as the principle of proportionality of activity on the other. Adding to the inherent tension within this balancing exercise, are the unique characteristics of EU administrative governance, most notably the complexity of its integrated yet evolutionary nature.<sup>65</sup> Judicial control of Europe's integrated administration therefore faces several problems: the dilution of responsibilities and the multitude of different forms of administrative governance complicate the allocation of responsibility and the application of general principles of law. Courts, for example, already have difficulties establishing a sufficient level of

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of indicators for politically sensitive matters. These could be e.g. in the form of information shared through the Conference of European Affairs Committees (COSAC) as mentioned by the Protocol of the Treaty of Amsterdam "on the role of national parliaments in the European Union" or by other horizontal contacts between parliaments. It could also be by information received through civil servants involved in forms of EU administrative governance.

<sup>64</sup> Political control through parliaments from the European, the national and sub-national levels, will additionally be supported by parliamentary ombudsmen to whom citizens can address their specific problems.

<sup>65</sup> L. Azoulay, 'The Judge and Administrative Governance', in: C. Joerges, R. Dehousse, *Good Governance in Europe's Integrated Market* (OUP, Oxford, 2002), 109-137.

judicial review of comitology procedures.<sup>66</sup> In composite administrative procedures for the single-case implementation of EU law, the European courts face the challenge of how to address the administrative unity of national and supranational administrations. Here, the European courts tend to sanction violations of procedural rights of participants in review of the final decision, whether taken by the Commission or by national authorities.<sup>67</sup> 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 co-operative procedures is as inevitable as problematic.<sup>68</sup> Effective judicial control therefore relies on the courts ability to allocate 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.<sup>69</sup> Judicial control, however, adopts what we might refer to as a gradual approach. This is a reflection of a certain hierarchy of norms,<sup>70</sup> implicitly developed by case law which differentiates the intensity of review of administrative activity. The differentiation is at the heart of the distinction between judicial and political control. The more political control is afforded in areas more akin to legislative activity – agenda setting and policy making through expert groups and the

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<sup>66</sup> See for illustration, K.St.C. Bradley, ‘Comitology and the Courts: Tales of the Unexpected’, in: H.C.H. Hofmann, Alexander Türk (eds.) *EU Administrative Governance* (Edward Elgar, London 2006), 417-447.

<sup>67</sup> Increasingly, the ECJ and the CFI address this type of question. ECJ case law: Cases C-269/90 *Technische Universität München* [1991] ECR I-5469; C-97/91 *Borelli v Commission* [1992] ECR I-6313; C-32/95 *Commission v Lisrestal* [1996] ECR I-5373; C-151/01 P *Commission v La Conquete Scea* [2002] ECR I-1179. CFI case law: T-450/93 *Lisrestal v Commission* [1994] ECR II-1177; T-346/94 *France Aviation v Commission* [1995] ECR II-2841; T-42/96 *Eyckeler & Malt v Commission* [1998] ECR II-401; T-215/00 *La Conquete Scea v Commission* [2001] ECR II-181.

<sup>68</sup> For further detailed analysis see the excellent analyses by: S. Cassese, *European Administrative Proceedings*, 68 *Law and Contemporary Problems* [2004] 21-36.

<sup>69</sup> See Case T-188/97 *Rothmans v Commission* [1999] ECR II-2463. The Community judge faces here similar problems to a judge of a member state court when reviewing administrative procedures with several agencies involved and complex structures of internal interaction.

<sup>70</sup> Such a hierarchy would be explicitly introduced by the “Treaty establishing a Constitution for Europe”. See H.C.H. Hofmann, A Critical Analysis of the new Typology of Acts in the Draft Treaty Establishing a Constitution for Europe, 7 *European Integration Online Papers (EIoP)* [2003], 1-46, at <http://www.eiop.or.at>.

activity of council working parties- the less detailed judicial control will take place. The same holds true for some forms of abstract-general rule making by administrations, for example in the area of Lamfalussy rules and also in some parts of the comitology process. On the other hand, the ECJ and the CFI are increasingly intensifying their review of administrative decisions in individual cases.<sup>71</sup> This type of judicial review of administrative activity is geared towards safeguarding both procedural and substantive rights, thereby following a rights-based approach to control of integrated administrations.

Next to these traditional modes of political and judicial control, additional modes of accountability can be developed in the system of Europe's integrated administration. For example a system of mutual supervision built into cooperative structures in the form of checks and balances would ensure greater accountability in certain policy areas or for decision-making in different policy phases. The approach would be to transfer the disadvantages of heterarchic systems – traditionally adverse to control and supervision – into a structure in which the presence of actors from different origins allows for a certain degree of mutual control.<sup>72</sup> The system of comitology is an example of the harmonisation of the two conflicting approaches of checks and balances and personal involvement of civil servants. Comitology committees are a form of integration of the Commission and national experts. At the same time, comitology committees, at least the management and two different types of regulatory

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<sup>71</sup> For the area of merger control see e.g.: Case T-342/99 *Airtours plc v Commission of the European Communities* [2002] ECR II-2585, where the CFI reviewed a merger decision of the European Commission (Case No IV/M.1524 - *Airtours/First Choice*, Commission decision of 22 September 1999) and reviewed in detail the Commission's analysis of the facts, the applied economic theory as well as its definition of the concept of collective dominance of the market. Other high-profile cases of detailed review of Commission single-case decisions were the Joined Cases T-310/01 and T-77/02 *Schneider Electric SA v Commission* [2002] ECR II-4071; Joined Cases T 5/02 and T-80/02 *Tetra-Laval BV v Commission* [2002] ECR II-4381, upheld by the ECJ in case C-12/03 P, *Commission v Tetra Laval BV*, judgment of 15 February 2005. See also J. Schwarze, 'Judicial Review of European Administrative Procedure', (2004) *Public Law* 146-166, at p. 159-161.

