

Current Debates in European Administrative Law – Background and Perspectives

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The regulation of administrative procedures in the EU is currently a topic under much scrutiny. This chapter addresses some of the debates regarding a possible innovative codification of EU administrative procedure law. It does so by looking at changing modes of delegation of powers for implementation of EU law and policy and the evolving legal context of the EU's highly integrated multi-level system. The chapter therefore addresses questions such as which criteria should govern the exercise of powers delegated to the administration. It does so by looking at how effective decision-making procedures can be geared towards ensuring that basic constitutional principles and values are complied with in real-life administrative action. Answers to these questions also guide considerations about which elements should ideally be addressed by a possible codification of administrative procedure law of the EU.

A. *The Current Situation and the Basis for Reform Debates*

The EU, from its very beginnings, has been designed as an experimental undertaking for sharing sovereignty. In the past six decades of integration, it has developed and transformed itself many times through *inter alia* taking-on responsibilities for an increasing amount of policy areas and deepening its role in their administration.

The beginnings of European integration with the creation of the first of the 'European communities', the European Coal and Steel Community (ECSC) consisted of an organization dealing with sector-specific regulation giving it a distinctively administrative character.² But the establishment of the European Economic Community (EEC) under the Treaty of Rome changed the focus of public attention on matters related to integration in some ways away from a sector specific-regulation. It was geared towards the creation of a framework Treaty applicable to more broadly defined economic regulation for the common market. The EEC was therefore basically engaged in what would qualify as acts of general content of a quasi-

² The ECJ case-law relating to the ECSC acknowledged the essentially administrative nature of the ECSC and its acts, reviewing them by reference to criteria developed in national administrative law, interpreted mainly in the light of the French administrative tradition. These concepts included *inter alia* the presumption of validity, the consequences for illegality, and the conditions for revocation of administrative acts, as well as the distinction between the non-existence and the nullity of administrative acts and the conditions for and consequences of the revocation of administrative acts, such as liability. See Case 4/54 *ISA v High Authority* [1954-1956] ECR 91; Case 8/55 *Federation Charbonniere de Belgique v High Authority* [1954-56] ECR 245; Joined Cases 7/56 & 3-7/57 *Algera and Others v Common Assembly* [1957] ECR 39; Case 9/56 *Meroni v High Authority* [1957 and 1958] ECR 133; Case 10/56 *Meroni v High Authority* [1957 and 1958] ECR 157; Joined Cases 43/59, 45/59, & 48/59 *Von Lachmüller v Commission* [1960] ECR 983; Case 105/75 *Giuffrida v Council* [1976] ECR 1395.

legislative nature.³ Member States implemented EEC law within each state using their specific national legislative, administrative and judicial apparatus. This is the model of indirect administration sometimes also described as ‘executive federalism’.⁴ Despite this, EU law has transformed the constitutional, regulatory and administrative structures of its Member States. It does so in very concrete ways, for example, by requiring Member States to establish certain regulatory structures such as independent regulatory or supervisory agencies.⁵ This has been often not only the result of specific policy needs but also resulting from more general requirements of ensuring effective and equal application of EU law. Also the setup of the EU’s executive itself has been subject to transformation. Through the creation of ever more specialised agencies generally coordinating Member State implementation with action of EU bodies and in some important areas also having been granted genuine decision-making powers, the EU has also significantly increased the diversity and amount of actors involved in implementation.

General principles governing the procedures of the ‘European administration’ were initially developed by the case law of the Court of Justice of the European Union (CJEU). Other matters of procedure were addressed in a piece-meal fashion successively by legislative acts of the Union. Some of the underlying basic values have since also been outlined in various Treaty provisions such as the foundational principles in Articles 2 TEU and Articles 9-12 TEU addressing questions of democracy, transparency, and participation. An source with growing importance in practice is also the EU’s Charter of Fundamental Rights which includes *inter alia* procedural rights such as those to good administration (Article 41 CFR) and to an effective judicial remedy (Article 47 CFR). Amongst others, the constitutional principles which require compliance across the policy areas with the rule of law and its sub-elements, democracy, transparency, openness, participation and good administration. These principles define

³ H-P Ipsen, ‘Zur Exekutivrechtsetzung in der Europäischen Gemeinschaft’, in: P. Lerche, P. Badura, R. Scholz (eds), *Wege und Verfahren des Verfassungslebens*, Beck (München 1993) 425 with further references.

⁴ J Frowein, ‘Integration and the Federal Experience in Germany and Switzerland’, in: M. Cappelletti, M. Seccombe, J. Weiler (eds), *Integration through Law — Europe and the American Federal Experience, Vol 1: Methods, Tolls and Institutions, Book 1: A Political, Legal and Economic Overview* de Gruyter (Berlin 1986) 573; K. Lenaerts, ‘Regulating the regulatory process: “delegation of powers” in the European Community’ 18 *ELRev* (1994) 23; J. Ziller, ‘L’*autorité Administrative dans l’Union européenne*’ 14 *EU Working Papers Law* (2004) 9.

⁵ Member States are sometimes obliged under EU law to create independent agencies under national law: See e.g. the EMCDDA Regulation 302/93/EEC of 8 February 1993 also establishing the European Information System on Drugs and Drug Addiction (Reitox network) [1993] OJ L 36/1, the EU-OSHA Regulation (EC) No 2062/94 establishing a European Agency for Safety and Health at Work [1994] OJ L216, the EFSA Regulation [2002] OJ L31/1, the EASA Regulation [2008] OJ L79/1, the ECDC Regulation [2004] OJ L 142, the CFCA Regulation [2005] OJ L128/1, and the FRA Regulation [2007] OJ L53/1. See: H.C.H. Hofmann, G.C. Rowe, A. Türk, *Administrative Law and Policy of the EU*, Oxford (OUP 2011).

some of the essential normative yardsticks against which the legitimacy and lawfulness of executive rulemaking procedures ought to be assessed.⁶ One of the central challenges is how to improve realisation of constitutional principles of the EU in the de-centralised implementation of EU law whilst at the same time simplifying the policy-centred system of laws.

Ensuring compliance of administrative procedure law with higher ranking constitutional provisions is a formidable challenge in a unitary system, in which legislation, executive rule-making and final individualised decision-making are undertaken by the same body of law within the same legal person. Within the EU, the conditions are more complex since implementation of EU law and policies is organised both on the EU level as well as within the Member States: Despite organisational separation of the various actors on the national or Union levels, procedural rules link the actors from various levels to a single system of ‘European administration’.⁷ The procedural rules achieving this linkage are policy-specific. With only a few exceptions,⁸ they are not generally harmonised across policy fields. Only very few acts are applicable to more than one policy in a horizontal manner. Each policy which EU law touches has developed its own approach and set of rules. Generally speaking, the evolutionary development of administrative procedure rules in a policy specific manner have led to a patchwork of rules and procedures applicable to the exercise of delegated powers. The pluralisation of actors contributing to implementation of EU law on the European level and the emergence of networks of regulators organised by agencies have complicated the matter further.

I. Delegation and Pluralisation of the Executive

⁶ D. Curtin, H. Hofmann, J. Mendes, ‘Constitutionalising EU Executive Rule-Making Procedures: A Research Agenda’ (2013) 19 *ELJ* 1.

⁷ This can be regarded as the actual sense of the use of this term in Article 298(1) TFEU.

⁸ An example for this rare kind of horizontally set of rules is the Comitology regulation applicable to the exercise of implementing powers conferred on the Commission under Article 291 TFEU and the previous Comitology decisions. See: Comitology Decisions of 1987, 1999, and 2006 and the Comitology Regulation of 2011. See: 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 L197/33, Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission [1999] OJ L184/23 amended by Council Decision 2006/512/EC of 17 July 2006 [2006] OJ 2006 L200/11; Regulation (EC) 182/2011 of 16 February 2011 of the European Parliament and of the Council laying down the rules and general principles concerning mechanisms for control by Member States of the Commission’s exercise of implementing powers [2011] OJ L55/13. Another is the financial regulation of the EU governing the expenditure of EU budgetary means Regulation 966/2012 of the EP and the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002, OJ 2012 L 298/1.

Compliance, in principle, with the basic ideas of executive federalism, however, have also had profound impact on the administrative organisation within the Union. Delegating executive powers to the EU-level to be exercised, as the Treaties had originally envisioned, by the Commission was in many cases regarded as a threat to de-central administration by Member States. Nonetheless, the considerable increase in EU powers in successive Treaty amendments and the complexity of the policy regimes established, make delegation a necessity. This is acknowledged in the Treaties in that the Commission can be conferred competences to adopt so called ‘delegated’ acts (Article 290 TFEU), which allow for supplementing and amending non-essential parts of Union legislation, and ‘implementing’ acts (Article 291 TFEU) confer genuine administrative powers on the Commission subject to control of the Member States. Only exceptionally under Article 291 TFEU, can implementing powers be conferred on the Council.

Delegation to other bodies than the European Commission, however, is in reality a more general phenomenon than might be expected when reading Articles 290 and 291 TFEU. Implementation of EU policies in which a wide variety of actors, such as the Commission, European agencies, networks, and private parties are involved. This has been driven by practical necessity and political impulses, rather than being designed around any preconceived or abstract constitutional model.⁹ A subsidiarity-friendly approach allowing for continued de-central administration in view of needs of coordination of policy approaches in the ‘European administrative space’ as the area without internal frontiers, was the creation of a large number of EU agencies.¹⁰

Agencies provide a unitary administrative framework within which they integrate, usually through committees, networks of national and supranational administrative bodies.¹¹ Although each individual EU agency has its specific *raison d’être*, generally speaking, the need for the creation of agencies can often be broadly linked to the development of a system of integrated administration in Europe. The ‘agencification’ of the EU executive is in part due to the need

⁹ H.C.H. Hofmann, A.H. Türk, ‘Policy Implementation’ in: H.C.H. Hofmann, A.H. Türk (eds), *EU Administrative Governance* Cheltenham (Elgar 2006).

¹⁰ See e.g. Case C-66/04 *UK v Parliament and Council (Smoke flavorings)* [2005] ECR I-10553; Case C-217/04 *UK v Parliament and Council (ENISA)* [2006] ECR I-3771; Case C-270/12 *United Kingdom v Commission (Short selling)* [2014].