<sup>72</sup> The benefits of mutual control can be weakened by the fact that participation in procedures of integrated administration can affect the loyalty, outlook and behaviour of those individuals participating in the process. This is powerfully illustrated by J. Trondal, *Re-Socialising Civil Servants: The Transformative Powers of EU Institutions*, 39 *Acta Politica. International Journal of Political Science* [2004], 4-30.



committees, allow for the supervision of the Commission through the ability of the committees to refer matters for decision to the Council and, to a certain degree, the involvement of the European Parliament. Equally, the Lamfalussy-type procedures applied in the financial services sector, allow for a certain amount of review of the formation of administrative rules by the Commission. A further example for a certain evolving system of mutual control is the relationship between European agencies and the European Commission. Often, only the Commission can take the final decisions, whereas the expertise lies with the agency. In this respect, the Commission can have a certain supervisory role. Other such inter-agency related systems of checks and balances exist in the relationship between Community agencies including the Commission and national agencies. Such relationships are often described in terms of network and heterarchy but they also contain elements of mutual control and supervision. Such network structures further exist with respect to private parties. An example is the norm-setting role of private standardization bodies,<sup>73</sup> whose standards are accepted by administrations until there is proof of them being insufficient. Systems of checks and balances are also being created within different Commission services, especially where the Commission takes very sensitive individual decisions as in the area of competition law. An example is the increasingly independent position of the Commission's internal 'Hearing Officer', who ensures the enforcement of parties' procedural rights in competition cases.<sup>74</sup>

#### **D. The European Administrative Space: Shared Sovereignty through Integrated Administration**

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<sup>73</sup> E.g. CEN, CENELEC and ETSI.

<sup>74</sup> An alternative to these checks and balances within the Commission, especially in matters related to competition law where the Commission concentrates investigative and adjudicative powers, is to transfer the adjudicative powers of the administrations to independent courts. Also, it is possible to safeguard accountability through forms of non-judiciary alternative dispute settlement procedures such as the ombudsman procedures. Accountability can finally also be helped by developing the role of independent inspectorates such as the Court of Auditors.

This paper started out by analysing the link between the notion of the European administrative space and the de-territorialisation of public law within the EU. I have attempted to show that European administrative space cannot be reduced to a two-dimensional concept. EU/EC law does not simply create another distinct territorial layer over the pre-existing Member States territories. Instead, the European administrative space is the area in which increasingly integrated administrations jointly exercise powers delegated to the EU and in a system of shared sovereignty.<sup>75</sup> The notion of the European administrative space is linked to administrative action in the creation, administration and maintaining of EU/EC law as well as the Europeanised national law. The European administrative space is thus a three dimensional concept with complex vertical, horizontal and diagonal relations of the actors therein.<sup>76</sup> Its development has been evolutionary and fluid. Its structures have been developed on a case-by-case basis in different policy areas.<sup>77</sup> Moreover, the various forms of administrative cooperation differ according to each of the policy phases of agenda setting, legislative rule-making and implementation. Since the different policy phases cannot always be clearly distinguished, the different forms of cooperation are designed and have practically developed to facilitate the development of EU policies by working hand in hand with each other.<sup>78</sup> Despite differentiation in single policy areas, the phenomenon of administrative cooperation has led to an ‘integrated administration’ i.e. an intensive and often seamless cooperation between national and supranational administrative actors and activities. As shown in this article, the full relevance of integrated administration in the EU only becomes clear if the ‘external’ point of view of administrative activity, which is concerned with externally visible implementing activities by national and supranational administrations, is complemented with an ‘internal’ point of view. The internal point of view, does not concentrate on administrative activity in the phase of

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<sup>75</sup> The EC thus created a ‘new type of legal order’ whose law became ‘an integral part of the legal systems of the Member States.’ ECJ Case 6/64 *Costa v. ENEL* [1964] ECR 1141.

<sup>76</sup> C. Joerges, *The Legitimacy of Supranational Decision-Making*, 44 *JCMS* [2006], 779-802.

<sup>77</sup> H. Kassim, ‘The European Administration: Between Europeanization and Domestication’, in: J. Hayward and A. Menon (eds.), *Governing Europe* (OUP, Oxford 2003), 151.

<sup>78</sup> Due to a lack of a clear positive hierarchy of norms in the EC, the legislative phase for example cannot be neatly distinguished from the implementing phase. Also, experience in the implementing phase often results in agenda setting activities for further reform.

implementation alone. It takes into account also the externally less visible, nonetheless equally relevant, activities of administrative cooperation through structures such as expert committees, working parties, comitology committees, Lamfalussy procedures and agency networks.

These observations illustrate the necessity of a legal analysis of the realities of European administration away from a familiar two-level model towards an integrated approach. This has consequences not only for our understanding of the role of administration in Europe but also for the analysis of key aspects such as the accountability thereof. It is not possible simply to draw on traditional state-like models as a blue-print for government and governance structures in the EU. This paper shows that integrated administration is at the core of the EU's legal and political system. Integrated administration is what renders the EU system of government and governance unique and distinct from models we know from the Member States' legal systems – be they more unitary or more federal in their internal structures. It is the substance behind the theoretical notion of shared sovereignty and gives the European administrative space its shape.