¹¹ The use of the concept of network in this context is not meant as a reference to any of the ‘network’ theories, developed in particular in political science, but rather to a relationship between different authorities. For an analysis of the network theories in relation to agencies, see E. Chiti, ‘Decentralisation and Integration into the Community Administrations: A New Perspective on European Agencies’ 10 *ELJ* (2004) 402. The fact that the creation of agencies was undertaken in a rather unsystematic and even haphazard way, is not specific to the EU but a common feature to many legal systems. R. Dehousse, ‘Delegation of Powers in the EU: The Need for a Multi-principals Model’ (2008) 31 *Western European Politics* 789, 790.

for the establishment of centres of regulatory competence to inform political decision-making and thereby to contribute to the technical quality of regulatory activity.¹² ‘Technical’ issues of fact-finding and risk assessment are often a task delegated to specific EU agencies designed to bring together the relevant actors from the supranational, national, regional and international level to ensure a co-ordinated provision of expertise.¹³ Importantly, most agencies created in the past decade have also been given a role in preparing executive rule-making by the Commission.¹⁴ Some have also been granted powers to adopt individually legally binding decisions (adjudication in US terms). In some cases, such decision-making involves carrying out the complex economic assessments required in highly regulated areas, such as for example decisions taken by the European Chemicals Agency (ECHA),¹⁵ the Office for the Harmonisation of Internal Market (OHIM for the registration of trademarks),¹⁶ and the European Securities and Market Authority (ESMA).¹⁷ These agencies exert administrative discretion qualified by the provisions of the relevant regulations.

II. *Integrated Administration and Composite Procedures*

The pluralisation of executive bodies in the EU both result from and are at the same time a result of a change in the functions performed by administrations of the Member States and the

¹² See especially Case C-270/12 *United Kingdom v Commission* (Short selling) [2014] para 82. See also, in its 2002 Communication, the Commission describes the key reason for the establishment of agencies in the ability to provide scientific assessments based on technical evaluations which ‘are not influenced by political or contingent considerations’ (Communication from the Commission – The operating framework for the European Regulatory Agencies, COM (2002) 718 final, 5).

¹³ In the field of food safety, the EFSA carries out the function of risk assessment while the Commission is attributed the role of managing such risks on the basis of the scientific advice provided by the EFSA. An example can be found in the network operating under the supervision of the European Environmental Agency (EEA), [2009] OJ L126/13 – codified version. The EEA Regulation has entrusted the agency with establishing the European Environment Information and Observation Network (EIONET), which consists of the EEA itself, five European Topic Centres, National Focal Points and National Reference Centres, creating a network of around 900 experts from 37 different countries. Other agency regulations contain requirements for the establishment and management of similar networks, such as the EMCDDA Regulation (Reitox network), the EU-OSHA Regulation, the EFSA Regulation, the EASA Regulation, the ECDC Regulation, the CFCA Regulation, and the FRA Regulation. See: H.C.H. Hofmann, G.C. Rowe, A.Türk, *Administrative Law and Policy of the EU* Oxford (OUP 2011) 285-306.

¹⁴ D. Curtin, H. Hofmann, J. Mendes, ‘Constitutionalising EU Executive Rule-Making Procedures: A Research Agenda’ 19 *European Law Journal* (2013) 1. E. Chiti, ‘European Agencies’ Rulemaking: Powers, Procedures and Assessment’, 19 *European Law Journal* (2013) 93.

¹⁵ See REACH Regulation 1907/2006 [2006] OJ L396/1.

¹⁶ Case T-187/06 *Schröder v Community Plant Variety Office (CPVO)* [2008] ECR II-3151, confirmed on appeal in Case C-38/09 *P Schröder v Community Plant Variety Office (CPVO)* [2010] ECR I-3209.

¹⁷ Case C-270/12 *United Kingdom v Commission* (Short selling) [2014].

EU when implementing EU law and policy. The changes are characterised by a re-definition of the conditions of public administration in the EU and the development of a genuinely ‘integrated administration’. Administrative functions in the EU are now undertaken in nearly all policy areas with input from several administrative actors both from the Member States and the European level. They are linked together through procedural provisions under EU law. The integrated administration from this point of view has emerged from the fundamental needs of the Member States to forge links between, on one hand, national and European administrations and, on the other, between and among Member State administrations. The objective is to maximise the problem-solving capacity, influence and effectiveness of a de-centrally organised administrative implementation of EU law and policies.¹⁸ As Lindseth observes, in the EU as in the Member States, ‘the separation of regulatory power from the ultimate sources of legitimacy has been among the most important elements of the constitutional settlement of administrative governance in the twentieth century, whether national or supranational.’¹⁹

The increasing integration of administrative procedures in the EU requires any administrative procedure law to acknowledge and structure the fact that in many cases, both Member State and EU authorities contribute to ‘composite procedures’²⁰ These are multiple-step procedures with input from administrative actors from different jurisdictions, cooperating either vertically (between EU authorities and those of a Member State), horizontally (between authorities in two or more Member States) or in triangular relations (involving authorities of different Member States and of the EU).²¹ Final measures or decisions, whether issued by a Member

¹⁸ The success of integration has been ascribed to the fact that purely intergovernmental structures would not have been capable of addressing the joint regulatory problems faced by a market as integrated as that of EU. A federal structure, on the other hand, could be expected to threaten the very existence of the EU Member States by establishing strong hierarchical structures which the Member States may not be prepared to support. Creating an integrated administrative structure is the third way characterised by decision-making and implementing strategies on the European level where necessary, but satisfying Member States by maintaining a strong role through broad and intensive participation (W. Wessels, ‘Verwaltung im EG-Mehrebenensystem: Auf dem Weg in die Megabürokratie?’, in: M. Jachtenfuchs, B. Kohler-Koch (eds), *Europäische Integration* (Leske + Budrich 1996); W. Wessels, ‘An Ever Closer Fusion? A Dynamic Macropolitical View on Integration Processes’ 35 *JCMS* (1997) 267).

¹⁹ P. Lindseth, *Power and Legitimacy* Oxford (OUP 2010) 19.

²⁰ See also with further discussion: H.C.H. Hofmann, ‘Decision-Making in EU Administrative Law – The Problem of Composite Procedures’ 61 *Administrative Law Review* (2009, special edition) 199.

²¹ Composite procedural elements exist for example in the area of technical safety, product safety (See Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety [2002] OJ L11/4), standardisation and normatisation (Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations [1998] OJ L204/37, as amended), procedures leading to the admission of medical products (Regulation 726/04 of the European Parliament and of the Council laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency [2004] OJ L136/1, as amended), and genetically modified organisms (Art. 11,

State or an EU authority, are based on procedures involving more or less formalised input of the participants from the different levels. Within policy areas regulated by EU law, there are many examples of procedures with composite elements,²² but forms of cooperation differ from one policy area to another. A common feature, is that procedural integration of administrations in the EU often relies upon procedures designed to jointly obtain and assess information necessary for a final decision.²³ Information cooperation is, therefore, at the heart of rules and procedures governing EU administrative law but composite procedures also arise with respect to enforcement cooperation.

The continuing pluralisation of the executive in combination with highly integrated administrative procedures has created its own problems of transparency and accountability. This arises not least from a potential blurring of responsibilities in coordination activities and contributions to composite procedures which may lead to difficulties in discerning who is responsible for which part of a decision and how to influence the process. Accordingly, composite procedures have often escaped judicial review both on the national and the EU level because their activities can take place in the realm of preparatory measures and collection as well as distribution of information needed for final decision-making only.

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 [2001] OJ L106/1), regulation of telecommunications (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 [2002] OJ L108/33), public procurement (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 [2004] OJ L134/114; Directive 2004/17/EC of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors [2004] OJ 2004 L134/1; 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 [2005] OJ L257/1, asylum procedures (Council Regulation 2725/2000 of 11 December 2000 concerning the establishment of «Eurodac» for the comparison of fingerprints for the effective application of the Dublin Convention [2000] OJ L316/1), as well as the combating of money laundering (Council Decision 2000/542/JHA of 17 October 2000 concerning arrangements for cooperation between financial intelligence units of the Member States in respect of exchanging information [2000] OJ L271/4).

²² 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 they act either to implement EU law or when they are bound in their activity by general principles of EU law.

²³ See with further references and explanations in H.C.H. Hofmann, 'Composite Procedures in EU Administrative Law' in: H.C.H. Hofmann, A.H. Türk (eds), *Legal Challenges in EU Administrative Law: The Move to an Integrated Administration* Cheltenham (Elgar, 2009).

III. Consequences

In the EU, powers are jointly exercised under a largely rule-based legal and political system. In this, all sorts of government and governance functions are shared in a multi-level structure characterised by an organizational separation of administrative actors organised either on the level of the EU or by the Member States.²⁴ This separation has been made workable by very significant forms of procedural cooperation and interaction within specific forums organised by EU law.²⁵ Trans-jurisdictional cooperation is an essential component of administration in the EU. Specific procedural rules enable and shape cooperation. But aside of the ‘comitology’ procedures,²⁶ now limited to the area of implementing acts under Article 291 TFEU, most procedural rules for implementing EU law through administrative procedures are policy-specific. Amongst these, agencification stands out as the central paradigm of the change of the EU from national actors reaching out to the EU level to a fundamental restructuring of the regulatory space with genuine cooperative procedures. On the other hand, the pluralisation of the executive bodies and the reliance on networks instead of clear allocation of administrative responsibility between Member States and EU bodies has led to a complication of regulatory procedures and an increasing challenge to maintain values such as the rule of law and transparency as well as to ensure modes of judicial review and other forms of anticipatory and ex post modes of accountability.

²⁴ On the structure of the EU administration, see, among others, E. Chiti, ‘The administrative implementations of European Union law: a taxonomy and its implications’ in H. Hofmann, A. Türk (eds), *Legal Challenges in EU Administrative Law* Cheltenham (Elgar 2009), 9; J. Ziller, ‘Exécution centralisée et execution partagée: le fédéralisme d’exécution en droit de l’Union européenne’ in: J. Dutheil de la Rochère (ed), *L’exécution du droit de l’Union, entre mécanismes communautaires et droits nationaux* Bruylant (Brussels 2009), 111; E. Schmidt-Aßmann, ‘Introduction: European Composite Administration and the role of European administrative law’, in O. Jansen, B. Schöndorf-Haubold (eds), *The European Composite Administration* (Intersentia 2011) 1; H. Hofmann, G. Rowe, A. Türk, *Administrative Law and Policy of the European Union* OUP (Oxford 2011); Paul Craig, *EU Administrative Law* (2nd edn), OUP (Oxford 2012).

²⁵ P. Lindeth, *Power and Legitimacy*, OUP (Oxford 2010), 254 with reference to A. Menon, S. Weatherill, ‘Legitimacy, accountability, and delegation in the European Union’ in: A. Arnall, D. Wincott (eds.), *Accountability and legitimacy in the European Union* OUP (Oxford 2002), 119.

²⁶ These were first developed in the 1960s, and subsequently codified by the Comitology Decisions of 1987, 1999, and 2006 and the Comitology Regulation of 2011. See: 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 L197/33 (nlif), Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission [1999] OJ L184/23 amended by Council Decision 2006/512/EC of 17 July 2006 [2006] OJ 2006 L200/11; Regulation (EC) 182/2011 of 16 February 2011 of the European Parliament and of the Council laying down the rules and general principles concerning mechanisms for control by Member States of the Commission’s exercise of implementing powers [2011] OJ L55/13.

B. The Specific Procedural Issues Regarding Forms of Act and Action

Administrative implementation of EU law and policies generally results in some form of legally binding or non-binding act. Union bodies can issue acts addressed at individual natural and legal persons but equally at Member States and their sub-entities. Such acts can be classified as to whether they are intended to have a pre-determined amount of addressees in mind or whether they are designed to be applicable in a more general manner.

The former, ‘administrative acts’ can take forms of unilateral decision-making in the typical form of a decision (Article 288 TFEU fourth paragraph). Regarding single-case decision-making, a variable level of detail of procedural regulation different policy-specific and sector-specific provisions in EU law leads to diverse levels of detail and in some cases protection of individuals on matters such as, for example, rights to a hearing or other matters. The differences are not necessary following a specific logic and the sheer diversity of procedural rules can lead to confusions and even, occasionally, contradictions. As a consequence, similar or equal problems are regulated in a different manner. The debate is therefore whether a specific rule is merited by a given policy area or whether a general, cross-section rule might be able to address the issue equally well or better.

Administrative activity to regulate specific individualized cases can also be issued in forms not listed in Article 288 TFEU, for example, as contracts entered into by an EU institution or agency on one side and a Member State, agency or private person, on the other. In fact, contracts have become a versatile tool of EU administrative law being used not only for purposes of procurement of goods and services and administration of policies such as development aid and research.²⁷ Contracts are also used to supplement or complement formal decisions, for example in the context of undertakings negotiated with parties to a merger in the area of the Commission’s merger control. Finally, contracts have a distinct role as tool in the settlement of disputes about obligations arising from EU law.²⁸ Addressing contracts in EU administrative procedure requires taking a stance on which of these forms of act and their specific usages, if not all, should be applicable. Any choice has considerable consequences for the amount of detail which needs to be taken into account. Will it be enough to address participation and

²⁷ R. Caranta, G. Edelstam, M. Trybus (eds.) *EU Public Contract Law - Public Procurement and Beyond*, Bruylant (Bruxelles 2013).

²⁸ H.C.H. Hofmann, Agreements in EU Law, 31 *European Law Review* (2006) 800.

defence rights regarding unilateral decision-making? Or, alternatively, will it be necessary also to address the relation between unilateral and negotiated acts such as contracts. The latter would imply addressing also the very different approaches which various EU administrative legal systems have developed on these matters.

Executive rule-making through general acts, on the other hand, has many specific problems of their own. Next to the more formalised forms of delegated (Article 290 TFEU) and implementing acts (Article 291 TFEU)²⁹ such acts have various kinds of sub-categories the binding nature of each cannot always readily be determined.³⁰ This is especially true in cases where composite procedures involve EU agencies, such as the European Securities and Markets Authority, directing guidelines at Member State bodies for implementation in national law.³¹ Other matters of guidance and planning also remain to be further explored for their legal value and the rights of parties involved.

Finally, regarding composite procedures, often no judicially formal act will result from them. But the ongoing procedures themselves may nonetheless influence the conditions under which rights of individuals can be enjoyed. Examples are acts of mutual assistance or the management of common data basis. Where, such as in the context of the Schengen Information System, or the Single Market Database large amount of personally or commercially sensitive data are concerned, specific procedural rules are required to address the issues of rights of protection of data and access to data.³²

²⁹ T. Christiansen, M. Dobbels, 'Non-Legislative Rule Making after the Lisbon Treaty: Implementing the New System of Comitology and Delegated Acts', 19 *European Law Journal* (2013) 42-56; J. Mendes, 'Delegated and Implementing Rule Making: Proceduralisation and Constitutional Design', 19 *European Law Journal* (2013) 22-41.

³⁰ L. Senden, Soft Post-Legislative Rulemaking: A Time for more Stringent Control, 19 *European Law Journal* (2013) 57-75.

³¹ Regulation (EU) 1095/2010 of the European Parliament and the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision 716/2009/EC and repealing Commission Decision 2009/77/EC [2010] OJ L331/84 last amended by Directive 2014/51/EU of the European Parliament and of the Council of 16 April 2014 amending Directives 2003/71/EC and 2009/138/EC and Regulations (EC) 1060/2009, (EU) 1094/2010 and (EU) 1095/2010 in respect of the powers of the European Supervisory Authority (European Insurance and Occupational Pensions Authority) and the European Supervisory Authority (European Securities and Markets Authority) [2014] OJ L153/1. M. Busuioc, Rule-Making by the European Financial Supervisory Authorities: Walking a Tight Rope, 19 *European Law Journal* (2013) 111.

³² See with further discussion: H.C.H. Hofmann, M. Tidghi, Rights and Remedies in Implementation of EU Policies by Multi-Jurisdictional Networks, 20 *European Public Law* (2014) 147.

C. *Constitutionalisation of the EU Regulatory Model?*

In the past six decades of European integration through law the transformations of the legal landscape in Europe have been fundamental. During this period, the process of European integration has shaped but also reflected and re-enforced the predominant legal transformations of the time,³³ including the move towards an increasing focus on ‘regulatory’ law.³⁴ In the context of European integration, the creation of the ‘European administrative space’³⁵ has contributed to challenging pre-established constitutional doctrines including those of sovereignty and territorial reach of public law. The growth in policy making powers, the diversification of forms of act and the pluralisation of the executive actors has not always followed a model pre-defined in the Treaties. Procedures established in the EU for regulatory governance have evolved generally ad-hoc responding to the needs of the time and of specific policy areas. Difficulties therefore arise from the fact that the vast array of actors, forms of acts and applicable procedures make it difficult to assess to what extent constitutional values and general principles of EU constitutional law guide the development of procedural norms for executive action.

One of today’s challenges therefore consists of restructuring the EU’s system of executive so that it finds itself increasingly in compliance with general constitutional values of the EU. Such retro-fitting or further evolution of the legal system is not un-common. Administrative law both on the national level and in the EU has in the past been ‘characterised by paradigmatic transformations which are initiated by administrative decision-makers in experimental processes’ and then formalised as principles or legitimate approaches by court practice and the legislator.³⁶ Most Member States of the EU have addressed the dynamics of transformations in their legal systems by codification of a basic set of rules on administrative procedure.³⁷ Even

³³ See e.g. A. Milward, *The European Rescue of the Nation-State* (2nd edn), Routledge (London 2000), 223.

³⁴ S. Rose-Ackerman, The Regulatory State, in M. Rosenfeld, A. Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* OUP (Oxford 2012), 671.

³⁵ See with further discussion: H.C.H. Hofmann, Mapping the European Administrative Space, 31 *West European Politics* [2008], 662.

³⁶ K.-H. Ladeur, ‘The Evolution of General Administrative Law and the Emergence of Postmodern Administrative Law’, *Osgoode Hall law School Research paper* No 16/2011, 6; M. Ruffert (ed.), *The Transformation of Administrative Law in Europe, La mutation du droit administrative en Europe*, Sellier (München 2007).

³⁷ See with a comparative overview e.g. J. Ziller, Is a law of administrative procedure for the Union institutions necessary? Introductory remarks and prospects, European Parliament, Directorate General for Internal Policies, *PE 432.771* (2011), 18.

countries like France which so far did not adopt such general rules are moving towards a general law on administrative procedure for relations between the individual and the state.³⁸

However, if amongst the most challenging design-tasks for any rules of EU administrative procedure law is ensuring compliance with constitutional principles of the EU in the context of a de-central implementation of EU law, this task has not been made easier by that fact that in the past, the EU Treaties did not contain an explicit legal basis for establishing a single piece of procedural legislation. It was in absence of a core set of administrative procedure rules, that each policy area developed its own specific set of rules and principles and the EU Courts tried to enforce certain minimum standards by the development of constitutional-level general principles of EU law.³⁹ The approach to use general principles of EU law as an ‘Er-satz’-set of procedural standards which an administrative procedure act could offer, has as disadvantage that the general principles are necessarily vague and require to be filled on a case-by-case basis with specific meaning. This is – in a way – a parallel situation to the protection of fundamental rights in the EU pre entry into binding force of the Charter of Fundamental Rights of the EU. Although the ‘security valve’ of Article 6(3) TEU ensures that the Charter is no final enumeration of fundamental rights in the EU which can choke off further developments, the Charter does add to legal clarity and certainty by offering an accessible and readable enumeration applicable throughout policy areas. An administrative procedure act for the EU could aim at achieving the same objectives – albeit in an area more directly applicable in daily affairs of implementation of Union law. The aim such administrative procedure would thus be to ensure procedural justice as means of ‘translating’ into daily decision-making important constitutional value choices.⁴⁰ In that sense, the law of administrative procedures should act as a concretisation of constitutional law.⁴¹ This is also the approach taken by the

³⁸ French « loi n°2013-1005 du 12 novembre 2013 habilitant le Gouvernement à simplifier les relations entre l’administration et les citoyens ». For discussions of earlier attempts to legislate in this field in France, see e.g. Y. Gaudemet, La codification de la procédure administrative non contentieuse en France, *Recueil Dalloz Sirey* (1986) 107; P. Gonod, la codification de la procédure administrative, *AJDA* (2006) 489.

³⁹ These general principles resulted from a comparative analysis of Member State law (See e.g. the approach in Joined Cases 7/56 & 3-7/57 *Alegera and others v Common Assembly* [1957/58] ECR English Special Edition 39) and policy-specific norms of EU law - as prominently demonstrated by J. Schwarze, *European Administrative Law*, (translation from the original: J. Schwarze, *Europäisches Verwaltungsrecht Nomos* (Baden-Baden, 1988). Such deductive method is not uncommon as studies in ‘Global Administrative Law’ illustrate. See e.g. G. della Cananea, A. Sandulli (eds.), *Global Standards for Public Authorities*, Editoriale Scientifica (Napoli 2012); G. Anthony, J.-B. Auby, J. Morrison, T. Zwart (eds.) *Values in Global Administrative Law*, Hart (Oxford 2011).

⁴⁰ D. Curtin, H.C.H. Hofmann, J. Mendes, ‘Constitutionalising EU Executive Rule-Making Procedures: A Research Agenda’, 19 *European Law Journal* (2013), 1.

⁴¹ This formulation of the problem goes back to an article in German by: F. Werner, ‘Verwaltungsrecht als Konkretisiertes Verfassungsrecht’, (1959) *Deutsches Verwaltungsblatt*, 527.

EP's resolution of 15 January 2013, in which the EP has called upon the European Commission to develop a proposal for a regulation on EU administrative procedure based on constitutional principles.⁴²

D. An EU Regulation of Administrative Procedures?

The discussions outlined above show that the debate on the necessity of an EU administrative procedure act has accordingly already some history.⁴³ It addresses three basic problems. One is the question of applicability of a general set of rules on administrative procedure in view of policy-specific rules. A second is the question of the scope of applicability of EU administrative procedure rules in cases of Member State implementing activity. A third relates to the degree in which EU administrative procedure rules should address specific forms of act.

*I. EU administrative procedure rules as *lex generalis*?*

Some of the most important and – maybe also most discussed – aspects of drafting a possible EU administrative procedure act would refer to the scope of applicability of general rules on EU administrative procedure.

One scenario could consist of establishing rules on administrative procedure which contain only minimum standards for all administrative activity but being the basic level of protection applicable across all policy areas. It would leave the option of defining a higher level of protection to policy-specific rules. In that scenario, in absence of any policy specific rules, the general principles would be applicable. This approach allows to ensure that a certain flexibil-

⁴² European Parliament Resolution of 15 January 2013 with recommendations to the Commission on a Law of Administrative Procedure of the European Union (2012/2024(INI)); see also the Council of Europe Recommendation CM/Rec(2007)7 of the Committee of Ministers to member states on good administration.

⁴³ See with further references e.g. C.Harlow, Codification of EC Administrative Procedures, Fitting the Shoe to the Foot or the Foot to the Shoe, 2 *European Law Journal* (1996) 3; S. Kadelbach, 'European Administrative Law and the Law of a Europeanised Administration', in: C.Joerges, R.Dehouste (eds.) *Good Governance in Europe's Integrated Market*, Oxford University Press (Oxford, 2002), 167; C. Ladenburger, 'Evolution oder Kodifikation eines allgemeinen Verwaltungsrechts in der EU', in: H.-H. Trute, T. Groß, H. Röhl, C. Möllers, (eds.), *Allgemeines Verwaltungsrecht - zur Tragfähigkeit eines Konzepts*, Mohr Siebeck (Tübingen: 2008), 107; O. Mir Puigpelat, 'La codificación del procedimiento administrativo en la union administrativa europea', in: F. Velasco Caballero, J.-P. Schneider (eds.), *La unión administrativa europea*, Marcial Pons (Madrid, 2008), 51 (with German translation published as 'Die Kodifikation des Verwaltungsverfahrensrechts im Europäischen

ity for newly developing areas is given whilst at the same time requiring that exceptions are made explicit and subject to full and public scrutiny of any possible justification.

An alternative approach, however, might be more successful in overall increasing the level of protection of basic constitutional principles. It would provide for a general act with high levels of protection to which policy-specific law could, in justified cases, create exceptions both providing for higher as well as lower levels of protection. This approach would allow for a base-line of more than minimum level protection and – by means of requirement of justification – put the onus of reasoning on any norm suggesting lower than standard protection.

II. Scope of Application of EU Administrative Procedure Law in Case of Member State Implementation?

Similarly, the relation of EU administrative procedure law and that of the Member States is a contentious issue. Whether Member States should apply EU procedural rules when implementing EU law at all, or only when acting in specific contexts such as participation in EU information systems and conducting mutual assistance operations, has been subject to many debates. To a certain degree they are reminiscent of the dispute surrounding the interpretation of Article 51(1) of the Charter of Fundamental Rights of the EU and the *Akerberg Fransson* case of the CJEU.⁴⁴ One possibility is to argue in favour of an approach parallel to the definition of the institutional scope of applicability of Article 41 CFR which includes institutions, bodies, offices and agencies of the Union only and excludes the Member States. Although such limited scope has disadvantages for the protection of individuals, it would allow the development of an EU law on administrative procedures by means of a step-by-step approach in which a test phase of applying rules to EU institutions might be expanded later also to Member States when implementing EU law. The great disadvantage of such approach is that it will be problematic for composite procedures since one procedure will be subject to the laws of different jurisdictions. Any form of information cooperation but probably also most areas of mutual assistance will therefore have to be addressed from a purely EU law based approach in order to grant effective protection.

Verwaltungsverbund', *Die Verwaltung* (2009) Beiheft 8, 177-210); M. Shapiro, 'Codification of Administrative Law: The US and the Union', 2 *European Law Journal* (1996) 26.

⁴⁴ Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* [2013].

III. Procedural Rules for Different Forms of Act?

Next to discussions on the overall scope of a possible general set of rules for EU administrative law, debates on potential rules on specific forms of act of the EU each have their specificities in the debate. For example, there has been much debate about executive rule-making procedures including the role of impact assessment procedures therein.⁴⁵ But also the scope of applicability of the rules on rule-making raise questions as to whether to treat all externally binding and not directly externally binding rules to the same set of procedural rigour of a formalised rule-making procedure. Since distinctions can be slightly blurry, especially in cases where in practice informal rules are used to replace formal rule-making, arguably, the fundamental procedural principles of transparency and participation should also be complied with. But it would, on the other hand, also make sense to develop EU legislation in the field of administrative procedures in a step-by-step approach testing first the workings of a more formalised rule-making procedure on externally binding acts before rolling out such procedures also to formerly non-binding types of act.

Matters of EU public contract law have proven to be complex not least because of the great versatility of this form of act. With regard to public contracts, basic questions which need to be addressed include whether public contract law should be specific for public procurement.⁴⁶ Might the same model of public contracts and procedural rules applicable to them also be used for all other types of contracts? Should, then, the conclusion and execution of contracts concluded by public authorities implementing EU law for matters such as settlement of conflicts follow the same procedural rules? And, what are the basic EU principles linked to contracts? How far are they different from unilateral decision-making? Should there even be a specific regime for public contracts as opposed to contracts under private law? And how to ensure that by choosing the mode of contractual approach, a public authority could not only circumvent procedural guarantees provided for by law for unilateral decision-making, but also substantive legal provisions?

⁴⁵ A. Alemanno, A. Meuwese, Impact Assessment of EU Non-Legislative Rulemaking: The Missing Link in 'New Comitology', 19 *European Law Journal* (2013) 76.

⁴⁶ R. Noguellou, U. Stelkens (eds.), *Comparative Law on Public Contracts: Comparative analysis of the public contract law of 28 states* Bruylant (Brussels 2010).

Further issues concern information management procedures whose good functioning are essential pre-conditions for the realisation of the right to good administration.⁴⁷ In requiring fair and impartial decision making, good administration depends on procedures which allow administrations taking into account and reasoning about the relevant facts of a case including those which arise from other jurisdictions within the EU. The question is not only whether such matters can be made capable of being addressed in a cross-section manner as an essential part of a possible future EU administrative procedure code. The question is also how to ensure that effective judicial review will be possible of any act which results from such information sharing arrangement. One approach would consist of clarification of applicable law to information cooperation and identifying clearly responsibilities including responsible courts. In absence of such basic requirements, increasing administrative cooperation and integration would otherwise result in decreasing possibilities of holding administrations to account.

E. Where To From Here?

Any future EU legislation on administrative procedure requires a legal basis in the Treaty. Whilst initially, much consideration was based on possibilities or limits of Article 114 TFEU, with entry into force of the Treaty of Lisbon, Article 298 TFEU now opens different options for adopting Union legislation to support the administrative organisation and procedural rules. The reference in the first paragraph of Article 298 TFEU to a ‘European administration’ as explicitly opposed to the otherwise mentioned ‘institutions, bodies, offices and agencies of the Union’ arguably not only allows for the adoption of measures addressed at Union bodies, but also contains a legal basis for provisions on information management and mutual assistance

⁴⁷ D.-U. Galetta, H.C.H. Hofmann, J.-P. Schneider, Information Exchange in the European Administrative Union: An Introduction, 20 *European Public Law* (2014) 65-69; D.-U. Galetta, Informal Information Processing in Dispute Resolution Networks: Informality versus the Protection of Individual’s Rights?, 20 *European Public Law* (2014) 88; H.C.H. Hofmann, M. Tidghi, Rights and Remedies in Implementation of EU Policies by Multi-Jurisdictional Networks, 20 *European Public Law* (2014) 147; J.-P. Schneider, European Information Systems and Data Protection as Elements of the European Administrative Union, in: D. Dörr, R. Weaver (eds.), *The Right to Privacy in the Light of Media Convergence – Perspectives from Three Continents*, Walter de Gruyter (Berlin/Boston 2012) 374; J.-P. Schneider, ‘Informationssysteme als Bausteine des Europäischen Verwaltungsbunds’, *Neue Zeitschrift für Verwaltungsrecht* (2012) 65

which Member States administrations undertake in implementation of EU law.⁴⁸ But whether such far reaching approach could be currently opportune is another matter. The EP has called for the Commission to draft a legislative proposal on administrative procedures. One may hope that these attempts will lead to an outcome fully exploring the dimensions of the problem and not remaining on the surface. A network of EU and administrative law professors and practitioners, the Research Network on EU Administrative Law (ReNEUAL), has developed in preparation of the legislative procedure set of ‘Model Rules of EU Administrative Procedure’.⁴⁹ These Model Rules attempt to present in a clear and accessible manner solutions to the legal questions discussed throughout this chapter and could be used as benchmark against which to review any legislative proposals from the Commission.

⁴⁸ P. Craig, ‘A General Law on Administrative Procedure, Legislative Competence and Judicial Competence’, 19 *European Public Law* (2013), 503.

⁴⁹ The Model Rules are available with explanations and introductions in full text in English language at www.reneual.eu. French, Spanish, Italian, German and Polish translations are in preparation and will be published when available. The author of this chapter is one of the founders and coordinators of ReNEUAL.